STATE OF LOUISIANA	*	**NO. 2017-KA-0823**
VERSUS	*	**COURT OF APPEAL**
ROBERT IOVENITI	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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LOMBARD, J. DISSENTS WITH REASONS,

For differing reasons, the majority of this panel reverses the district court judgment granting the defendant's motion to quash on two counts: Count 1: possession with intent to distribute Hydrocodone in violation of La. Rev. Stat. 40:967(A)(1); Count 2: possession with intent to distribute Alprazolam (Xanax) in violation of La. Rev. Stat. 40:967(A)(1).[1] For the reasons that follow, I respectfully dissent.

Pursuant to La. Rev. Stat. 40:991, an individual who "claims possession of a valid prescription for any controlled dangerous substance as a defense to a violation of the provisions of the Uniform Controlled Dangerous Substances Law" must only produce "sufficient evidence of a valid prescription." La. Rev. State. 40:991(A). Although the statute provides an example of what constitutes sufficient evidence: "an original prescription bottle with the defendant's name, the pharmacist's name, and prescription number, it does not confine a district court's consideration only to those elements, leaving the determination of whether sufficient evidence of a valid prescription has been produced to the discretion of the district court.

[1] The concurring judge upholds the district court judgment quashing Count 6: possession of Sildenafil (Viagra-a "legend drug," not a "controlled substance") in violation of La. Rev. Stat. 40:1060.13.

In this case, the district court found that the defendant presented sufficient evidence that his "prescriptions were filled pursuant to a lawful order of a practitioner" and granted the defendant's motion to quash, observing further that the State presented no evidence that the prescriptions (or quantity of pharmaceutical drugs) at issue were inconsistent with personal use or of intent to distribute.

The record before this court, as clarified by the district court's submission of *all exhibits entered into evidence* at the March 28, 2017, to supplement the record, supports this finding. Specifically, according to the district court, the defense exhibits introduced into evidence at the hearing consist of Defense Exhibit A, a notarized "Affidavit of Pharmacists Authenticating Records of Prescription Medications He Dispensed" signed by Raul Acevedo stating that he is a licensed professional pharmacist in Belize operating the Free-Town Drug Store in Belize and that in the course of his profession pharmacy practice he filled the prescriptions (for the pharmaceutical drugs at issue in this matter) which were prescribed for the defendant by a licensed medical practitioner for the defendant. The affiant also declared that "he hereby certifies that the copy of the prescriptions attached [to his affidavit] is a true and authentic copy of the original prescription records maintained by the undersigned affiant in the scope of his professional pharmacy practice." The affidavit is witnessed and notarized with an attached Apostille.[2] Defense Exhibit B, as transmitted by the district court, is a copy of the prescription for hydrocodone and Free-town Drug Store invoices for hydrocodone,

[2] The transcript clearly indicates that defense counsel submitted an original notarized affidavit with attachments into evidence at the hearing without objection by the State or contradictory comment by the district court. Inexplicably, the document transmitted to this court appears to be a copy of the documents. Thus, it appears that the defense counsel submitted original documents into evidence and the district court found them to be so. Under these circumstances, any administrative error or misplacing of the actual documents which resulted in a copy rather than original notarized affidavit should not disadvantage the defendant who submitted the requisite original.

Viagra, Xanax, and Valium.[3] There are no State exhibits in the record before this court.[4]

Inexplicably, with regard to the evidence introduced at trial, the writing judge misrepresents the record as it exists before this court, relying on a summary of exhibits derived from a minute entry and transcript (including a summary of State exhibits that do not appear anywhere in the record before this court) that conflicts with the actual record submitted to this court. Because, as originally transmitted to this court, the exhibits introduced into evidence were missing, this court ordered the district court to supplement the record with the exhibits introduced into evidence at the hearing. The district court complied, transmitting the Defense Exhibit A and Exhibit B with a cover letter stating that these were all the documents admitted into evidence at the hearing in this matter. To the extent that there is a conflict between the exhibits that actually appear in the record before this court and characterizations of those exhibits derived from a minute entry and transcript, we are a court of record and therefore the evidence *in the record before this court* must take precedence, particularly in a case such as this where the district court has, in effect, personally certified and transmitted the exhibits submitted into evidence upon which its decision is based.

The writing judge also asserts that the district court erred in considering "the Letter" because it was inadmissible, apparently referencing a letter from the pharmacist found in the record following the State's Opposition to the Defendant's Motion to Quash, filed on August 11, 2015.[5] The letter is an explanation by the

[3] The affiant declares that he dispensed the prescriptions at issue as prescribed by a licensed medical practitioner and attached copies of the prescription for Hydrocodone and Xanax. A copy of the prescription for Viagra does not appear in the exhibit so it must be presumed that the district court found the notarized statement by the pharmacist that the pharmaceutical drugs, including the Viagra, were dispensed pursuant to a prescription issued by a medical practitioner sufficient.

[4] The hearing transcript indicates that the State introduced as its Exhibit "1" a copy of the Belize Drug Formulary and Therapeutics Manual and, as its Exhibit "2" a document which the State declared was "to help the interpretation" of the prescriptions presented by the defense. Neither of these documents were included in the exhibits submitted to the record by the district court, nor do they appear anywhere else in the record before this court.

pharmacist as to why he dispensed the prescriptions, including the refills, to the defendant who was hurt while travelling in Belize and presented prescriptions with supporting medical records from a local medical doctor. There is, however, nothing in the record which suggests that it was offered into evidence by the defense or that (as the writer concedes) the district court referenced the letter in either its oral or written ruling. As such, the gratuitous finding that "the Letter" was inadmissible (and that the district court abused its discretion in considering it) is a red herring.

