A P P E N D I X

A

977 F.3d 1146
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
John Matthew GAYDEN, Jr., Defendant-Appellant.

No. 18-14182
|
(October 9, 2020)

Synopsis

Background: Following denial of his motions to suppress, 2018 WL 8809238, to disqualify expert, to dismiss indictment, and to exclude testimony, 2018 WL 8808058, defendant was convicted in the United States District Court for the Middle District of Florida, No. 6:16-cr-00187-CEM-TBS-1, Carlos Mendoza, J., of unlawful distribution of controlled substance related to his prior medical practice, and he appealed.

Holdings: The Court of Appeals, Tallman, Circuit Judge, sitting by designation, held that:

[1] district court did not abuse its discretion in denying defendant's motion to dismiss for pre-indictment delay;

[2] warrantless review of defendant's records disclosed to state via its prescription drug monitoring program did not violate Fourth Amendment;

[3] district court did not abuse its discretion in denying defendant's motion to exclude government witness's expert testimony;

[4] district court did not violate Ex Post Facto Clause in sentencing defendant;

[5] imposition of two-level obstruction of justice enhancement was warranted; and

[6] defendant's 235-month sentence was not substantively unreasonable.

Affirmed.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion; Trial or Guilt Phase Motion or Objection; Sentencing or Penalty Phase Motion or Objection.

West Headnotes (22)

[1] **Criminal Law** Amendments and rulings as to indictment or pleas

Court of Appeals reviews district court's denial of motion to dismiss indictment for abuse of discretion.

[2] **Indictments and Charging Instruments** Intentional delay; tactical advantage

Indictments and Charging Instruments Prejudice

To establish violation of defendant's Fifth Amendment rights, defendant must show that pre-indictment delay caused him actual substantial prejudice and that delay was product of deliberate act by government designed to gain tactical advantage. U.S. Const. Amend. 5.

[3] **Indictments and Charging Instruments** Intentional delay; tactical advantage

Although defendant seeking to dismiss indictment for pre-indictment delay is not obligated to prove bad faith on government's part, critical element is that government makes judgment about how it can best proceed with litigation to gain advantage over defendant and, as result of that judgment, indictment is delayed.

[4] **Indictments and Charging Instruments** Cause of Delay

Indictments and Charging Instruments Loss of evidence or witnesses

District court did not abuse its discretion in denying defendant's motion to dismiss for pre-indictment delay in charging him with unlawful distribution of controlled substance related to his

prior medical practice, even though defendant was prejudiced by his inability to call his mother and his former office manager as trial witnesses because they died after relevant conduct but before trial, and by destruction of records obtained under administrative subpoenas, where government claimed that two-year delay during pre-indictment period was at least partially caused by need to retain new expert, and there was no evidence of tactical delay.

[5] **Criminal Law** Review De Novo
Criminal Law Reception of evidence
Criminal Law Evidence wrongfully obtained

In reviewing denial of motion to suppress, Court of Appeals reviews factual findings for clear error, viewing evidence in light most favorable to prevailing party, and reviews de novo application of law to facts.

[6] **Searches and Seizures** Persons, Places and Things Protected

Fourth Amendment protects people, not places. U.S. Const. Amend. 4.

[7] **Searches and Seizures** Expectation of privacy

What person knowingly exposes to public, even in his home or office, is not subject of Fourth Amendment protection. U.S. Const. Amend. 4.

[8] **Searches and Seizures** Expectation of privacy

Fourth Amendment's application depends on whether person invoking its protection can claim justifiable, reasonable, or legitimate expectation of privacy that has been invaded by government action. U.S. Const. Amend. 4.

[9] **Searches and Seizures** Abandoned, surrendered, or disclaimed items

Under third-party doctrine, individual lacks reasonable expectation of privacy protected by Fourth Amendment in information revealed to third party and conveyed by that third party to government authorities, even if information is revealed on assumption that it will be used only for limited purpose and that confidence placed in third party will not be betrayed. U.S. Const. Amend. 4.

