IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 08-00026-04-CR-W-FJG
	)	
CHRISTOPHER L. ELDER	)	
	)	
Defendant.	)	

DEFENDANT ELDER'S REPLY TO THE GOVERNMENT'S ANSWER TO ELDER'S MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO RULE 29, OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL PURSUANT TO RULE 33

Defendant Elder argued in his motion on Point I that:

> The evidence is insufficient as a matter of law as to the conspiracy count and the substantive counts of distribution because the government failed to prove an essential element of the offense; that is, that the drugs were dispensed other than for a legitimate medical purpose and not in the usual course of professional practice.

The crux of the government's answer to both Elder and Solomon's motions where this point was discussed is:

> Sufficient evidence in the record supported the jury's determination that the drugs in this case were prescribed other than for a legitimate medical purpose and not in the course of professional practice, and that the drugs had been

> dispensed or distributed. The jury was entitled to render their verdicts based upon all of the evidence in the record, not solely the testimony of Dr. Morgan, the government's medical expert. The totality of the evidence in the record established that all of the prescriptions written in Texas and filled at the Medicine Shoppe in Belton, Missouri, whether written by Dr. Elder or by Dr. Okose, were fictitious, in that they were written without the patient's knowledge or consent, and the drugs were diverted and never provided to the patients for whom the prescriptions had ostensibly been written. Consequently, the only inference possible is that these prescriptions were, by definition, illegitimate and not written in the course of professional practice.

Government answer at page 2.

More simply stated, the government contends that the totality of the evidence supports a finding that the jury could do its job based on non-expert evidence presented at trial, citing a 5th Circuit case, *United States v. Armstrong*, 550 F.3d 382 (5th Cir. 2008). As will become apparent from the discussion of other trial facts, infra, *Armstrong* is clearly distinguishable on the facts. Notably, the government makes no attempt in the answer pleading to distinguish or discount the clear language in *United States v. Hurwitz*, 459 F.3d 463 (4th Cir. 2006) which suggests the "other evidence" cited by the government here is simply insufficient to overcome the testimony of their own expert who could only testify that Elder's practices were unusual as opposed to contrary to the national accepted standard.

From the beginning, Doctor Elder's behavior in this case negated consciousness of guilt. Connie Overton, a diversion investigator from the Houston

field office, admitted during her testimony that Dr. Elder was "cooperative" and gave "investigative leads", something that is not the characteristic behavior of a guilty person.

Evidence at trial established that Doctor Elder held dual board certifications by the American Board of Pain Medicine and the American Board of Physical Medicine and Rehabilitation. He was a member of the National Association of Drug Diversion Investigators (NADDI) and was quite familiar with the concerns DEA has in this type of case and their investigative techniques. Much of the government's case relied on speculation and conjecture and was built through inference upon inference. The government failed entirely to establish any motive in the case or offer a concrete explanation through credible evidence as to why someone with such credentials would engage in the alleged criminal conduct charged in the indictment.

From the beginning, the investigation itself lacked objectivity in many respects. The Court will recall the testimony of Pharmacist Board Investigator Van Fleet who testified that he established contact with Dr. Peter Okose and or Mr. Robert Kleinman and in turn received via a faxed letter confirmation that the prescriptions were valid and should be filled, a contention he clearly rejected. When asked by defense counsel why he never attempted to Contact Dr. Elder early

in the investigation, his response was an unequivocal " They are all just the same". They of course were not.

The government from the very inception has attempted to paint Dr. Elder and Dr. Okose in the same light. Dr. Okose is an Internist and has been sanctioned by the Texas Medical Board on more than three separate occasions. Robert Kleinman, an Okose employee, testified Okose saw between 200-400 patients daily, and generated an income of ten million dollars. Conversely, during the alleged conspiracy Dr. Elder saw a comparatively small number of patients over a brief six months and thereafter had his DEA number abused through the use of the faxed refill orders with the forged initials even though he specifically indicated no refills on the original scripts he wrote. Dr. Elder testified that he never authorized any refills while Rostie admitted the pharmacy computer software would indicate to her “when refills were due” and that she initiated such refill requests and purposely refilled the prescriptions without ever speaking with Elder or confirming they were authorized or necessary when she clearly had originals that said “no refills.”

