

**UNPUBLISHED**

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

**UNITED STATES OF AMERICA**

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v.

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**FRANKLIN SUTHERLAND,**

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Defendant.

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Case No. 1:00CR00052

Case No. 1:01CR00009

**OPINION AND ORDER**

By: James P. Jones

United States District Judge

*S. Randall Ramseyer, Assistant United States Attorney, Abingdon, Virginia, for United States of America; W. Thomas Dillard and Wade V. Davies, Ritchie, Fels & Dillard, PC, Knoxville, Tennessee, for Defendant.*

In this criminal case, I set forth the reasons for denying the defendant's post-conviction motion for judgment of acquittal, or in the alternative for a new trial.

**I**

After a jury trial in this court, the defendant, Dr. Franklin Sutherland, was convicted of several hundred counts of violating 21 U.S.C.A. § 841 (West 1999 & Supp. 2001), prohibiting the unlawful distribution of controlled substances. Subsequently, pursuant to Federal Rules of Criminal Procedure 29(c) and 33, the

defendant moved for judgment of acquittal, or in the alternative for a new trial.

Oral argument on the motion was held on July 12, 2001. This opinion memorializes my decision made at the conclusion of the argument.

## II

The defendant first argues that the evidence was insufficient to sustain the convictions, noting that the government's expert medical witness did not personally examine the patients in question and admitted that the patients could have been in pain. These points were brought out through cross-examination by the defense counsel for the jury's consideration. The jury was also able to consider the testimony of the patients and view their medical records. I find that there was sufficient evidence, both direct and circumstantial, from which the jury could find that the defendant distributed controlled substances without a legitimate medical purpose and beyond the bounds of medical practice.<sup>1</sup>

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<sup>1</sup> The convictions must be sustained if, viewed in the light most favorable to the government, there is substantial evidence to support them. *See Glasser v. United States*, 315 U.S. 60, 80 (1942). "In reviewing the sufficiency of the evidence, [the court is] not entitled to weigh the evidence or to assess the credibility of witnesses, 'but must assume that the jury resolved all contradictions . . . in favor of the Government.'" *United States v. Romer*, 148 F.3d 359, 364 (4th Cir. 1998) (quoting *United States v. United Med. & Surgical Supply Corp.*, 989 F.2d 1390, 1402 (4th Cir. 1993)), *cert. denied*, 525 U.S. 1141 (1999). In evaluating the sufficiency of the evidence to support a conviction, the relevant question is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). It is the role of the jury to judge the credibility of

Next, the defendant argues that 18 U.S.C.A. § 841 is unconstitutionally vague as applied to physicians. For reasons stated in my prior opinion dated May 10, 2001, I deny the defendant's present motion on the same grounds.

The defendant also contends that the jury was improperly instructed. The standard of review for jury instructions in this circuit is whether the jury instructions, in their entirety and as part of the whole trial, adequately instructed the jury on the elements of the offense and the accused's defenses. *See United States v. Bostian*, 59 F.3d 474, 480 (4th Cir. 1995). Under this standard, I find that the jury was properly instructed. The defendant first contends that the instructions were erroneous because the court rejected the defendant's proposed jury instruction giving hypothetical examples of conduct which would constitute illegal and legal medical practices. The introduction of these examples of conduct, taken from other cases and dissimilar to the facts in evidence before the jury, would have been confusing and misleading to the jury. Rather, the jury was given careful instruction as to each element of the offense, and instructed to make its decision based "solely on the evidence presented at the trial." As such, the jury was adequately instructed.

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witnesses, resolve conflicts in testimony, and weigh the evidence. *See United States v. Manbeck*, 744 F.2d 360, 392 (4th Cir. 1984). I may enter a judgment of acquittal only when there is a complete absence of probative facts to support the conclusion reached by the jury. *See Sherrill White Constr., Inc. v. South Carolina Nat'l Bank*, 713 F.2d 1047, 1050 (4th Cir. 1983).

Sutherland next argues that the jury instructions were improper because they included an objective, rather than subjective, standard for determining whether the defendant's conduct was illegal. Specifically, the court instructed the jury that the government must prove, as an element of the offense, that the defendant had acted "without a legitimate medical purpose and beyond the bounds of professional medical practice." The defendant contends that the instruction should have read "without a legitimate medical purpose and beyond the bounds of *his* professional medical practice," thus measuring the defendant's actions against his own prior behavior rather than the behavior of others in the medical community. I do not find this to be an accurate characterization of the law.

As an initial matter, in the seminal case of *United States v. Moore*, 423 U.S. 122, 124 (1975), the Supreme Court held that a physician violates § 841 when his activities "fall outside the usual course of professional practice." Thus, there is no indication of a subjective standard. It is true that some Fourth Circuit cases have stated the standard somewhat differently, defining it as "not for legitimate medical purposes in the usual course of his professional medical practice or beyond the bounds of medical practice." *United States v. Tran Trong Cuong*, 18 F.3d 1132, 1141 (4th Cir. 1994). This statement of the law, however, does not impose a subjective standard as the defendant argues. It is clear to me that the phrase "his professional medical practice" does not

refer simply to the defendant's own prior actions, but rather to the defendant's own *practice area* in general. It defies logic that a doctor could escape criminal liability for his conduct so long as he is consistent in those activities such that they constitute the usual course of his own practice. I conclude that the jury was adequately instructed on the proper standard.