1 Cases that cite this headnote

[10] **Searches and Seizures** Administrative inspections and searches; regulated businesses

Physician did not have reasonable expectation of privacy in automated prescription records he disclosed to state via its prescription drug monitoring program (PDMP), and thus Drug Enforcement Administration (DEA) special agent's warrantless review of physician's records in PDMP did not violate Fourth Amendment; physician had no special privacy interest in his prescribing records, his participation in PDMP system was voluntary, and prescriptions were, by their very nature, intended to be disclosed to pharmacies that filled them. U.S. Const. Amend. 4.

[11] **Criminal Law** Admissibility

Denial of motion to exclude expert testimony is reviewed for abuse of discretion. Fed. R. Evid. 702.

[12] **Criminal Law** Experiments and Tests; Scientific and Survey Evidence
Criminal Law Aid to jury
Criminal Law Knowledge, Experience, and Skill

In determining admissibility of expert testimony, trial court must consider whether: (1) expert is qualified to testify competently regarding matters he intends to address; (2) methodology by which expert reaches his conclusions is sufficiently reliable as determined by sort of inquiry mandated in *Daubert*; and (3)

testimony assists trier of fact, through application of scientific, technical, or specialized expertise, to understand evidence or to determine fact in issue. Fed. R. Evid. 702.

1 Cases that cite this headnote

[13] **Criminal Law** Admissibility

District court did not abuse its discretion in prosecution for unlawful distribution of controlled substance related to defendant's prior medical practice in denying defendant's motion to exclude government witness's expert testimony that defendant overprescribed controlled substances on ground that expert's review of irrelevant inflammatory information about defendant before forming his opinion made his opinion subject to confirmation bias, even though demonstrating confirmation bias on cross-examination would require disclosure of that inflammatory information. Fed. R. Evid. 702.

[14] **Criminal Law** Review De Novo

Criminal Law Sentencing

Court of Appeals reviews interpretation of Sentencing Guidelines de novo and any underlying factual findings for clear error.

[15] **Criminal Law** Sentencing

Court of Appeals reviews whether district court imposed substantively reasonable sentence for abuse of discretion.

[16] **Constitutional Law** Penal laws in general

Constitutional Law Punishment in general

Constitutional Law Criminal Proceedings

Ex Post Facto Clause prohibits enactment of statutes that: (1) punish as crime act previously committed that was innocent when done; (2) make more burdensome punishment for crime, after its commission; or (3) deprive one charged with crime of any defense available according to law at time when act was committed. U.S. Const. art. 1, § 9, cl. 3.

[17] **Constitutional Law** Sentencing and Imprisonment

Sentencing and Punishment Time of other offense or misconduct

District court did not violate Ex Post Facto Clause in sentencing defendant for unlawful distribution of controlled substance related to his prior medical practice by considering prescriptions he wrote before state amended its standard of care guidance for pain management medicine in calculating total drug weight involved in his case, where defendant's conduct was prohibited under either version of standard of care. U.S. Const. art. 1, § 9, cl. 3; Fla. Admin. Code Ann. r. 64B8-9.013.

[18] **Sentencing and Punishment** Obstruction of justice

Imposition of two-level obstruction of justice enhancement was warranted in sentencing defendant for unlawful distribution of controlled substance related to his prior medical practice, where defendant made substantial "updates" to his patient records after state search warrant for some of his files was executed, but before federal search warrant for all of his remaining files was served, to purportedly document more fulsome patient examinations to justify writing prescriptions that were not initially recounted in defendant's contemporaneous patient records.

U.S.S.G. § 3C1.1.

[19] **Criminal Law** Sentencing

Review for sentence's substantive unreasonableness involves examining totality of circumstances, including inquiry into whether statutory sentencing factors support sentence.

18 U.S.C.A. § 3553(a).

[20] **Criminal Law** Burden of showing error

Criminal Law Judgment, sentence, and punishment

Court of Appeals ordinarily expects sentence within Guidelines range to be reasonable, and defendant has burden of establishing that sentence is unreasonable in light of record and statutory sentencing factors. 18 U.S.C.A. § 3553(a).

[21] **Criminal Law** Sentencing

Court of Appeals should only vacate sentence as substantively unreasonable if it is left with definite and firm conviction that district court committed clear error of judgment in weighing statutory sentencing factors by arriving at sentence that lies outside range of reasonable sentences dictated by facts of case. 18 U.S.C.A. § 3553(a).

