UNPUBLISHED

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

UNITED STATES OF AMERICA	)	
	)	Case No. 1:00CR00052
	)	Case No. 1:00CR00093
	)	Case No. 1:01CR00009
v.	)	
	)	**OPINION AND ORDER**
	)	
FRANKLIN SUTHERLAND,	)	By: James P. Jones
	)	United States District Judge
Defendant.	)	

S. Randall Ramseyer, Assistant United States Attorney, Abingdon, Virginia, for United States; W. Thomas Dillard, Ritchie, Fels & Dillard, Knoxville, Tennessee, for Defendant.

In this criminal case against a physician accused of the unlawful distribution and dispensing of controlled substances, I deny the defendant's motion to dismiss the indictment because I find that the underlying statutes are not unconstitutionally vague as applied to a physician.

I

The defendant, Dr. Franklin Sutherland, stands accused of violating 21 U.S.C.A. § 841 (West 1999 & Supp. 2000), the general statutory provision prohibiting the unlawful distribution of controlled substances, and 21 U.S.C.A. § 859 (West 1999 & Supp. 2000), which prohibits the unlawful distribution of controlled substances to minors. For each count, the Superseding Indictment charges that Sutherland acted "without a legitimate medical purpose and beyond the bounds of medical practice." (Superceding Indictment, Apr. 26, 2001, at 1, 17.)

The defendant has moved to dismiss the Superseding Indictment on the ground that § 841 and § 859 are unconstitutionally vague as applied to physicians. Written and oral argument has been presented, and the issue is ripe for decision.

II

Sutherland maintains that §§ 841 and 859 are unconstitutionally vague as applied to physicians because the standard "without a legitimate medical purpose and beyond the scope of medical practice" does not give physicians specific warning that their conduct may be criminal. I reject this argument.

In *United States v. Moore*, 423 U.S. 122, 124 (1975), the Supreme Court held that physicians could be prosecuted under § 841 "when their activities fall outside the

usual course of professional practice." While the Court did not specifically address a vagueness challenge to the application of the statute to physicians, it did uphold the doctor's conviction because "[t]he evidence presented at trial was sufficient for the jury to find that respondent's conduct exceeded the bounds of 'professional practice.'" *Id.* at 142. Furthermore, the Court held that the statute was not ambiguous, and should not be construed to exclude physicians from prosecution. *Id.* at 145. Therefore, in light of Supreme Court precedent applying the statute to physicians, and indeed supplying the standard the defendant now attacks as impermissibly vague, the defendant's claim is not persuasive.

Not only has the Supreme Court applied the unlawful distribution and dispensing statutes to a physician, but the Fourth Circuit has as well. In *United States v. Tran Trong Cuong*, 18 F.3d 1132, 1137 (4th Cir. 1994), the court rejected a physician defendant's argument that the standard set forth by the Supreme Court in *Moore*, i.e., that a physician "exceeded the bounds of 'professional practice,'" 423 U.S. at 142, was insufficient to support a criminal conviction because it was akin to a negligence standard. The Fourth Circuit clarified that

> [a] criminal prosecution requires more [than a negligence standard] — that is, proof beyond a reasonable doubt that the doctor was acting outside the bounds of professional medical practice, as his authority to prescribe controlled substances was being used not for treatment of a patient, but

> for the purpose of assisting another in the maintenance of a drug habit or of dispensing controlled substances for other than a legitimate medical purpose, i.e., the personal profit of the physician.

Tran Trong Cuong, 18 F.3d at 1137. In fact, the court noted that the standard "without a legitimate medical purpose" was stricter than the *Moore* standard of "exceeding the bounds of medical practice," and therefore benefitted the defendant. *Id.* at 1138; *see also United States v. Daniel*, 3 F.3d 775, 778 (4th Cir. 1993) (holding that the "not for a legitimate medical purpose" standard is sufficient in indictment). Finally, in *United States v. Singh*, 54 F.3d 1182, 1186-87 (4th Cir. 1995), the Fourth Circuit identified three elements necessary to convict a physician of distributing a controlled substance in violation of § 841. The government must prove (1) that the defendant distributed or dispensed a controlled substance, (2) that the defendant acted knowingly and intentionally, and (3) that the defendant's actions "were not for legitimate medical purposes in the usual course of his professional medical practice or [were] beyond the bounds of medical practice." *Id.* at 1187 (quoting *Tran Trong Cuong*, 18 F.3d at 1141).

The application of these elements, acknowledged the court, must be analyzed on a case-by-case basis. *See id.* As to the third element, the court noted that "there are no specific guidelines concerning what is required to support a conclusion that an

accused acted outside of the usual course of professional practice." *Id.* (quoting *United States v. August*, 984 F.2d 705, 713 (6th Cir. 1992)). Sutherland contends that because application of the statutes to a physician requires a case-by-case analysis, a doctor cannot be on notice as to the illegality of his or her conduct, and the statutes are therefore unconstitutionally vague. This argument was rejected in *United States v. Collier*, 478 F.2d 268, 272 (5th Cir. 1973). There, the court held that "statutes affecting medical practice need not delineate precise circumstances constituting the bounds of permissible practice." *Id.* The court concluded that the statute was not unconstitutionally vague. *See id.*

The defendant here seeks to compare the standard in the present case to abortion cases where standards have been held unconstitutionally vague. For example, Sutherland points to *Colautti v. Franklin*, 439 U.S. 379 (1979), in which the Supreme Court struck down a statute for which criminal liability rested on a doctor's medical judgment on the viability of a fetus. *See id.* at 381. *Colautti* is not applicable to the present case. That case dealt with a statute criminalizing certain abortions. Reproductive rights have been recognized as "fundamental" under the Constitution. *See Roe v. Wade*, 410 U.S. 133, 153 (1973). In cases touching upon fundamental rights, there is a heightened vagueness standard. *See United States v. Robel*, 389 U.S. 258, 275 (1967) (Brennan, J., concurring) ("The area of permissible indefiniteness

narrows . . . when the regulation invokes criminal sanctions and potentially affects fundamental rights.”). Therefore, Sutherland’s analogies to vague criminal statutes dealing with abortion are inapposite.

III

In conclusion, I find it clear from the precedent of the Supreme Court, the Fourth Circuit, and other circuits that § 841 and § 859 are not unconstitutionally vague as applied to physicians. Therefore, it is **ORDERED** that the Defendant’s Motion to Dismiss Based Upon the Unconstitutional Vagueness of the Statute as Applied to a Physician is denied.

ENTER: May 10, 2001

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United States District Judge