

DEA registration was revoked in 2008, following a conviction for health care fraud in the Western District of Virginia and the subsequent suspension of her medical license.

That same year, Dr. Cheek met Dr. Kathleen Schultz, a retired physician. Dr. Schultz agreed to assist Cheek at New River Medical Associates until she could regain her medical license. From September 2008 to February 2009, Dr. Schultz worked at the practice one day per week and prescribed controlled substances for Dr. Cheek's patients.

On February 12, 2009, Dr. Cheek's medical license was reinstated by the Virginia Board of Medicine. However, in order to prescribe the controlled substances that she primarily used to treat her pain patients, Dr. Cheek was required to reapply for and obtain a new certificate of registration from the DEA. Although Dr. Cheek quickly reapplied for a certificate of registration, her efforts were ultimately unsuccessful.

After Dr. Cheek's medical license was reinstated, her arrangement with Dr. Schultz changed. Dr. Cheek began seeing patients again on February 23, 2009, pursuant to an oral agreement with Dr. Schultz that was later reduced to writing. The agreement provided that Dr. Schultz only needed to see patients receiving Schedule II controlled substance prescriptions on the patients' first visit, that Dr. Cheek would conduct all follow-up visits, and that Dr. Schultz would approve medications recommended by Dr. Cheek and sign the prescriptions as needed. The agreement further provided that patients receiving prescriptions for Schedule III through V controlled substances would only be seen by Dr. Cheek, and that Dr. Cheek or her staff members could call in prescriptions for such medications using Dr. Schultz's name and DEA registration number.

This arrangement continued until June 25, 2009, when Dr. Cheek added an addendum to her agreement with Dr. Schultz. The addendum provided that Dr. Schultz would see all patients once who were receiving any scheduled medication, and that after the initial visit, the patients would only be seen by Dr. Cheek. According to the government's evidence, however, Dr. Cheek continued her practice of calling in prescriptions for controlled substances, using Dr. Schultz's DEA registration, before Dr. Schultz had examined the patients.

On June 14, 2010, a search warrant was executed at Dr. Cheek's medical office. During the search, investigators seized 170 patient files. The investigators determined that, from February 23, 2009 to May 14, 2009, Dr. Cheek wrote five controlled substance prescriptions using her revoked DEA registration number. Additionally, from February 23, 2009 to May 19, 2010, there were at least 81 instances in which Dr. Cheek saw a new patient and called in prescriptions for Schedule III or IV controlled substances using Dr. Schultz's DEA registration number, before Dr. Schultz had seen or examined the patients.

On May 24, 2012, Dr. Cheek was charged in a 173-count indictment returned by a grand jury in the Western District of Virginia. Counts 1 through 5 charged her with dispensing and distributing controlled substances without holding a valid DEA certificate of registration, in violation of 21 U.S.C. § 841(a)(1). Counts 6 through 10 charged her with using a revoked and suspended DEA registration number in the course of dispensing controlled substances, in violation of 21 U.S.C. § 843(a)(2). Counts 11 through 91 charged her with dispensing and distributing controlled substances without a valid DEA registration, and not for a legitimate medical purpose by a practitioner acting in the usual course of professional practice, in violation of 21 U.S.C. § 841(a)(1). Counts 92 through 172 charged her with using a DEA registration

number that had been issued to another person in the course of dispensing and distributing controlled substances, in violation of 21 U.S.C. § 843(a)(2). Count 173 charged her with maintaining 28-32 Town Center Drive, Dublin, Virginia, for the purpose of unlawfully distributing controlled substances, in violation of 21 U.S.C. § 856(a)(1). Dr. Cheek went to trial and, on February 22, 2013, a jury returned a verdict of guilty on Counts 1 through 172 of the indictment, and a verdict of not guilty on Count 173.

The case is presently before the court on Dr. Cheek's motion for judgment of acquittal, the government's motion for a preliminary order of forfeiture, and the government's written objections to the presentence report. The court held a hearing on the pending matters on June 3, 2013.

