
NO. 05-2940 EM

Criminal

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA

Appellee

v.

HARRY MEYER KATZ

Appellant

*APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI*

SUPPLEMENTAL BRIEF OF APPELLEE

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I. **GONZALES v. OREGON DOES NOT BAR PROSECUTION OF PHYSICIANS FOR VIOLATIONS OF 21 U.S.C., §841(a)(1).**

Dr. Katz's Supplemental Brief argues that Gonzales v. Oregon, 126 S. Ct. 904 (2006) prohibits the prosecution of physicians who prescribe controlled substances outside the scope of professional practice and not for a legitimate medical purpose. The holding in that case is not nearly as broad as Dr. Katz would have this Court believe. In Gonzales, the Supreme Court was asked to examine an Interpretive Rule issued by then-Attorney General John Ashcroft, which purported to supersede an Oregon statute permitting physician-assisted suicide. As Justice Kennedy announced, "[t]he question before [the Court] is whether the Controlled Substances Act allows the United States Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, notwithstanding a state law permitting the procedure." Id. at 911. The instant case involves neither the interpretation of a regulation nor a state statute. On the contrary - the instant case involves a regulation which has been in place since 1971 and has been approved by the United States Supreme Court and the Congress of the United States.

"A 1971 regulation promulgated by the Attorney General requires that every prescription for a controlled substance 'be issued for a legitimate medical purpose

by an individual practitioner acting in the usual course of his professional practice.’ 21 CFR §1306.04(a)(2005).” Id. at 912. The prosecution of physicians for violations of Section 841(a)(1) was first authorized by the United States Supreme Court in United States v. Moore, 423 U.S. 122 (1975). The Gonzales Court reiterated that, pursuant to Moore, “[d]ispensing controlled substances without a *valid* prescription, furthermore, is a federal crime.” Gonzales, 126 S. Ct. at 914 (emphasis added). In addition,

[t]he CSA allows prescription of drugs only if they have a ‘currently accepted medical use,’ 21 U.S.C. §812(b)(1); requires a ‘medical purpose’ for dispensing the least controlled substances of those on the schedules, §829©; and, in its reporting provision, defines a ‘valid prescription’ as one ‘issued for a legitimate medical purpose,’ §830(b)(3)(A)(ii). Similarly, physicians are considered to be acting as practitioners under the statute if they dispense controlled substances ‘in the course of professional practice.’” §802(21).

Id. at 915. So, unless a prescription has a legitimate medical purpose, it is not a *valid* prescription and its issuer is subject to criminal prosecution under Moore.

The validity of the prescriptions was the only issue in the case against Dr. Katz.

In the instant case, the government presented the testimony of expert witness Dr. Ted Parran. The government will not attempt to summarize Dr. Parran’s testimony here inasmuch as the Court has both reviewed the government’s initial brief and heard oral argument. Suffice it to say that Dr. Parran testified to numerous

instances in which Dr. Katz made significant omissions in evaluating his patients and prescribing controlled substances. Dr. Parran testified that as to each of the prescriptions written to the four patients whose charts he examined, it was his opinion that the prescriptions were written outside the scope of professional practice and not for a legitimate medical purpose.

The jury heard testimony from Dr. Katz's patients. They testified about the various ailments from which they claimed they suffered - some real and some not. As Dr. Katz correctly noted in his opening brief, Dr. Parran did not testify that prescribing these medications for the claimed ailments could *never* constitute a legitimate medical purpose - only that the medical purpose was not legitimate as to a particular patient under these particular facts. In this case the jury merely applied these facts to the clearly established law. This crucial fact makes the government's case against Dr. Katz vastly different from the facts of Gonzales. In that case, the Attorney General of the United States issued an Interpretive Rule stating that "assisting suicide is not a 'legitimate medical purpose' within the meaning of 21 CFR 1306.04 (2001), and that prescribing, dispensing, or administering federally controlled substances to assist suicide violates the Controlled Substances Act." Gonzales, 126 S. Ct. at 913-914. In so doing, the Attorney General attempted to effectively create a strict liability standard - that prescribing a controlled substance

for the purpose of assisting suicide could *never* constitute a legitimate medical purpose, no matter what the circumstances.

At the conclusion of its lengthy and thoughtful analysis, the Supreme Court held that “the CSA’s prescription requirement does not authorize the Attorney General to bar dispensing controlled substances for assisted suicide in the face of a state medical regime permitting such conduct.” Id. at 925. It rejected the creation of a strict liability standard for physicians who utilize controlled substances to assist suicide. Despite the obvious opportunity to do so, the Supreme Court did not overrule Moore. Moreover, the Court did not indicate that criminal prosecutions of physicians under Section 841(a)(1) are no longer viable. To the contrary, the Court again cited to Moore in its final paragraphs, reaffirming that

the prescription requirement is better understood as a provision that ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. As a corollary, the provision also bars doctors from peddling to patients who crave the drugs for those prohibited uses.

Id. Section 841(a)(1) continues to provide a tool with which to prosecute physicians who prescribe controlled substances outside the scope of professional practice and not for a legitimate medical purpose. By its reference to Moore, the Supreme Court has authorized the prosecution of physicians who provide controlled substances to patients who seek them for “prohibited uses.”

The value of Gonzales is limited by its narrow issue: whether the Attorney General may issue an Interpretive Rule that purports to create a strict liability standard under federal law for conduct that has been specifically legalized under state law. Because there is neither an interpretation of a regulation nor a state statute at issue here, and because the Court eschewed an obvious opportunity to overrule Moore, it is the government's position that Gonzales has no bearing upon the outcome of this appeal. The government therefore urges this Court to deny Dr. Katz's Motion for Panel Rehearing and affirm his 176 convictions for violations of 21 U.S.C. §841(a)(1).

CONCLUSION

For the foregoing reasons, Dr. Katz's Motion for Panel Rehearing should be denied and the judgment of the District Court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

COMES NOW counsel for Appellee and certifies the following:

1. The Brief of Appellee complies with the page limitations set forth within Fed.R.App.P. 32(a)(7)(A) and this Court's Order dated February 7, 2006.
 2. The word processing software used to prepare the Supplemental Brief of Appellee was WordPerfect, Version 12.0.
 3. The attached 3 ½" computer diskette contains the text of the Supplemental Brief of Appellee. This disk has been scanned for viruses and was found to be virus free. In addition, a 3 ½" computer diskette containing the Brief of Appellee has been served on counsel of record.
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing and one diskette that has been scanned for viruses and is virus free, were mailed postage prepaid United States Mail first class to:

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on this _____ day of February, 2006.

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