[22] **Controlled Substances** Extent of punishment

Sentencing and Punishment Degree of harm caused by offense in general

Sentencing and Punishment Remarks and conduct of court

Defendant's 235-month sentence for unlawful distribution of controlled substance related to his prior medical practice was not substantively unreasonable, despite defendant's contentions that district court failed to consider mitigating evidence and demonstrated personal animus toward him; court did consider mitigating evidence, sentence was at low end of his Guidelines range, and court's harsh words in addressing impact of defendant's abusive prescription practices appropriately conveyed opprobrium of community harmed by his misbehavior.

Attorneys and Law Firms

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Katherine Grace Howard, Conrad Benjamin Kahn, Ali Kamalzadeh, Michael Shay Ryan, Rosemary Cakmis, Federal Public Defender's Office, Orlando, FL, for Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 6:16-cr-00187-CEM-TBS-1

Before MARTIN, ROSENBAUM, and TALLMAN, * Circuit Judges.

Opinion

TALLMAN, Circuit Judge:

***1149** Dr. John Gayden, Jr., was convicted of seven counts of unlawful distribution of a controlled substance related to his prior medical practice, which the evidence showed attracted an unusually high volume of drug-seeking patients. He now appeals his conviction and sentence, raising a series of challenges to the district court's pretrial rulings and the sentence imposed. We affirm his conviction and sentence.

I

Gayden practiced in Indialantic, Florida for many years. In October 2011, the Florida Department of Health closed Gayden's medical practice and he later surrendered his medical license. Around the same time, law enforcement began to investigate Gayden's medical practice based on tips that he was prescribing excessive amounts of Oxycodone. Drug Enforcement Administration Special Agent Eva Sala led the investigation of Gayden and his patients by reviewing automated prescription records through Florida's Prescription Drug Monitoring Program (PDMP).

The PDMP is an electronic database administered by the State of Florida. It collects records statewide of controlled substances prescriptions from prescribers and pharmacies into a single location, allowing medical professionals to review a patient's controlled substances prescription history as a way to deter abusive drug-seeking and "doctor shopping."

Law enforcement officers may apply to obtain access to the PDMP for criminal pharmaceutical investigations. Once granted access, an officer can electronically search through prescription records and filter them by category to look for trends in the type, frequency, and dosage of prescriptions written by a specific physician or filled at a particular pharmacy.

Through her review of the PDMP, Agent Sala discovered Gayden had a history of irregular prescribing practices, including issuing scripts for opioids in higher quantities, of greater potency, and in greater frequency than the norm. Based on this information, she obtained a state search warrant for twelve of Gayden's patient records, which Gayden had stored at his mother's home. Later, Agent Sala obtained a federal search warrant for the remaining patient records stored there. Law enforcement also issued administrative subpoenas to pharmacies, conducted surveillance on Gayden's clinic, obtained audio and video recordings from undercover patient visits to Gayden's clinic, and obtained information from some of Gayden's patients and employees regarding Gayden's prescribing practices. The investigation disclosed long lines of patients waiting to get into Gayden's office and officers learned the doctor insisted on cash only to pay for his services.

***1150** In September 2016, just before the five-year statute of limitations ran, a federal grand jury indicted Gayden on seven counts of unlawful distribution of a controlled substance, in violation of 21 U.S.C. § 841(a)(1). During pretrial proceedings, Gayden moved to dismiss the indictment for unreasonable investigative delay, to suppress the evidence obtained from Agent Sala's search of the PDMP and Gayden's patient records, and to exclude evidence from the government's proposed trial expert, Dr. Gary Reisfield. The district court denied each of Gayden's motions.

The jury convicted Gayden on all seven counts of the indictment. At the sentencing phase, the district court calculated Gayden's Sentencing Guideline range between 235 and 293 months of imprisonment. Gayden presented mitigating evidence concerning his age, medical and mental conditions, and increased vulnerability in a prison setting. Before pronouncing sentence, the district judge characterized his actions by referring to him as an "arrogant monster." The district court then sentenced Gayden to 235 months' imprisonment. Gayden timely filed a notice of appeal.

II

A

[1] Gayden first challenges the district court's denial of his motion to dismiss the indictment for pre-indictment delay. "We review the district court's denial of [a] motion to dismiss the indictment for an abuse of discretion." *United States v. Pielago*, 135 F.3d 703, 707 (11th Cir. 1998).