Discussion

I. Motion for Judgment of Acquittal

Dr. Cheek's motion challenges the sufficiency of the evidence to support her convictions. When a motion for judgment of acquittal is based on a claim of insufficient evidence, the jury verdict "must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." Glasser v. United States, 315 U.S. 60, 80 (1942). "Substantial evidence is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." United States v. Green, 599 F.3d 360, 367 (4th Cir. 2010). In determining whether substantial evidence supports the verdict, the court considers both circumstantial and direct evidence, drawing all reasonable inferences from such evidence in the government's favor. United States v. Harvey, 532 F.3d 326, 333 (4th Cir. 2008). The court does not reweigh the evidence or reassess the jury's

determination of witness credibility, United States v. Brooks, 524 F.3d 549, 563 (4th Cir. 2008), and can overturn a conviction on insufficiency grounds “only when the prosecution’s failure is clear,” United States v. Moye, 454 F.3d 390, 394 (4th Cir. 2006) (internal quotation marks omitted).

A. Counts 1 through 5 and 6 through 10

As set forth above, Counts 1 through 5 charged Dr. Cheek with dispensing and distributing controlled substances without holding a valid DEA certificate of registration, in violation of 21 U.S.C. § 841(a)(1). Counts 6 through 10 charged Dr. Cheek with using a DEA registration number that had been revoked and suspended in the course of dispensing a controlled substance, in violation of 21 U.S.C. § 843(a)(2). These counts were based on five prescriptions for controlled substances, which Cheek wrote between February 23, 2009 and May 14, 2009, using her revoked DEA registration number.

Section 841(a)(1) provides that “[e]xcept as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally . . . to . . . distribute[] or dispense . . . a controlled substance.” 21 U.S.C. § 841(a)(1). Section 822(b), in turn, “defines what activities are authorized by the subchapter and by implication fills out the ‘except as authorized by this subchapter’ part of section 841.” United States v. Blanton, 730 F.2d 1425, 1429 (11th Cir. 1984). Under § 822(b), “[p]ersons registered by the Attorney General under this subchapter to . . . distribute[] or dispense controlled substances are authorized to . . . distribute [] or dispense such substances . . . to the extent authorized by their registration.”¹ 21 U.S.C. § 822(b)

¹ The Attorney General’s registration authority under the Controlled Substances Act has been delegated to the DEA. See 21 U.S.C. § 871(a); 28 C.F.R. § 0.100(b).

(emphasis added). “Thus, under the plain language of the statute, a person who is not registered . . . for a [controlled] substance is not authorized to dispense it,” and, therefore, “not excepted from prosecution under section 841.”² Blanton, 730 F.2d at 1429.

Section 843(a)(2) of Title 21 is “commonly referred to as the unlawful drug prescribing statute.” United States v. Collins, No. 07-69-DLB, 2007 U.S. Dist. LEXIS 82816, at *7 (E.D. Ky. Nov. 7, 2007), aff’d, 366 F. App’x 640 (6th Cir. 2010). The statute makes it unlawful for any person to knowingly or intentionally “use in the course of the . . . distribution[] or dispensing of a controlled substance, . . . a registration number which is . . . revoked, suspended, expired, or issued to another person.” 21 U.S.C. § 843(a)(2).

Viewing the evidence in the light most favorable to the government, the court concludes that there was sufficient evidence from which a reasonable jury could have found that Dr. Cheek was guilty beyond a reasonable doubt of the offenses charged in Counts 1 through 10 of the indictment. The government’s evidence established that Dr. Cheek wrote and signed five controlled substance prescriptions using her revoked DEA registration number. The evidence also established that Dr. Cheek was aware that she did not have a valid DEA registration number and that she could not personally prescribe controlled substances without one. While Dr. Cheek maintains that she accidentally wrote the five prescriptions that gave rise to the first ten counts of

² Even registered physicians are not beyond the reach of § 841. Registered physicians are only authorized to prescribe controlled substances if “they comply with the requirements of their registration.” United States v. Hurwitz, 459 F.3d 463, 475 (4th Cir. 2006) (citing 21 U.S.C. § 822(b)). As permitted by the Controlled Substances Act, the Attorney General has promulgated regulations addressing the conditions under which registered physicians are authorized to dispense controlled substances. Id. “The regulations provide that a prescription for a controlled substance is effective only if it is ‘issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his [or her] professional practice.’” Id. (quoting 21 C.F.R. § 1306.04(a)). Accordingly, “registered physicians can be prosecuted under § 841 when their activities fall outside the usual course of professional practice.” United States v. Moore, 423 U.S. 122, 124 (1975).

the indictment, there was sufficient evidence from which the jury could reasonably find that Dr. Cheek acted with the requisite knowledge and intent. Accordingly, her motion for judgment of acquittal will be denied with respect to these counts.