Moreover, the district court did not err in in admitting the notarized affidavit and attached documents into evidence. La. Code Evid. art. 902 clearly states that extrinsic evidence of authenticity is not required with respect to the admissibility of "documents executed in a jurisdiction other than Louisiana accompanied by a certificate of acknowledgment executed in the manner provided by the law of that jurisdiction by a notary public or other officer authorized by law to take acknowledgments." La. Code Evid. art. 902(8)(b). There is no dispute in the record before the court that the affidavit submitted into evidence by the defendant was executed in the manner provided for by the law in Belize. As such, the affidavit was clearly admissible into evidence whether or not the district court incorrectly referenced La. Code Evid. art. 902(3) pertaining to foreign public documents. A district court's reasons for judgment (written or oral), while defining and elucidating the principles upon which the case is being decided, forms no part of the official judgment from which an appeal is taken. *Hamilton v. Hamilton,* 97-2090 (La. App. 4 Cir. 6/24/98), 716 So.2d 412, 415 (1998) (citation omitted). In other words, erroneous reasons for judgment are not part of the judgment and, therefore, not grounds for reversal where other reasons may be found to support the judgment. *Id.*

[5] As such, the letter appears in the record attached to an opposition brief filed by the State rather than being admitted into evidence by the district court.

In addition, whether the district court erred in interpreting La. Code Evid. art. 902(3) to be applicable in this case is not clear error. The plain language of the statute – a document purported to be "executed or attested by a person authorized by the laws of a foreign country to make the execution or attestation" - appears to encompass a licensed pharmacist attesting to the dispensation of pharmaceutical drugs in accordance with the laws of his country. As the writing judge concedes, a "public document" is not defined in the provision itself. Rather, the writing judge argues that the district court erred because the commentary to Article 902(3) indicates that the drafters intended the provision to relate only to government-generated documents. Although the drafters may have intended the term to be defined restrictively, that intention is not reflected in the provision itself nor has such definition been adopted jurisprudentially. Moreover, as a practical matter, the comment indicating that the drafters intended the provision to be more narrowly interpreted than its actual language conveys does not appear in the standard desk copy (*West's Louisiana Statutory Criminal Law and Procedure)* relied upon by most attorneys. As such, without specific authority restricting the provision to the drafter's intent rather than the actual language, to claim that the district court abused its discretion in relying upon the plain language of the provision is problematic. In any event, as previously stated, the notarized affidavit with its attachments is admissible under La. Code Evid. art. 902(8)(b) and, therefore, whether or not the district court erred in referring to La. Code Evid. art. 902(3) is irrelevant.

Finally, the concurring judge errs in reversing the judgment of the district court based on a conclusion that a defendant with a valid prescription may, nonetheless, be charged for possession with intent to distribute. Notably, this statement of law is one of first impression, made without being fully briefed,

argued, and decided in the district court below. Independent research reveals no statutory or jurisprudential authority to support this position.

Possession is the lesser included offense of possession with intent: Section A of La. Rev. Stat. 40:967 provides that it is illegal to possess with intent to distribute a controlled dangerous substance; Section C of the same statute provides that it is illegal to possess a controlled dangerous substance "unless such substance was obtained directly or pursuant to a valid prescription or order from a practitioner" pursuant to La. Rev. Stat. 40:978. In addition, possession is specifically included as a responsive verdict to the charge of possession with intent to distribute. La. Code Crim. Proc. art. 814(47). As such, unlawful possession of a controlled dangerous substance is an inherent element of possession with intent to distribute a controlled substance which, in turn, means that a person who cannot be charged with the lesser offense cannot be charged with the greater offense.

The concern that lawfully obtained drugs are subject to abuse is well-founded but also one shared by the state legislature as evidenced by the statutory schemes which address the problem. It is clearly illegal to dispense or distribute *any* controlled dangerous substance without a license, La. Rev. Stat. 40:972, whether or not the drugs are lawfully possessed. Thus, to the extent that the defendant in this case possesses the drugs lawfully, it remains illegal for him to dispense or distribute them to anyone else. Likewise, the "Pain Management Clinic Drug Abuse and Overdose Prevention Act" makes it illegal for a person to fraudulently obtain a controlled dangerous substance or for a physician to assist a person fraudulently obtain prescription drugs, La. Rev. Stat. art. 971.2; La. Rev. Stat 40:1060.15. Thus, to the extent that someone obtains a prescriptions for controlled dangerous substances with the intention of selling them, the state legislature has foreseen this possibility and responded legislatively. Similarly, the Prescription Monitoring Program, La. Rev. Stat. 40:1001 *et seq.,* provides statutory

authority for the State to monitor and inhibit diversion of legally obtained controlled substances and prescription drugs. Accordingly, it is not only beyond the scope of our authority to judicially expand La. Rev. Stat. 40:961 to create an antidote to the problem of prescription drug abuse, it is unnecessary.

The role of this court is not to substitute its own factual determinations for that of the district court, *i.e.,* the fact-finder, but, rather, to review that decision under the abuse of discretion standard. Therefore, the issue is not whether we, individually, would have made a different decision but whether the record supports the discretionary decision of the district court. In this case, there is evidence in the record to support the district court judgment and, to the extent the majority reaches outside the record and jurisprudential authority to reach a different conclusion from the district court, I respectfully disagree. Accordingly, I would affirm the district court judgment on all counts.