

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20070885-CA
v.)	
)	F I L E D
DeAnn H. Johnson,)	(December 11, 2008)
)	
Defendant and Appellant.)	2008 UT App 458

First District, Logan Department, 061100071
The Honorable Thomas L. Willmore

Attorneys: A.W. Lauritzen, Logan, for Appellant
Mark L. Shurtleff and Christine F. Soltis, Salt Lake
City, for Appellee

Before Judges Thorne, Billings, and McHugh.

THORNE, Associate Presiding Judge:

DeAnn H. Johnson appeals from her conviction on three third degree felony counts of falsely obtaining prescription medications. See Utah Code Ann. § 58-37-8(a)(ii) (Supp. 2008). Johnson pleaded guilty to these offenses but reserved certain issues for appeal pursuant to State v. Sery, 758 P.2d 935 (Utah Ct. App. 1988). We affirm.

At Johnson's preliminary hearing, the State introduced a statement by Johnson's prescribing physician to establish that Johnson had failed to inform the physician that she was obtaining controlled substances from another source. In a motion to quash the resulting bindover, Johnson claimed that her failure to disclose constitutes a privileged physician-patient communication that should have been excluded from consideration by the district court at the preliminary hearing. See generally Utah R. Evid. 506 (defining the physician-patient privilege); see also Utah Code Ann. § 58-37-6(9) (Supp. 2008) (establishing an exception to the privilege for "information communicated . . . in an attempt to unlawfully procure . . . a controlled substance"). The district court denied Johnson's motion, rejecting her argument that the drug-fraud exception to the privilege contained in Utah Code section 58-37-6(9) was unconstitutional and determining in

the alternative that the privilege did not apply under the circumstances.

Johnson appeals, arguing that section 58-37-6(9)'s drug-fraud exception is an unconstitutional intrusion by the legislature into the supreme court's rule-making province, that the State's use of her physician's statement was barred by rule 506 of the Utah Rules of Evidence, and that there was insufficient evidence to support the district court's bindover order. The constitutionality of a statute and the application of a privilege are both questions of law that we review for correctness. See State v. Ross, 2007 UT 89, ¶ 17, 174 P.3d 628 ("The issue of whether a statute is constitutional is a question of law, which we review for correctness, giving no deference to the trial court." (internal quotation marks omitted)); State v. Blake, 2002 UT 113, ¶ 6, 63 P.3d 56 ("A court's decision regarding the existence of a privilege is a question of law for the court, and is reviewed for correctness." (internal quotation marks omitted)). Review of a district court's bindover decision "generally involves a mixed question of law and fact, which requires this court to afford some deference to the trial court." State v. Rhinehart, 2006 UT App 517, ¶ 8, 153 P.3d 830.

This court has previously examined the physician-client privilege in the context of drug fraud in State v. Anderson, 972 P.2d 86 (Utah Ct. App. 1998). Anderson, like the present case, involved a defendant charged with "fail[ing] to disclose that he was already receiving prescribed narcotics from other doctors." Id. at 89. The Anderson court characterized the defendant's attempt to invoke the physician-patient privilege as a "manipulat[ion of] the privilege to protect his fraud," id., and further stated that "[t]he information that defendant withheld from the physicians was not 'communicated in confidence and for the purpose of diagnosing or treating the patient.'" Id.

Rule 506 only protects information "communicated in confidence and for the purpose of diagnosing or treating the patient." See Utah R. Evid. 506(b). Anderson's determination that the type of nondisclosure at issue in this case is not a confidential communication made for the purpose of diagnosis or treatment removes the challenged evidence from the protections of rule 506 without regard to whether Utah Code section 58-37-6(9) might also render the evidence unprivileged.¹ See Utah Code Ann.

¹Additionally, the district court expressly found in this case that Johnson was "attempting to use the privilege to protect her alleged fraud" and that "Johnson's failure to inform her doctor of other prescriptions from other physicians is not a
(continued...)

§ 58-37-6(9). Accordingly, we affirm the district court's decision that rule 506 does not apply under the circumstances and the resulting denial of Johnson's motion to quash.²

Finally, we turn to Johnson's argument that the State provided insufficient evidence at her preliminary hearing to support the district court's bindover order. At a preliminary hearing, the State need only demonstrate probable cause that the defendant should be bound over. See State v. Virgin, 2006 UT 29, ¶ 17, 137 P.3d 787. "In order to establish probable cause, the prosecution must produce evidence sufficient to support a reasonable belief that the defendant committed the charged crime." Id.

Here, Johnson was charged with fraudulently obtaining a controlled substance, which requires proof only that a person knowingly or intentionally obtained a prescription for a controlled substance "by misrepresentation or failure by the person to disclose his receiving any controlled substance from another source." Utah Code Ann. § 58-37-8(3)(a)(ii) (Supp. 2008). The State presented evidence that, on five separate occasions, Johnson obtained prescriptions for a controlled substance without disclosing to her prescribing physician that she was already receiving controlled substances from another source. Under the circumstances, this evidence is sufficient "to support a reasonable belief that the defendant committed the charged crime." See Virgin, 2006 UT 29, ¶ 17; cf. State v. Pledger, 896 P.2d 1226, 1229 (Utah 1995) ("In making a determination as to probable cause, the magistrate should view the evidence in a light most favorable to the prosecution and resolve all inferences in favor of the prosecution.").

We hold that evidence of Johnson's failure to disclose her receipt of controlled substances from other sources to her prescribing physician does not constitute a privileged

¹(...continued)
communication in confidence for the purpose of diagnos[is] or treatment." To the extent that Anderson requires a factual inquiry into the applicability of the privilege in any particular case, these findings place Johnson's case squarely within the Anderson rule. See State v. Anderson, 972 P.2d 86, 89 (Utah Ct. App. 1998). We note that Johnson could have challenged these factual findings on appeal but did not do so.

²Because we do not rely on Utah Code section 58-37-6(9) in reaching today's decision, we need not address Johnson's arguments pertaining to the interpretation and constitutionality of that statute.

communication under rule 506 as interpreted in Anderson and that the State presented sufficient evidence at the preliminary hearing to bind Johnson over for trial. Accordingly, we affirm Johnson's convictions.

William A. Thorne Jr.,
Associate Presiding Judge

WE CONCUR:

Judith M. Billings, Judge

Carolyn B. McHugh, Judge