When Dr. Morgan was asked about this he was dismayed and stated that the notion of a pharmacist initiating a refill was particularly odd and troublesome. Each prescription shown as an exhibit clearly had no refill on it. That Elder was not involved in the bogus refill scheme is clear, as there were no faxes, emails, or

other correspondence between Dr. Elder and the Medicine Shoppe and the initials on the refill faxes were plainly not his. The court will not doubt recall the dramatic side by side comparisons of initials on original scripts to the initials contained on the fax refill sheets. Elder did not initial the refill sheets period.

Other witnesses supported Doctor Elder's defense that he was seeing real patients and writing what he thought to be legitimate prescriptions for real people. Sony Chin testified he found nothing unusual about Elder's prescription writing and this was later repeated by Maggie Ortega on the stand. Dr. Richard Morgan, the government's expert, agreed on a high percentage of the issues that each was examined on and never expressed an opinion that Elder's practice was outside the scope of national standards. It is also noteworthy that Morgan also admitted that from time to time patients use false identification and are able to fool or trick the treating physician and it in fact had happened to him (see summary of Morgan's testimony in defendant's original motion).

Also, the medications involved in this case are significant. All were schedule III-V, which means not only are they weak, but the street value of these drugs are woefully low i.e. 2-3 dollars a pill. This is of course in shape contrast to higher scheduled narcotics which have far greater street value and would logically be what one would expect a doctor with criminal intent to deal in. In short, the government failed to prove that any original prescriptions written by Dr. Elder

were done outside the course of providing reasonable medical treatment. Indeed, not all patients were treated with medications; some were treated with diathermy, electrical stimulation, and ultrasound, as testified to by Doctor Elder.

The government makes much of the fact that no medical records were produced for many of the patients Doctor Elder saw at South Texas Wellness Center. Testimony at trial established that a locum tenems employee such as Dr. Elder was not the custodian of records, and does not bear any responsibility as to the location of these records. The owners of the medical facility where Doctor Elder was employed were responsible for all patient files. Despite being fully aware of this and given immunity from prosecution, those owners, Pleshette and ADA Johnson, offered little in the way of explanation. Pleshette Johnson, the only one of the two owners to testify, stated some 44 times that she could not recall the answer to relevant questions posed to her. She admitted her Mother hired Dr. Elder. She testified he saw real patients, both for pain and other conditions. She kept his script pads in her office and issued them to him as he needed them. She was a chiropractor and her mother managed the business.

Ms. Johnson admitted to large sums of cash that passed back and forth between her and Solomon, yet she kept no books and there was no contract between her and Solomon – they dealt in cash. She of course received immunity to testify, as did her mother who was not called. At the end of his six months of

employment, she gave Dr. Elder a 1099 for $5,000.00. Elder then left the STWC on Jan 1, 2005. When directly confronted about the files she should have had in her possession and custody, Johnson testified that Doctor Elder must have taken patient files because she did not have them. It is far more plausible she simply destroyed them early in the investigation before she had immunity. This was likely because of her involvement with the other conspirators, the cash transactions, and the damning method of deliveries tied to the bogus refills all pointed directly to her involvement. That Elder was a dupe and being used is of course confirmed by the failure to take his name off the clinic door until late 2007 even though he left in January 2005.

A good bit of trial evidence focused on what should or should not appear on a prescription written during the alleged conspiracy. Sunny Chin, a Pharmacist, and Doctor Morgan both confirmed it was not necessary to have prescriptions with the patient's address on it. This was a change enacted in 2008 and now provides that any modification to a prescription renders it null and void, an issue that the government repeatedly ignored and tried to suggest showed criminal intent on Doctor Elder's part. The method of filling out prescriptions simply proved nothing relevant.

The types of medication were also an issue. Doctor Elder testified promethazine, i.e. Phergnan, is a cough suppressant, and he agreed with Dr.

Morgan, it had absolutely no role in the treatment of pain. He testified it would be used in conjunction with an antibiotic which he in fact wrote prescriptions for while at STWC.