[2] Gayden argues the government's delay in bringing the indictment violated his Fifth Amendment rights.[1] To establish a violation of a defendant's Fifth Amendment rights, the defendant must show that "pre-indictment delay caused him actual substantial prejudice and that the delay was the product of a deliberate act by the government designed to gain a tactical advantage." *United States v. Foxman*, 87 F.3d 1220, 1222 (11th Cir. 1996). Addressing the first element, Gayden asserts that he was prejudiced by his inability to call his mother and his former office manager as trial witnesses, as both individuals died after the relevant conduct but before trial, and by the destruction of records obtained under administrative subpoenas. Even assuming Gayden shows prejudice here, he still must show a deliberate act by the government designed to gain a tactical advantage over him.

[3] **[4]** Gayden correctly notes that he is not obligated to prove bad faith on the government's part, but "[t]he critical element is that the government makes a judgment about how it can best proceed with litigation to gain an advantage over the defendant and, as a result of that judgment, an indictment is delayed." *Foxman*, 87 F.3d at 1223 n.2. Here, Gayden offers conclusory assertions about the government's timeline and never disputes the government's claim that a two-year delay during the pre-indictment period was at least partially caused by the need to retain a new expert. At best, Gayden's position can be summed up as "the government failed to explain the delay" – which places the burden on the wrong party – and "the government should have completed its investigation ***1151** more quickly" – which does not adequately show a "tactical delay." The district court did not abuse its discretion in denying Gayden's motion to dismiss the indictment for pre-indictment delay.

B

[5] Gayden next argues the district court erred in denying his motions to suppress evidence obtained from Agent Sala's search of the PDMP and of patient files stored at Gayden's mother's home. "A denial of a motion to suppress involves mixed questions of fact and law. We review factual findings for clear error, and view the evidence in the light most favorable to the prevailing party. We review *de novo* the application of the law to the facts." *United States v. Barber*, 777 F.3d 1303, 1304 (11th Cir. 2015) (citations omitted).

1

Gayden contends the district court should have suppressed the government's evidence obtained from the PDMP because the government should have obtained a warrant before searching the PDMP.[2] He argues the third-party doctrine, generally allowing warrantless searches of information disclosed to others, should not extend to his prescribing records because the nature of the PDMP raises concerns under *Carpenter v. United States*, —— U.S. ——, 138 S. Ct. 2206, 201 L.Ed.2d 507 (2018).

[6] **[7]** **[8]** The Fourth Amendment safeguards "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. It "protects people, not places. What a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). "[T]he application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979).

[9] Under the third-party doctrine, an individual lacks a reasonable expectation of privacy "in information 'revealed to a third party and conveyed by [that third party] to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and that confidence placed in the third party will not be betrayed.' " *Presley v. United States*, 895 F.3d 1284, 1291 (11th Cir. 2018) (quoting *United States v. Miller*, 425 U.S. 435, 443, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976)). But the Supreme Court in *Carpenter* declined to extend the third-party doctrine to cell-site location information, holding that "a warrant is required in the rare case where the suspect has a legitimate privacy interest in records held by a third party." 138 S. Ct. at 2222. The Court reasoned that "[g]iven the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection." *Id.* at 2217. It further stressed that its holding "is a narrow one," with specific consideration given to "the unique nature of cell phone location information," ***1152** *id.* at 2220, which "provides an intimate window into a person's life," *id.* at 2217. Accordingly, *Carpenter* does not, on its face, apply to Gayden's prescribing records.

However, *Carpenter* reiterates that two primary rationales underlie the third-party doctrine: the nature of the information sought and the voluntariness of the exposure to third parties. *Id.* at 2219–20. We consider Gayden's argument through this lens.

[10] First, Gayden maintains no special privacy interest in his prescribing records. Gayden attempts to vicariously assert a privacy interest here based on the sensitive and confidential nature of his patients' medical records. Although individual patients might arguably have a stronger basis to assert such a privacy interest in their *own* medical information, Gayden in his role as the prescriber does not have a similar privacy interest in the prescription records of his patients. "[T]he Fourth Amendment's ultimate touchstone is reasonableness." *Brigham City, Utah v. Stuart*, 547 U.S. 398, 398, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006) (internal quotation marks omitted). Gayden cannot reasonably assert a privacy interest in his prescribing records that is solely derived from other people's interest in the confidential nature of their own medical information which they choose to disclose to a pharmacist to get filled.