B. Counts 11 through 91 and 92 through 172

Counts 11 through 91 charged Dr. Cheek with dispensing and distributing controlled substances without a valid DEA registration, and not for a legitimate medical purpose by a practitioner acting in the usual course of professional practice, in violation of 21 U.S.C. § 841(a)(1). Counts 92 through 172 charged her with using a DEA registration number that had been issued to another person in the course of dispensing controlled substances, in violation of 21 U.S.C. § 843(a)(2). These counts were based on 81 prescriptions for Schedule III and IV controlled substances that were called in by or at the direction of Dr. Cheek, using Dr. Schultz's registration number, before Dr. Schultz had seen or examined the patients.

In moving for judgment of acquittal, Dr. Cheek again argues that the evidence was insufficient to establish that she acted with the requisite knowledge and intent. Dr. Cheek contends that she and Dr. Schultz attempted "to conform with what they thought the law required for the dispensing of medications to patients," and that their actions were "not indicative of a criminal intent." (Mot. for J. of Acquittal at 4-5.) Given the evidence presented at trial, however, the court finds no merit in Dr. Cheek's argument.

The government's evidence established that Dr. Cheek did not have her own DEA registration number, and that she attempted to circumvent this requirement by knowingly and intentionally calling in prescriptions for Schedule III and IV controlled substances using Dr. Schultz's DEA registration number. The evidence also established that Dr. Cheek prescribed the

controlled substances before Dr. Schultz had ever seen or examined the patients. A registrant-patient relationship is required under Virginia law,³ and the government's evidence, including the testimony of Dr. Marc Swanson, a pain management specialist, established that Dr. Cheek's use of Dr. Schultz's DEA registration number clearly fell outside the usual course of professional practice.

Moreover, despite her efforts to portray herself as a neophyte in the area of controlled substance regulations, Dr. Cheek was a licensed physician during the time period in question, and she had previously maintained a certificate of registration from the DEA for a number of years. Additionally, Dr. Cheek's practice concentrated on the treatment of patients suffering from pain, and she had taken courses on the use of controlled substances for pain management.

In sum, the totality of the evidence, considered in the light most favorable to the government, was sufficient for a reasonable jury to find beyond a reasonable doubt that Dr. Cheek was guilty of the offenses charged in Counts 11 through 172 of the indictment. Accordingly, her motion for judgment of acquittal will be denied.

II. Motion for Preliminary Order of Forfeiture

The government also included a forfeiture count in the indictment, seeking forfeiture of an unspecified sum of United States currency and the property housing Dr. Cheek's medical practice, pursuant to 21 U.S.C. § 853(a). Dr. Cheek elected to forego a jury determination of the forfeitability of the property, and to instead have the matter decided by the court. See Fed. R. Crim. P. 32.2(b)(5).

³ See Va. Code § 54.1-3303A ("A prescription for a controlled substance may be issued only by a practitioner of medicine . . . who is authorized to prescribe controlled substances The prescription shall be issued for a medicinal or therapeutic purpose and may be issued only to persons . . . with whom the practitioner has a bona fide practitioner-patient relationship.").

For the reasons stated during the hearing, the court is of the opinion that the government is entitled to an order of forfeiture in some form. However, the court will take the matter under advisement pending further discussion by the parties. In the event that the parties are unable to reach an agreement, the court will proceed to rule on the forfeiture issues.

III. Objections to the Presentence Report

The government filed two written objections to the probation officer's calculation of Dr. Cheek's applicable sentencing guideline range.⁴ Specifically, the government objects to the absence of a two-level managerial role enhancement and to the probation officer's calculation of the applicable drug weight.

A. Managerial Role Enhancement

Under § 3B1.1(c) of the United States Sentencing Guidelines, a court is directed to increase a defendant's base offense level by two levels "[i]f the defendant was an organizer, leader, manager, or supervisor in any criminal activity" U.S.S.G. § 3B1.1(c). To qualify for an enhancement under this section, "the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants." *Id.* cmt. n. 2. A "participant" is defined as "a person who is criminally responsible for the commission of the offense, but need not have been convicted." *Id.* cmt. n. 1; *see also United States v. Harvey*, 532 F.3d 326, 338 (4th Cir. 2008) (distinguishing "participants" from "innocent bystanders"). In determining whether a defendant played an organizational or leadership role, courts are directed to consider the following factors:

⁴ A third objection, pertaining to the absence of an adjustment for obstruction of justice, was raised during the hearing. That objection will be addressed at sentencing.

the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

U.S.S.G. § 3B1.1, cmt. n. 4. The facts establishing the enhancement must be supported by a preponderance of the evidence. United States v. Cabrera-Beltran, 660 F.3d 742, 756 (4th Cir. 2011).