He also testified he never told an investigator that he would never prescribe promethazine with codeine, as it is an effective drug for cough. He testified he told DEA agent Waterson, that he "would prefer to give a referral to the patient to see an internist and or a pulmonologist." While Ms. Waterson's version of this conversation may have differed some, it is worthwhile to note that Ms. Waterson, on at least two occasions, willingly and knowingly, according to her testimony, withheld writing government reports, and reducing to written memoranda potential exculpatory evidence, under the direct order of the prosecutor. Indeed, Waterson, stated that in over a twenty-year career with the Department of Justice she has never once been told to intentionally withhold a report; however, she admitted to doing so in this case which is particularly disturbing and troublesome and undermines her credibility.

While motive need not be proven in the case nor instructed on, motive is normally the practical explanation for criminal conduct. The motive for Rostie, Solomon, and Martin was shown to be substantial monetary gain. Financial analyst Lori Nelson, an employee of the United States Attorney's Office, stated she was instructed to "follow the money trail" by AUSA Rhodes. This resulted in charts,

exhibits, and testimony showing the substantial profits each of the other charged conspirators reaped from the scheme. On the other hand, the prosecution declined to conduct a basic net worth analysis of Doctor Elder's finances to see if he was living beyond his means to attempt to prove he made similar cash profits. Nelson's only explanation was she was not told to do so. She admitted it would have been a relatively simple undertaking. This suggests that the prosecution did not believe he made any such profits and that his only provable motive was to earn his salary as a treating physician. This explains the absence of money laundering charges against him and appears to support an inference that he was simply a dupe in the overall scheme.

The Westfield Medical Clinic prescriptions present a somewhat different issue. For approximately two months Dr. Elder requested a copy of any item bearing his medical and or DEA number while employed at Westfield. He saw real patients and kept charts. He never instructed patients to have their prescriptions filled at C&G or any other particular pharmacy. Sunny Chin testified he would sometimes contact Dr. Elder directly if he had any questions or any prescriptions needed clarification. Mr. Chin knew that the issuing healthcare practitioner must authorize any prescription requiring modification. How duplicates ended up in Missouri is pure conjecture on the part of the government. The investigators failed to interview five employees, all of whom had access to the

prescriptions once the patient received the original. Additionally there was a public photocopier located inside the pharmacy that patients could use, and submit the original to the pharmacy technician, while maintaining a copy, which Ascencia Nutritional Pharmacy eagerly accepted. Any one of a number of persons with prior connection to STWC and Solomon could have been responsible for these scripts, no least of whom was the owner of Westfield, Ms. Diane Hearn.

The evidence to support Dr. Elder's conviction on all charges is insufficient for failure to prove he acted outside the scope of his authorized practice contrary to the national standards for physicians.

Defendant's second point was:

> The Court erred when it failed to properly instruct the jury as to the issue of good faith as it related to Doctor Elder's defense that asserted that Elder was prescribing for real patients and that he believed his treatment methods and regimes were legitimate.

As argued in the original motion, in *United States v. Hurwitz*, 459 F.3d 463 (2006) the Fourth Circuit reversed a far more egregious case where there was a failure to adequately instruct on the crucial issue of good faith in physician prosecutions such as this.

Hurwitz makes it clear that the court must instruct on good faith and to the extent that this court did not do so for Elder, it is plain error of such a magnitude as

to justify a new trial on due process grounds, particularly in light of the fact that Solomon received such an instruction.

The government's answer dispenses with this argument by suggesting that there was no evidence that Elder treated real patients and that he intended to function as a physician. This is simply not supported by a large body of evidence presented at trial. Moreover, the clear holding in *Huwitz* says if there is evidence to support the defense contention of good faith dispensing, the instruction must be given regardless of any contravening evidence of illegal dispensing. And failure to give it for Elder when Solomon received such an instruction had to have confused the jury and caused them to believe the defense was unavailable to Elder.

This was error requiring reversal.

WHEREFORE, defendant moves the Court to enter a judgment of acquittal as to all counts or alternatively grant him a new trial.

/s/
John R. Osgood for Defendant Christopher Elder
Attorney at Law, #23896
Commercial Fed Bnk- Suite 305
740 NW Blue Parkway
Lee's Summit, MO 64086
(816) 525-8200

CERTIFICATE OF SERVICE

I certify that a copy of this pleading has been caused to be served on the Assistant United States Attorney for Western District of Missouri and other ECF listed counsel through use of the Electronic Court Document Filing System on Tuesday, October 12, 2010.

/s/
JOHN R. OSGOOD