Second, Gayden's disclosure of his prescribing records to third parties was voluntary. Gayden was not required to participate in the PDMP system. Instead, Gayden volunteered by enrolling as a participant in the automated system, which was specifically designed to share his prescription records

between health care providers and pharmacies to combat the statewide opioid crisis. Moreover, the third-party doctrine applies "even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *Miller*, 425 U.S. at 443, 96 S.Ct. 1619. It is true that Gayden disclosed his prescribing records on a limited basis, but that does not make the disclosure involuntary. Indeed, the prescriptions Gayden wrote for his patients were, by their very nature, intended to be revealed to others when they were disclosed by the physician and the patients to the pharmacies which filled them.

Because on this record Gayden did not have a reasonable expectation of privacy in the prescriptions he wrote for his patients, and because Gayden voluntarily disclosed those prescription records to others through his participation in the computerized tracking system, he fails to establish why *Carpenter*'s rationale should extend to shield from state public health and law enforcement authorities his patient prescription records. Instead, the prescription records are third-party material and the district court did not err in denying his motion to suppress the evidence obtained without a warrant from the PDMP system.

2

Gayden also challenges the search and seizure of the patient medical files Gayden stored at his mother's home. His argument is largely devoted to establishing his standing to challenge the search, although he also minimally argues that the federal search warrant for these records was not supported by probable cause because it relied on tainted information obtained through improper state warrants. This claim is unpersuasive. Even when information obtained from the improper state search warrants is excised from the affidavit supporting the federal search warrant, the federal warrant remains amply supported by other facts establishing probable ***1153** cause. *United States v. Bush*, 727 F.3d 1308, 1316 (11th Cir. 2013). Moreover, Gayden develops no argument as to why the good-faith exception to the exclusionary rule should not apply. *See United States v. Taylor*, 935 F.3d 1279, 1289–91 (11th Cir. 2019). The district court did not err in denying on both grounds Gayden's motion to suppress evidence obtained from the patient files stored at his mother's home.

C

[11] **[12]** Gayden next argues that the district court erred in denying his motion to exclude the government's expert witness, Dr. Gary Reisfield, under the *Daubert* standard enshrined in Federal Rule of Evidence 702. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Denial of a *Daubert* motion is reviewed for an abuse of discretion, which "places a 'heavy thumb' – 'really a thumb and a finger or two' – 'on the district court's side of the scale.' " *United States v. Pon*, 963 F.3d 1207, 1219 (11th Cir. 2020) (quoting *United States v. Brown*, 415 F.3d 1257, 1268 (11th Cir. 2005)). In determining the admissibility of expert testimony, the trial court must consider whether:

> (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

United States v. Frazier, 387 F.3d 1244, 1260 (11th Cir. 2004) (citation omitted).

[13] Gayden contends Dr. Reisfield's testimony that he overprescribed controlled substances should have been excluded because the expert witness reviewed irrelevant inflammatory information about Gayden before forming his opinion. Gayden argues Dr. Reisfield's opinion was thus subject to confirmation bias rendering it unreliable. But the potential for confirmation bias, to which Gayden concedes "all persons" are subject, and which the district court properly ruled was appropriate fodder for cross-examination, does not establish that the district court abused its discretion in allowing Dr. Reisfield to testify. The fact that defense

counsel had to make a difficult tactical decision to forgo asking questions to demonstrate bias in formulating his expert opinion, which would have required eliciting information that would have harmed Gayden if the jury heard it, is not the kind of Hobson's choice that mandates striking the expert from testifying. The district court did not abuse its discretion in denying Gayden's *Daubert* motion.

D

Gayden argues that the cumulative effects of the district court's pretrial and trial rulings deprived him of a fair trial. Having failed to establish any error, though, Gayden's cumulative error argument similarly fails.

