

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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LEDET, J., CONCURS IN PART AND DISSENTS IN PART WITH REASONS

At the contradictory hearing, Mr. Ioveniti offered two exhibits, together consisting of three documents:¹ Defense Exhibit 1, consisting of the Affidavit and the Prescriptions; and Defense Exhibit 2, consisting of the Letter. The State contends that neither of these exhibits was properly authenticated. I agree.

In *State v. Rainey*, we emphasized that the Code of Evidence is fully application to contradictory hearings on motions to quash pursuant to La. C.Cr.P. art. 532(10). 2014-0523, pp. 5-6 (La. App. 4 Cir. 9/17/14), 150 So.3d 370, 373 (observing that “because a hearing on a motion to quash is a formal judicial examination, the Louisiana Code of Evidence applies” and that “rulings on motions to quash based on La.Code Crim. Proc. art. 532(10), which require factual determinations by the trial court, also require application of the rules of evidence”).

¹ Those exhibits were, according to the March 28, 2017 minute entry, as follows:

- “[Defense] Exhibit 1—Prescription and Affidavit from Pharmacist to Authenticate from Belize”;
- “[Defense] Exhibit 2—Letter to Court from Pharmacist”;
- “[State] Exhibit 1—Belize Manual (pg 85) What Said the Prescription Is Not Valid Because the Pharmacist Did Not Sign the Prescription”; and
- “[State] Exhibit 2—“Requested from World Health Org for Valid Prescriptions from Abroad.”

In my view, principled application of the Code of Evidence compels the conclusion that Mr. Ioveniti's evidence was not admissible.

For evidence to be admissible at a hearing on a motion to quash pursuant to La. C.E. art. 532(10), it must first be authenticated—that is, the proponent of the evidence must produce “evidence sufficient to support a finding that the matter in question is what its proponent claims.” La. C.E. art. 901(A). Thus, evidence must either be authenticated, as provided in La. C.E. art. 901; or self-authenticating, as provided in La. C.E. art. 902. *State v. Gray*, 16-1195, p. 22 (La. App. 4 Cir. 6/28/17), ___ So.3d ___, ___, 2017 WL 3426021, *11. Generally, a district court's ruling on the authentication of evidence is reviewed for abuse of discretion. *Gray*, 16-1195 at pp. 21-22, ___ So.3d. at ___, 2017 WL 3426021 at *11 (citing *State v. Wright*, 11-0141, pp. 10-11 (La. 12/6/11), 79 So.3d 309, 316; *State v. Cosey*, 97-2020 (La. 11/28/00), 779 So.2d 675, 684)). Nevertheless, when a district court's ruling is based upon an error of law, the ruling is no longer entitled to deference by the reviewing court because “[a] district court by definition abuses its discretion when it makes an error of law.” *State v. Lee*, 11-0398, p. 6 (La. App. 4 Cir. 1/30/12), 83 So.3d 1191, 1196 (quoting *Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996) (internal quotation marks omitted)).

The district court did not reference the Letter in either its oral ruling or its subsequent written judgment on the motion to quash. It is thus unclear whether, or on what basis, the district court may have found the Letter to be authentic. In any event, because Mr. Ioveniti called no witness to authenticate it, and because the Letter is not self-authenticating under La. C.E. art. 902, the Letter was not properly authenticated and was thus inadmissible. To the extent the district court found otherwise, I would find that the district court abused its discretion.

The district court did find, however, in its written judgment, that the Affidavit and the Prescriptions were self-authenticating as foreign public

documents under La. C.E. art. 902(3). Under La. C.E. art. 902(3), a “foreign public document” is:

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.

Neither the Affidavit nor the Prescriptions meet this definition for two reasons.

First, neither document is a public document. Although the term “public document” is not defined by La. C.E. art. 902(3), the comments to Article 902(3) make clear that the term “refers to documents that reflect the acts of government and the official activities of its officers, agents, and employees” La. C.E. art. 902(3), cmt. (b). The Affidavit is not a public document. The Affidavit makes no reference to the acts of the Belizean government or to the official activities of its officers, agents, and employees. To the contrary, the Affidavit represents that Mr. Acevedo is a pharmacist who operates the Free Town Drug Store; and the district court expressly found as much in its written judgment. Nor are the Prescriptions public documents. To the contrary, prescriptions—being health-care-related—are private documents.

Second, neither document bears a “final certification”—that is, a certification 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.” La. C.E. art. 902(3). While the Affidavit purports to have been executed before and signed by a notary public, and sealed and certified by a Belizean Deputy Registrar

General; neither of those officials is 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. And the Prescriptions themselves bear no certification of any kind.² Thus, as a matter of law, neither the Prescriptions nor the Affidavit is a self-authenticating foreign public document under La. C.E. art 902(3). *Accord Albitar v. Albitar*, 16-167 (La. App. 5 Cir. 6/30/16), 197 So.3d 332, 343. The Affidavit and the Prescriptions were thus inadmissible.

Because the district court's judgment is supported by no admissible evidence, I would find that the district court abused its discretion in granting the motion to quash. Accordingly, I concur in the result as to Counts 1 and 2 and dissent from the result as to Count 6.

² La. C.E. art. 902(3) provides that a court may dispense with the requirement of final certification if two conditions are met: (1) that the proponent shows good cause why the final certification requirement is not satisfied; (2) that a reasonable opportunity has been given to all parties investigate the authenticity and accuracy of the official documents. In this case, because Mr. Ioveniti did not offer the Affidavit and the Prescriptions as foreign public documents (that was a *post hoc* theory of authentication advanced by the district court after the hearing), Mr. Ioveniti was never called upon to show good cause why none of his exhibits bears a final certification. More importantly, however, Mr. Ioveniti did not give the State a reasonable opportunity to investigate the authenticity and accuracy of the Prescriptions (or the representations set forth in the Affidavit) because—for the four-and-a-half years this case has been pending—Mr. Ioveniti has never disclosed the name of the physician he claims to have written the Prescriptions. Additionally, because the district court has provided this court only with copies of documents, rather than originals, it is unclear whether the defendant complied with La. C.E. art. 904.