

March 28, 2012

Tom D. Hall, Clerk of Court
Florida Supreme Court
500 South Duval Street
Tallahassee, Florida
32399-1927

Standard Jury Instructions Committee in Criminal Cases
c/o Bart Schneider
General Counsel's Office
Office of the State Courts Administrator
500 Duval Street
Tallahassee, FL 32399-1900

RE: Proposed jury instruction on affirmative defense of possession of drugs pursuant to a valid prescription, Standard Jury Instruction 3.6(n)

The Florida Supreme Court Committee on Standard Jury Instructions in Criminal Cases has proposed a new jury instruction entitled "Affirmative Defense: Controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription," Standard Jury Instruction 3.6(n). This comment recommends the following standard jury instruction on the prescription defense:

**3.6(n) AFFIRMATIVE DEFENSE: POSSESSION OF CONTROLLED SUBSTANCE
PURSUANT TO A VALID PRESCRIPTION**

An issue in this case is whether (defendant) possessed the controlled substance pursuant to a valid prescription.

It is not a crime for a person to possess a controlled substance if a person has a valid prescription and uses the controlled substance according to that prescription. To find the defendant possessed a controlled substance pursuant to a valid prescription, you must find the following:

1. (Defendant) possessed the controlled substance;
2. (Defendant) has a valid prescription lawfully obtained from a licensed practitioner; and

3. The possession and use of the controlled substance was in accordance with the terms of the prescription.

The defendant has the burden of establishing that the prescription was lawfully obtained from a licensed practitioner and used in accordance with the terms of the prescription by a preponderance of the evidence.

NOTE: The affirmative defense applies only to simple possession cases and trafficking cases in which the charge is trafficking by possessing a certain quantity. The affirmative defense does not apply to sale, purchase, manufacture, delivery, or possession with the intent to sell or deliver cases.

Florida law regarding the prescription defense

The valid prescription defense is based on the prohibited acts statute, § 893.13(6)(a), which provides:

It is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his or her professional practice or to be in actual or constructive possession of a controlled substance except as otherwise authorized by this chapter. Any person who violates this provision commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

This provision requires that the person lawfully obtain the controlled substance and necessarily includes a requirement that the person use the controlled substance in substantial accordance with the terms of the prescription. Several cases have held that the failure to instruct on the prescription defense is fundamental error, this Court should conduct an oral argument regarding this proposed jury instruction. *Ayotte v. State*, 67 So.3d 330 (Fla. 1st DCA 2011); *Glovacz v. State*, 60 So.3d 423 (Fla. 1st DCA 2011); *McCoy v. State*, 56 So.3d 37 (Fla. 1st DCA 2010).

In *Wagner v. State*, - So.3d -, 2012 WL 75107 (Fla. 4th DCA 2012), the

Fourth District held that trial court's jury instruction, which added the phrase "for a lawful purpose" to the statutory prescription defense, was a misstatement of the law and was reversible error because it negated the defendant's only defense. The court further held that "Wagner's subsequent decision to sell the contents of his prescription did not affect the validity of the prescription." According to the Fourth District, a person may obtain a prescription for Xanax and then sell that Xanax on any street corner because the person has a valid prescription.

Wagner is incorrectly decided because it is contrary to the applicable statutory language. The Fourth District improperly relied on § 499.03(2), a regulatory provision, rather than properly relying on § 893.13(6)(a), the applicable penal provision. It is the criminal statute that governs in a criminal case rather than a regulatory statute. *Mendenhall v. State*, 48 So.3d 740, 749 (Fla.,2010)(noting that a specific statute controls over a general statute). Moreover, Wagner was never entitled to the prescription defense in the first place. Wagner was charged with trafficking based on the conduct of arranging to sell his prescription Oxycodone and Xanax. The statutory language, however, is limited to the conduct of possession. While the court's observation that "Wagner's subsequent decision to sell the contents of his prescription did not affect the validity of the prescription" may be accurate, it is also a non-sequitur. The decision to sell the prescription drugs may not affect the validity of the original prescription but it certainly affects a defendant's entitlement to this affirmative defense. The statutory defense is limited to possession. And one must use the prescription in accordance with the

prescription to be entitled to the defense. The Fourth District's view - that a person one may obtain a prescription for Xanax and then sell that Xanax on any street corner because the person has a valid prescription - is an absurd result. *Davila v. State*, 75 So.3d 192, 198 (Fla. 2011)(noting that statutes should "not be interpreted so as to yield an absurd result" citing cases). It is very simple - the affirmative defense of having a valid prescription does not apply to the conduct of selling the drugs whether they are obtained by valid prescription or not. It is only the conduct of possession, not the conduct of selling, purchasing, manufacturing, delivering, or possession with intent to sell or deliver, that the prescription defense applies to.

Other jurisdiction's similar provisions

The federal government has an equivalent statutory provision codifying the prescription defense. The federal penalties for simple possession statute, 21 U.S.C. § 844(a), provides in pertinent part:

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. . .

It is not enough for the defendant to show that the original issuance of the drug was pursuant to a valid prescription. *United States v. Forbes*, 515 F.2d 676, 680 (D.C.Cir.1975)(stating that "it is not enough for the defendant to show that the original issuance of the drug was pursuant to a valid prescription" to be entitled to

the prescription defense). Rather, the defendant “must also show that his possession was pursuant to the prescription.” *Forbes*, 515 F.2d at 680. In the case of the patient whose name appears on the label, these showings will be identical. However, in the case of someone other than the patient named in the label, possession can be pursuant to the prescription only if he is acting as the agent of the patient. *Forbes*, 515 F.2d at 680.