E

[14] **[15]** Gayden raises both procedural and substantive challenges to his sentence. "We review the interpretation of the Sentencing Guidelines *de novo* and any underlying factual findings for clear error. We review whether the district court imposed a substantively reasonable sentence for abuse of discretion." ***1154** *United States v. Whyte*, 928 F.3d 1317, 1327 (11th Cir. 2019) (citations omitted).

1

[16] **[17]** First, Gayden contends the district court committed procedural error by improperly calculating his Sentencing Guidelines range to include a drug quantity from earlier prescriptions and documentation of medical necessity under a different formulation of state medical guidelines in violation of the *ex post facto* clause.

> The *ex post facto* clause prohibits the enactment of statutes which: (1) punish as a crime an act previously committed which was innocent when done[;] (2) make more burdensome the punishment for a crime, after its commission; or (3) deprive one charged with a crime of any defense available according to law at the time when the act was committed.

United States v. De La Mata, 266 F.3d 1275, 1286 (11th Cir. 2001). Gayden argues that because Florida amended its standard of care guidance for pain management medicine in October 2010, the district court should not have considered any prescriptions written by Gayden before the amendment date in its drug weight calculation. *Compare* Fla. Admin. Code r. 64B8-9.013 (2010) *with* Fla. Admin. Code r. 64B8-9.013 (2003). Gayden carries the burden of showing that the "change in law presents a 'sufficient risk of increasing the measure of punishment attached to the covered crimes' " – which is the "touchstone" of the court's inquiry in an *ex post facto* analysis. *Peugh v. United States*, 569 U.S. 530, 539, 133 S.Ct. 2072, 186 L.Ed.2d 84 (2013) (citation omitted). We conclude that Gayden has not made such a showing despite the differences in language in the Florida Administrative Code. Because Gayden's conduct was prohibited under either version of the standard of care, the district court did not violate the *ex post facto* clause by considering his pre-2010 prescriptions in calculating the total drug weight involved in this case.

[18] Second, Gayden contends the district court erred by applying a two-level obstruction of justice enhancement to Gayden's offense level. The Sentencing Guidelines allow for a two-level increase to the offense level where the defendant willfully obstructed or impeded the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and the obstructive conduct was related to the offense of conviction. U.S.S.G. § 3C1.1. The district court considered evidence that Gayden made substantial "updates" to his patient records after the state search warrant for some of his files was executed, but before the federal search warrant for all of his remaining files was served. These "updates" purported to document more fulsome patient examinations to justify writing prescriptions which were not initially recounted in Gayden's contemporaneous patient records. Based on this incriminating conduct, going to the heart of the charges for which he stood trial, the district court did not err in applying the obstruction of justice enhancement.

2

[19] **[20]** **[21]** Gayden also argues that his sentence was substantively unreasonable. A "review for substantive unreasonableness involves examining the totality of the circumstances, including an inquiry into whether the statutory factors in [18 U.S.C.] § 3553(a) support the sentence in question." *United States v. Gonzalez*, 550 F.3d 1319, 1324 (11th Cir. 2008). "We ordinarily expect a sentence within the Guidelines range to be reasonable, and the appellant has the burden of establishing the sentence is unreasonable in light of the record and the § 3553(a) factors." *Id.* The ***1155** appellate court should only vacate the sentence if it is "left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case." *United States v. Irey*, 612 F.3d 1160, 1190 (11th Cir. 2010) (quoting *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008)).

[22] Gayden contends the district court failed to consider mitigating evidence and demonstrated personal animus toward Gayden. However, the district court did consider the evidence Gayden highlights on appeal. Moreover, Gayden's sentence is at the low end of his Guidelines range. The district court's words for Gayden may have been harsh in addressing the impact of Gayden's abusive prescription practices, but they do not leave us with a "definite and firm conviction" that the court committed a clear error of judgment. *Irey*, 612 F.3d at 1190. They appropriately conveyed the opprobrium of the community harmed by his misbehavior. The sentence imposed of 235 months was not substantively unreasonable.

AFFIRMED.

All Citations

977 F.3d 1146, 113 Fed. R. Evid. Serv. 1529, 28 Fla. L. Weekly Fed. C 1999

Footnotes

* Honorable Richard C. Tallman, United States Circuit Judge for the Ninth Circuit, sitting by designation.