Upon review of the record, the court concludes that Dr. Cheek is subject to a two-level enhancement based on her role in organizing and managing Dr. Schultz. The evidence adduced at trial established that Dr. Cheek recruited Dr. Schultz as an accomplice because of her ability to prescribe controlled substances; that Dr. Cheek dictated the terms of their relationship; that Dr. Cheek determined Dr. Schultz's compensation, which was much less than Dr. Cheek's; and that Dr. Cheek exercised control over Dr. Schultz and the prescriptions that were issued using her DEA registration number. Additionally, while Dr. Cheek clearly organized and managed the criminal activity charged in the indictment, the evidence was also sufficient to establish that Dr. Schultz was criminally responsible for her role in Dr. Cheek's scheme and, thus, a "participant" for purposes of § 3B1.1.

Accordingly, the court finds, by a preponderance of the evidence, that Cheek is subject to a two-level enhancement under § 3B1.1(c). The government's objection in this regard is sustained.

B. Applicable Drug Weight

The government also argues that the probation officer erred in relying solely on the 86 controlled substance prescriptions charged in the indictment to determine Dr. Cheek's base

offense level under the Sentencing Guidelines. The government contends that there were 14,502 controlled substance prescriptions issued using Dr. Schultz's registration number during the relevant timeframe, and that all of the prescriptions should be included as relevant conduct in calculating Dr. Cheek's base offense level. For the following reasons, the government's objection will be overruled without prejudice.

The Sentencing Guidelines include a drug quantity table that provides base offense levels that correspond to particular quantities of enumerated controlled substances. U.S.S.G. § 2D1.1(c). For controlled substances not listed on the table, the Sentencing Guidelines include drug equivalency tables, which convert the weight of the substances to an equivalent quantity of marijuana. *Id.* § 2D1.1, cmt. n. 8. When determining the applicable drug quantity, the court is not bound by the evidence presented at trial and must consider reliable evidence of relevant conduct. *United States v. Young*, 609 F.3d 348, 358 (4th Cir. 2010).

Under § 1B1.3 of the Sentencing Guidelines, relevant conduct includes "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant"; and, in the case of jointly undertaken criminal activity, whether or not charged as a conspiracy, "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." In cases of jointly undertaken criminal activity involving controlled substances, the Sentencing Guidelines hold a defendant accountable for "all quantities of contraband with which [she] was directly involved," and "all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that [she] jointly undertook." U.S.S.G. § 1B1.3, cmt. n. 2.

In this case, the government maintains that all 14,502 controlled substance prescriptions issued using Dr. Schultz's registration number constitute relevant conduct for purposes of determining Dr. Cheek's base offense level. The total number of prescriptions cited by the government was apparently derived from a prescription monitoring program report, which was introduced at trial as Exhibit 174. That report, which consists of 454 pages of spreadsheets, lists the patient's name, the date of the prescription, the type of drug prescribed, and the prescription quantity and strength. Based on the quantitative information contained in the report, the government maintains that the 14,502 controlled substance prescriptions are equivalent to over 50,000 kilograms of marijuana and, thus, that Cheek qualifies for a base offense level of 38, rather than the base offense level of 12 assigned by the probation officer. See U.S.S.G. § 2D1.1(c).

Based on the current record, however, the court is unable to sustain the government's objection. Of the total number of prescriptions cited by the government, only 81 of them were considered by the jury and found to be unlawful. The remaining 14,421 prescriptions, consisting of prescriptions for Schedule II controlled substances written by Dr. Schultz, were not charged in the indictment. While the court recognizes that it "may consider uncharged . . . conduct in determining a sentence, as long as that conduct is proven by a preponderance of the evidence," United States v. Grubbs, 585 F.3d 793, 799 (4th Cir. 2009), "relevant conduct under the Guidelines must be criminal conduct," United States v. Dove, 247 F.3d 152, 155 (4th Cir. 2001). See also United States v. Chube, 538 F.3d 693, 702, 705 (7th Cir. 2008) (emphasizing in a case against two physicians charged with unlawfully distributing controlled substances that "relevant

conduct must be unlawful,” and, thus, that “[a]ny legitimate prescriptions must be deduced from pill totals before a final determination of relevant conduct is possible”).