A defendant who sells the lawfully acquired prescription drugs is not entitled to the prescription defense. *Cf. United States v. Bell*, 667 F.3d 431, 444-446 (4th Cir. 2011)(mandating the exclusion of any oxycodone pills personally taken by the defendant pursuant to her valid prescription from the amount of oxycodone pills she sold for purposes of the federal sentencing guidelines); *United States v. Marks*, 365 F.3d 101, 105-106 (1st Cir. 2004)(explaining the difference between acquiring drugs with a valid prescription for personal consumption and acquiring them for distribution to others for federal sentencing guidelines purposes).¹

¹ According to the Fourth District’s view as expressed in *Wagner*, Bell should have never been charged or convicted of conspiracy to distribute oxycodone pills because it was undisputed that she had a valid prescription for them. Such a view is contrary to the federal courts’ interpretation of the equivalent federal provisions and contrary to simple logic.

Placing the burden on defendant

The proposed jury instruction does not clearly place the burden on the defendant and it should do so. Both the burden of production and persuasion are properly placed on the defendant by a preponderance of the evidence. At common law, the burden of establishing any affirmative defense was the defendant's.

Florida, like many other states, has a reception statute adopting the common law. Indeed, Florida has two reception statutes. Florida has a general reception statute and a criminal reception statute.² Under these reception statutes, the common law is in full force in Florida regarding all matters that the legislature has not specifically addressed. *State v. Egan*, 287 So.2d 1, 3 (Fla. 1973) (holding that the criminal reception statute, § 775.01, was not void for vagueness and noting that “for more than 100 years” the common law of England has been in effect in Florida “except insofar as it has been modified or superseded by statute.”). At common law, the defendant had the burden of establishing any affirmative defense. As was true at common law, the burden of establishing the affirmative defense of “possession of controlled substance pursuant to a valid prescription” should be placed on the defendant.

² See § 2.01, Fla. Stat (2010)(providing: “The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state.”); § 775.01, Fla. Stat. (2010)(providing: “The common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, shall be of full force in this state where there is no existing provision by statute on the subject.”).

As the United States Supreme Court has explained, federal courts should follow established common law rules related to affirmative defenses when applying new criminal statutes. *Dixon v. United States*, 548 U.S. 1, 126 S.Ct. 2437, 165 L.Ed.2d 299 (2006)(noting “the common law long required the defendant to bear the burden of proving the existence of duress” and “long-established common-law rule is that the burden of proving duress rests on the defendant.”). The Supreme Court concluded that when a statute is silent, courts presume that “Congress intended the petitioner to bear the burden of proving the defense of duress by a preponderance of the evidence.” *Dixon*, 548 U.S. at 17. In *Dixon*, Congress passed a criminal statute, the Safe Streets Act, that did not codify the defense of duress, the United States Supreme Court dealt with the situation by recognizing the defense but placing the burden of proof on the defendant because that was the common law. *See also United States v. Jumah*, 493 F.3d 868, 873 (7th Cir. 2007)(explaining that when a statute is silent on the question of affirmative defenses and who bears the burden and when the affirmative defense does not negate an essential element of the offense, “we must presume that the common law rule that places the burden of persuasion on the defendant reflects the intent of Congress”).

Federal appellate courts following *Dixon* recognize many common law defenses but place the burden on the defendant, including the prescription defense. *United States v. Foster*, 374 Fed.Appx. 448, 449, 2010 WL 1553776, 1 (4th Cir. 2010)(concluding that the “exception in § 844(a) for possession pursuant to a valid prescription is an affirmative defense that Foster was required to establish”); *Woods*

v. Butler, 847 F.2d 1163, 1164 (5th Cir. 1988)(concluding that the Louisiana Controlled Dangerous Substances Law, La.Rev.Stat. 40:961, treating a valid prescription as an affirmative defense rather than an element was constitutional relying on *United States v. Forbes*, 515 F.2d 676 (D.C.Cir.1975), involving the federal equivalent statutory provision covering the prescription defense found in 21 U.S.C. § 844(a)).

This is the same situation here as in *Dixon, Foster, Woods, and Forbes*, and the same outcome should result - the defendant should have the burden of persuasion at the preponderance standard. The Florida Legislature codified the prescription defense. The statute, however, is silent regarding the burden. When a statute is silent regarding the burden, courts presume that the Legislature intended the petitioner to bear the burden of proving any affirmative defense by a preponderance of the evidence. The jury instruction should place the burden of establishing the elements of the prescription defense on the defendant.

Furthermore, it is proper to place the burden of establishing the prescription defense on the defendant because he is the party with the easiest access to the relevant information. As the Supreme Court has observed regarding placing the burden of establishing the affirmative defense of duress on the defendant, “accords with the doctrine that where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue.” *Dixon*, 548 U.S. at 9, 126 S.Ct. at 2443 (citing 2 J. Strong, McCormick on Evidence § 337, p. 413 (5th ed. 1999)). It is the defendant who knows which doctor of all the doctors in

the United States prescribed the medication, not the State. The State should not be required to checked with every doctor or subpoena the records of every drug store to determine if there is a valid prescription, when the defendant has ready access to that information. The burden of establishing the prescription defense should be squarely placed on the defendant.

Sincerely,

Charmaine Millsaps
Florida Bar No. 0989134

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this comment on the Proposed jury instruction on affirmative defense of possession of drugs pursuant to a valid prescription, Standard Jury Instruction 3.6(n) has been furnished by U.S. Mail to Judge Jacqueline Hogan Scola, Dade County Courthouse, 73 West Flager Street, Room 414 Miami, FL 33130 this 29th of March, 2012.