Sutherland argues that he was prejudiced by the introduction of improper evidence under Federal Rule of Evidence 404(b) regarding his assistance in the injection of illegal steroids into a former patient. As announced from the bench during trial, I found the evidence regarding the defendant's administration of an illegal substance to a patient to be relevant conduct admissible under the Fourth Circuit's test for 404(b) evidence. *See United States v. Queen*, 132 F.3d 991, 997 (4th Cir. 1997) (stating four-prong admissibility test). Furthermore, because of the similarity of the alleged conduct to the charged offenses, I found that the evidence was not unfairly prejudicial. *See Westfield Ins. Co. v. Harris*, 134 F.3d 608, 615 (4th Cir. 1998). Thus, the admission of the challenged evidence was not in error.

Next, the defendant contends that the court erred by allowing the government to elicit certain testimony admitted as a prior consistent statement to rebut an implicit charge of recent fabrication under Federal Rule of Evidence 801(d)(1)(B). Brian Elswick, a former patient of the defendant and a witness in the government's case-in-

chief, testified at trial that it had been Dr. Sutherland's idea to illegally write prescriptions for Elswick in the names of Elswick's girlfriend and father. (Tr. 2B-81.) On cross-examination, defense counsel asked Elswick about his agreement to cooperate with the government in the prosecution of Dr. Sutherland in exchange for a reduction in his own charges. (Tr. 2B-72-74.) Further, defense counsel challenged Elswick's testimony with his prior testimony before the grand jury indicating that it was Elswick's idea, not the defendant's. (Tr. 2B-81-85.) Elswick admitted that he could not recall exactly how the conversation took place, but insisted that it was the doctor's idea. (*Id.*)

Later in the case, the government called Elswick's former girlfriend, Sommer Chambers, as a witness. Over the objection of the defendant and after a bench conference on the issue (Tr. 2B-133-138), the court allowed the witness to testify that after Elswick had been indicted for related prescription drug violations in 1996, he had told Chambers that it had been Dr. Sutherland's idea to write prescriptions for Elswick in Chambers' name. (Tr. 2B-138.) I found that the statement was admissible under rule 801(d)(1)(B) as a prior consistent statement "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."

In support of his argument that the statement was improperly admitted, the defendant submits the case of *Tome v. United States*, 513 U.S. 150 (1995), in which the Supreme Court held that a prior consistent statement is not admissible if the prior

statement was made after the declarant's motive to lie had arisen. *See id.* at 167. The defendant contends that Elswick's motive to lie was to explain to Chambers why he had been arrested, and therefore the statements were all made after this motive had been developed. I find that while the defendant may have had such a motive to lie to Chambers at the time he made his statement to her, a different and more recent motive to lie was implied by defense counsel on cross-examination, which the government was entitled to rebut.

The questioning of Elswick regarding his cooperation with the government implied that Elswick's claim that it was Dr. Sutherland's idea to illegally write prescriptions was a recent fabrication in his own self-interest, namely, that Elswick was fabricating incriminating information about Sutherland so that his own charges would be dropped. Elswick's motive to lie to Chambers was different; there he was attempting to explain to his girlfriend why he was in trouble with the law. In other words, if Elswick had a motive to lie to Chambers at the time he made the statement to her, it could not have been the same motive to lie implied by the defense in its cross-examination of him, because Chambers had nothing to do with the government or the charges against Elswick. Thus, the rule in *Tome* that a prior statement made under the same motivation to lie is inadmissible does not govern the present case, and the statement was properly admitted.

Finally, the defendant contends that he was denied a fair trial because of certain prejudicial publicity during the trial. The newspaper article to which Sutherland refers dealt not with Sutherland's case, but rather about the general problem of prescription drug abuse in this geographic region.<sup>2</sup> As stated from the bench during the trial, such coverage was not prejudicial to the defendant because it did not involve "information about the defendant that would not be admissible before the jury or that was not in fact put before the jury in court." *United States v. Jones*, 542 F.2d 186, 195 (4th Cir. 1976) (quoting *United States v. Hyde*, 448 F.2d 815, 849 (5th Cir. 1971)). Furthermore, the jury venire was questioned extensively in voir dire regarding their exposure to any press coverage related to the defendant's case and prescription drug abuse in general. The jury itself was directed not to read or listen to any news accounts of the case. Accordingly, the court was under no obligation to further address the publicity issue with the jury during the trial.

### III

For the foregoing reasons, it is **ORDERED** that the defendant's Motion for Judgment of Acquittal, or in the Alternative for a New Trial (Doc. No. 82) is denied.

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<sup>2</sup> See Andrea Hopkins, *OxyContin: Task Force Convenes to Try to Stop Tide of Drug Abuse*, Bristol Herald Courier, May 18, 2001, at A1.

ENTER: July 26, 2001

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United States District Judge