At this time, the court is unable to conclude that the government has established the illegality of all 14,502 prescriptions issued by Dr. Schultz. The fact that 81 of the prescriptions were unlawfully called in by Dr. Cheek before patients had been seen by Dr. Schultz is not sufficient to sweep every other prescription issued by Dr. Schultz into the relevant conduct calculation. In other words, the court “may not . . . extrapolate that, because some of the patients received prescriptions that . . . were outside the usual course of medical practice, all of the prescriptions written to all of the patients . . . were outside the usual course of medical practice.” Chube, 585 F.3d at 357-58.

This is especially true in the instant case, where a large number of the uncharged prescriptions differ from those charged in the indictment. Unlike the 81 charged prescriptions that were called in for patients who had never been examined by Dr. Schultz, a portion of the uncharged prescriptions were written and issued by Dr. Schultz after she had personally examined the patients. While the government has not conceded that such prescriptions were written in the usual course of professional practice, the government nonetheless acknowledges that “one could argue” that prescriptions written for patients actually examined by Dr. Schultz should be excluded from the relevant conduct calculation. (Govt.’s Obj. at 2.)

The court recognizes that the vast number of prescriptions makes it more arduous for the government to establish which of the uncharged prescriptions were unlawfully dispensed. Nonetheless, that does not relieve the government of meeting this burden at sentencing. See Chube, 538 F.3d at 705-706 (holding that the government was required to prove that particular

prescriptions were unlawful in order to include them as relevant conduct, and that the court could not rely on mere extrapolation); see also United States v. Rosenberg, 585 F.3d 355, 358 (7th Cir. 2009) (applying Chube and holding that the government presented ample evidence to prove that certain prescriptions “were out of bounds and thus includable as relevant conduct”); United States v. Bell, 667 F.3d 431, 443 (4th Cir. 2011) (emphasizing, in a case involving the unlawful distribution of oxycodone, that because prescription drugs can be legally possessed, “only those quantities that the defendant conspired or intended to possess unlawfully” can be considered relevant conduct).

For these reasons, the government’s objection to the base offense level assigned by the probation officer is overruled without prejudice. In order for an uncharged prescription on Dr. Schultz’s prescription monitoring report to be considered relevant conduct, the record must contain sufficient facts from which the court can evaluate the circumstances surrounding that particular prescription and determine that it was issued in violation of the Controlled Substances Act. Mere sampling, extrapolation, or generalized expert opinion will not suffice. Only those particular uncharged prescriptions that are proven to be criminally unlawful will be included in the calculation of the applicable drug weight.⁵ See Chube, 538 F.3d at 705-706.

Conclusion

For the reasons stated, the defendant’s motion for judgment of acquittal will be denied, the government’s motion for a preliminary order of forfeiture will be taken under advisement,

⁵ The court notes that proof of a mere regulatory violation will be inadequate. See Dove, 247 F.3d at 155 (requiring relevant conduct to be “criminal conduct”); see also United States v. Joseph, 709 F.3d 1082, 1102 (11th Cir. 2013) (acknowledging that a violation of 21 C.F.R. § 1306.5, which requires that a prescription be signed and dated on the day of issue, “does not constitute a per se violation of section 841”).

and the government's written objections to the presentence report will be sustained in part and overruled without prejudice in part.

The Clerk is directed to send certified copies of this memorandum opinion to all counsel of record.

ENTER: This 12th day of June, 2013.

/s/ Glen E. Conrad
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

UNITED STATES OF AMERICA)
)
v.)
)
LINDA SUE CHEEK,)
)
Defendant.)
)

Criminal Action No. 7:12CR00040

ORDER

By: Hon. Glen E. Conrad
Chief United States District Judge

For the reasons stated in the accompanying memorandum opinion, it is now

ORDERED

as follows:

1. The defendant's motion for judgment of acquittal is **DENIED**;
2. The government's motion for a preliminary order of forfeiture is **TAKEN UNDER ADVISEMENT**; and
3. The government's written objections to the presentence report are **SUSTAINED IN PART AND OVERRULED WITHOUT PREJUDICE IN PART**.

The Clerk is directed to send certified copies of this order and the accompanying memorandum opinion to all counsel of record.

ENTER: This 12th day of June, 2013.

/s/ Glen E. Conrad
Chief United States District Judge