

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001006-MR

MICHAEL EDWARD SEARS

APPELLANT

APPEAL FROM WHITLEY CIRCUIT COURT
v. HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NOS. 02-CR-00013, 02-CR-0013-1 AND 02-CR-13-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: BARBER, KNOPF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a judgment pursuant to a conditional guilty plea convicting a dentist of three counts of illegally prescribing controlled substances. Appellant's sole argument is that he was unlawfully charged in the indictment because, as a licensed and practicing dentist, he could not be charged with simply violating KRS 218A.1404(3). We agree that appellant could not be charged with violating KRS 218A.1404(3). Hence, we reverse the judgment of conviction and

remand the matter for further proceedings consistent with this opinion.

On February 11, 2002, Michael Sears, a duly licensed and practicing dentist, was indicted on six counts of illegally prescribing controlled substances in violation of KRS 218A.1404(3). Except for the name of the drug and the name of the person the drug was prescribed for, the language of each count of the indictment was identical. Count I provided as follows:

On or about the 15th day of February, 1999, in Whitley County, Kentucky, the above-named defendant, Michael Sears, committed the offense of Illegally Prescribing A Controlled Substance when he wrote a prescription for Lorcet in the name of Lawrence Taylor.

At the end of the indictment, KRS 218A.1404 was listed as the statute that was violated.

Prior to trial, Sears moved to dismiss for failure to state a charge and for lack of jurisdiction. Attached to this motion were a copy of Sears's dentistry license for the 2000-2001 year and a copy of his controlled substance registration certificate issued on March 6, 2000, by the United States Department of Justice, Drug Enforcement Administration. The court denied the motion to dismiss. Thereafter Sears entered a conditional guilty plea to three counts of illegally prescribing controlled substances upon the Commonwealth's recommendation of

a one-year sentence on each count to run consecutively, with Sears to serve only six months and the balance probated for three years. The court ultimately accepted the Commonwealth's recommendation and entered its final judgment and sentence on April 15, 2003. This appeal by Sears followed.

Sears first argues that he could not "illegally" prescribe controlled substances pursuant to KRS 218A.1404(3) as alleged in the indictment because he was a duly licensed and practicing dentist. KRS 218A.1404(3) provides that "No person shall dispense, prescribe, distribute, or administer any controlled substance except as authorized by law." According to KRS 313.250(1), "licensed pharmacists may fill prescriptions of licensed dentists in this state for any drug necessary to practice dentistry."

KRS 218A.180(3) provides in pertinent part:

To be valid, a prescription for a controlled substance shall be issued only for a legitimate medical purpose by a practitioner acting in the usual course of his professional practice.

A violation of KRS 218A.1404(3) is a Class D felony for the first offense and a Class C felony for subsequent offenses "[u]nless another specific penalty is provided in [that] chapter." KRS 218A.1404(4). A violation of KRS 218A.180(3) is a Class A misdemeanor for a first offense and a Class D felony for a second or subsequent offense. KRS

218A.180(9). It is undisputed that Sears had no previous convictions for the above offenses.

The indictment at issue made no mention of KRS 218A.180(3) and did not specify that Sears prescribed a controlled substance for an illegitimate medical purpose. It was only at the hearing on the motion to dismiss that the Commonwealth clarified why Sears's conduct was illegal - because he was allegedly prescribing controlled substances for individuals who were not his patients in exchange for personally receiving half of the drugs after the prescription was filled. However, the indictment only charged Sears with illegally prescribing a controlled substance under KRS 218A.1404. An indictment must charge a crime under the facts alleged. Commonwealth v. Hamilton, Ky. App., 905 S.W.2d 83 (1995). In our view, the indictment at issue did not charge a crime in this case because Sears was authorized by law to prescribe controlled substances. Hence, Sears could not be guilty of illegally prescribing a controlled substance under KRS 218A.1404. Although it is a crime for a dentist to prescribe controlled substances for an illegitimate medical purpose under KRS 218A.180(3), the Commonwealth did not charge Sears with that crime.

We would also note that even if Sears could have been properly charged under KRS 218A.1404(3), the penalty provisions

in section (4) of that statute provide that the offense would be a Class D felony "[u]nless another specific penalty is provided in this chapter." Since there was a specific penalty for the conduct which made Sears's actions illegal (prescribing controlled substances for what was not a legitimate medical purpose) in KRS 218A.180(9), that penalty (Class A misdemeanor) would have been applicable. Hence, we also agree with Sears's argument that the circuit court did not properly have jurisdiction in this case. KRS 24A.110.

For the reasons stated above, the judgment of the Whitley Circuit Court is reversed and the matter remanded for further proceedings consistent with this opinion.

BARBER, JUDGE, CONCURS.

KNOFF, JUDGE, CONCURS AND FILES SEPARATE OPINION.

KNOFF, JUDGE, CONCURRING: I concur in the result reached by the majority opinion, but I write separately to address the sufficiency of the indictment in this case. CR 6.10(2) provides that an indictment is sufficient if it contains "a plain, concise and definite statement of the essential facts constituting the specific offense with which the defendant is charged." In Thomas v. Commonwealth, Ky., 931 S.W.2d 446 (1996), our Supreme Court held that it is unnecessary to restate all the technical requisites of the crime of which a defendant is accused, if the language of the indictment, coupled with the

applicable statute, unmistakably accomplishes this end result. Id. at 449. All that is necessary to "charge an offense," as required by RCr 6.10 and RCr 8.18, is to name the offense. Id. An indictment is sufficient if it fairly informs the accused of the nature of the charged crime, without detailing the formerly "essential" factual elements, if it informs the accused of the specific offense with which he is charged and does not mislead him. Id.

In this case, the indictment was not invalid merely because it failed to specify that Sears illegally prescribed controlled substances for individuals who were not his patients. Such a technical defect could have been cured by amending the indictment, or by the Commonwealth providing specifics of the in response to a motion for a bill of particulars. Id. at 449-50. Instead, as the majority correctly finds, the Commonwealth sought to charge Sears under KRS 218A.1404(3), rather than under 218A.180(3). The language and context of KRS 218A.1404(3) and its accompanying sections indicate that the legislature intended this section to criminalize the trafficking, possession or distribution of controlled substances by persons not authorized by law. The more specific statute, KRS 218A.180(3), criminalizes improper prescription of controlled substances by a licensed practitioner. Because Sears was licensed to prescribe controlled substances, the indictment failed to state a charge

against him under KRS 218A.1404(3) and should have been dismissed.

BRIEF FOR APPELLANT:

Darrell L. Saunders
Corbin, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Dennis W. Shepherd
Assistant Attorney General
Frankfort, Kentucky