1 Gayden also raises a Sixth Amendment challenge to the pre-indictment delay. The Sixth Amendment has not been applied to pre-indictment delay. *See* *United States v. Marion*, 404 U.S. 307, 315, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). Moreover, Gayden failed to raise this issue below. We decline to consider this argument for that reason. *Haygood v. Auto-Owners Ins. Co.*, 995 F.2d 1512, 1515 (11th Cir. 1993).

2 Gayden's opening brief also purports to challenge the government's use of administrative subpoenas. Gayden argued below that the government improperly used administrative subpoenas to obtain information from pharmacies, airlines, hotels, and a cell service provider. However, he fails to develop any argument on this subject on appeal. Accordingly, Gayden has waived any challenge to the administrative subpoena issue. *See* *United States v. Sperrazza*, 804 F.3d 1113, 1125 (11th Cir. 2015).

B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

v. **Case No: 6:16-cr-187-Orl-41TBS**

JOHN MATTHEW GAYDEN, JR.
_____/

ORDER

THIS CAUSE is before the Court on Defendant's Motion for Reconsideration to Suppress Illegally Seized Evidence (Doc. 167). Defendant argues that law enforcement violated sections 893.055 and 893.0551 of the Florida Statutes in obtaining evidence in this case, and that the illegally obtained evidence should be suppressed. Specifically, those statutes establish Florida's Prescription Drug Monitoring Program ("PDMP"). In short, that program requires pharmacies[1] that dispense Schedule II, III, or IV controlled substances to report those transactions to the state for use in the PDMP. *See* Fla. Stat. § 893.055(2)(a), (3)–(4); *see also generally* PDMP Fact Sheet, Doc. 167-3. While the information in the PDMP database is accessible to registered practitioners and pharmacies, law enforcement agencies are required to obtain permission to access it. Fla. Stat. § 893.055(7)(b), (c)(3). Further, law enforcement agencies "may not have direct access to [the PDMP] database." Fla. Stat. § 893.0551(3)(b).

The information at issue here involves prescribing information that Defendant gave to patients in the form of prescriptions. This information was then transmitted to pharmacies when the patients had their prescriptions filled, and the pharmacies then transmitted the information to the PDMP. According to Defendant, the DEA Special Agent investigating this matter, Eva Sala,

[1] The PDMP also has requirements for dispensing practitioners, but that is not at issue here.

somehow garnered unrestricted, direct access to the PDMP database in violation of Florida law. This impermissible access, Defendant argues, violated his Fourth Amendment rights.

First, it appears that Agent Sala did obtain permission to access the PDMP database. (May 30, 2018 Hr'g Tr., Doc. 123, at 131:15–25, 159:1–160:3). However, there is some confusion as to whether Agent Sala had direct access to the PMDP database. (*Id.* at 159:22–160:3). Nevertheless, even accepting Defendant's version of events as true—that Agent Sala was improperly given direct access to the database—such actions did not violate Defendant's Fourth Amendment rights.

As this Court explained in its previous Order on Defendant's first Motion to Suppress, (June 7, 2018 Order, Doc. 141), the Fourth Amendment only applies where the challenger has a reasonable expectation of privacy upon which the government intrudes. *Smith v. Maryland*, 442 U.S. 735, 740 (1979). Additionally, a defendant's "Fourth Amendment rights are violated only when the challenged conduct invaded his legitimate expectation of privacy rather than that of a third party." *United States v. Payner*, 447 U.S. 727, 731 (1980). Indeed, the United States Supreme Court "has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by [it] to [g]overnment authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *United States v. Miller*, 425 U.S. 435, 443 (1976) (citing cases); *see also Smith*, 442 U.S. at 743–44 (stating that the United States Supreme Court "has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties" and citing other Supreme Court cases). This rule follows from the Supreme Court's reasoning that where an individual reveals information to a third party, that individual "takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government." *Miller*, 425 U.S. at 443.

The information at issue here was revealed by Defendant to the patient, who revealed it to the pharmacy, which revealed it to the PDMP. Indeed, Defendant could not have even had a subjective expectation of privacy because he knew the information would be revealed in such a manner. In other words, Defendant revealed the information to a third party, knowing it would be revealed to additional third parties. At that point, he no longer had any protectable Fourth Amendment right to privacy in that information. Thus, even if law enforcement did not comply with Florida statutes and regulations in obtaining that information, such action did not violate Defendant's Fourth Amendment rights, and therefore, does not warrant suppression of the evidence obtained from the PDMP.

