

STATE OF LOUISIANA

*

NO. 2017-KA-0823

VERSUS

*

COURT OF APPEAL

ROBERT IOVENITI

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

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BROWN, J., DISSENTS IN PART AND CONCURS IN PART WITH REASONS:

I respectfully dissent in the result reached in the writer’s opinion that finds the district court abused its discretion in granting the motion to quash count six of the bill of information when it found Defendant proved the defense of a valid prescription pursuant to La. C.Cr.P. art. 532(10).

In *State v. Tran*, 12-1219 pp. 3-4 (La.App. 4 Cir. 4/24/13), 115 So.3d 672, 674, this court held in pertinent part:

“Production of the original prescription bottle with the defendant’s name, the pharmacist’s name, and prescription number shall be sufficient proof of a valid prescription as provided for in this Section.” [La.R.S. 40:991] *Id.* But, while such production by a defendant would be sufficient proof of a valid prescription, it is not—as we recently held—the *exclusive* means by which a defendant may prove possession of a valid prescription. *See State v. Williams*, 12–0110, p. 5, 101 So.3d [533] at 536 (“Therefore, pursuant to the rules of statutory construction, La. R.S. 40:991 should not be read to restrict the sources of evidence a defendant may use to establish that he possessed a validly issued prescription.”)

In the case *sub judice*, the district court, in reaching its conclusion that Defendant proved he had a valid prescription, found the affidavit of the pharmacist, Raul Acevedo, was self-authenticating under La. C.E. art. 902. Article 902 provides in pertinent part:

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

. . . .

(3) Foreign public documents. A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (a) of the executing or attesting person, or (b) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

. . . .

(8) Authentic acts, acknowledged acts, and other instruments attested by witnesses. (a) Authentic acts, acts under private signature duly acknowledged, and instruments attested by witnesses and accompanied by affidavits, as provided by Louisiana law, whether executed in Louisiana or elsewhere. (b) Documents executed in a jurisdiction other than Louisiana accompanied by a certificate of acknowledgment executed in the manner provided by the laws of that jurisdiction by a notary public or other officer authorized by law to take acknowledgments.

The district court concluded the pharmacist, in the affidavit, attested the copy of the prescription that was attached, was a true and authentic copy of the original prescription that he maintained in the course of his business. The affidavit was signed by the Mr. Acevedo in the presence of two witnesses and notarized by a notary public on April 8, 2015. Additionally, a stamp was affixed to the affidavit pronouncing, “Apostille, Convention de La Haye du 5 October 1961.” The stamp indicated it was a public document signed by a Notary Public, and certified and signed by E.O. Pennil, a Deputy Registrar General of Belize, and imprinted with the seal of the Registrar General of Belize.

I find, as did the district court, that the affidavit was authenticated pursuant to La. C.E. art. 902. Accordingly, I would affirm the district court's ruling quashing count six of the bill of information—possession of Sildenafil.

As to counts one and two—distribution of Hydrocodone, and Alprazolam, I concur in the result. As the Court explained in *State v. Franklin*, 13-0488 p. 5 (La.App. 4 Cir. 10/9/13), 126 So.3d 663, 667, (quoting *State v. Reaves*, 376 So.2d 136, 137-138 (La.1979)):

In making the determination of whether a given issue is appropriate to raise in a motion to quash, a court should determine whether 'it is a defense which, if successful, requires dismissal of the indictment [or bill of information] regardless of the merits of the charge . . . and which by its nature must be available before trial.'¹

I find, in this case, whether Defendant had a valid prescription is not a defense which requires dismissal of counts one and two of the bill of information. Thus, a party can illegally distribute or have possession with intent to distribute a drug under the Uniform Controlled Dangerous Substances Law ("UCDSL") but have a valid prescription to lawfully possess the drug. To find otherwise will increase the potential for abusing the defense made available under La. C.Cr.P. art. 532(10), resulting in far-reaching consequences.

¹ In *State v. Franklin*, 13-0488 (La. App. 4 Cir. 10/9/13), 126 So.3d 663, the ground raised by the defendant in his motion to quash was not one set forth in La. C.Cr.P. arts. 532 and 534. This Court, in reviewing the trial court's granting of the defendant's motion to quash, explained the lists set forth in arts. 532 and 534 were "merely illustrative, and motions not based on the grounds therein should not be automatically denied (citations omitted)." *Id.*, 13-488 at p. 5, 126 So.3d at 667. Although this case is not directly on point, the case law for which it is cited lends guidance for the issue before this Court.