Accordingly, it is **ORDERED** and **ADJUDGED** that Defendant's Motion for Reconsideration to Suppress Illegally Seized Evidence (Doc. 167) is **DENIED**.

DONE and **ORDERED** in Orlando, Florida on June 19, 2018.

CARLOS E. MENDOZA
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

v. **Case No: 6:16-cr-187-Orl-41TBS**

JOHN MATTHEW GAYDEN, JR.
_____/

ORDER

THIS CAUSE is before the Court on Defendant's Motion to Disqualify Gary M. Reisfield (Doc. 77) and the Government's Response (Doc. 89); Defendant's Motion to Dismiss for Prejudicial Pre-Indictment Delay (Doc. 80) and the Government's Response (Doc. 94); Defendant's Motion to Dismiss the Indictment for Vagueness (Doc. 81) and the Government's Response (Doc. 95); and Defendant's Motion Regarding the Proper "Standard of Care" Testimony (Doc. 84) and the Government's Response (Doc. 98). A hearing was held on May 10, 2018. (Min. Entry, Doc. 102). For the reasons stated below, Defendant's motions will be denied.

I. BACKGROUND

Defendant was charged by Indictment with seven counts of knowingly and intentionally dispensing and distributing oxycodone outside the usual course of professional practice and for other than legitimate medical purposes in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. (Indictment, Doc. 1, at 1–2). Defendant has filed numerous pre-trial motions, which the Court will address in turn.

II. DEFENDANT'S MOTIONS

A. Motion to Disqualify

Dr. Gary M. Reisfield is the Government's medical expert. The Government plans to call Reisfield to testify that in his opinion, Defendant prescribed drugs to his patients outside the usual

course of professional practice. Defendant seeks to disqualify Reisfield as an expert pursuant to *Daubert* and preclude him from testifying.

1. Legal Standard

Although opinion testimony is generally inadmissible, Federal Rule of Evidence 702 permits "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education" to provide opinion testimony in limited circumstances. Expert opinion testimony is admissible if: (1) "the expert's . . . specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue"; (2) "the testimony is based on sufficient facts or data"; (3) "the testimony is the product of reliable principles and methods"; and (4) "the expert has reliably applied the principles and methods to the facts of the case."

"[T]he Federal Rules of Evidence 'assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.'" *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993)). Pursuant to *Daubert*, the determination of admissibility is "uniquely entrusted to the district court," which is given "considerable leeway in the execution of its duty." *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1291 (11th Cir. 2005) (quotation omitted). However, "[t]he burden of laying the proper foundation for the admission of the expert testimony is on the party offering the expert, and admissibility must be shown by a preponderance of the evidence." *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999).

The Eleventh Circuit has distilled the test for determining the admissibility of expert testimony under Rule 702 and *Daubert* into three basic inquiries—(1) is the expert qualified; (2) is the expert's methodology reliable; and (3) will the testimony assist the trier of fact. *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998). "As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination."

Kearney v. Auto-Owners Ins. Co., No. 8:06-cv-595-T-24-TGW, 2007 WL 3231780, at *3 (M.D. Fla. Oct. 30, 2007) (quotation omitted); *see also Daubert*, 509 U.S. at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."); *S.E. Metals Mfg. Co. v. Fla. Metal Prods., Inc.*, 778 F. Supp. 2d 1341, 1344 (M.D. Fla. 2011) ("Any weaknesses in the underpinnings of the expert's opinion go to its weight rather than its admissibility.").

2. Analysis

Though Defendant cites *Daubert* in his motion, Defendant does not squarely challenge Readfield's testimony based on any of the three *Daubert* inquiries articulated by the Eleventh Circuit. Rather, Defendant argues that the Government provided Reisfield with a substantial amount of highly inflammatory, irrelevant information to review in forming his opinions regarding Defendant's prescribing practices and that exposure to this information caused Readfield's opinion to be biased. Additionally, Defendant asserts that no attempts were made to reduce the risk of Reisfield forming a biased opinion based on this irrelevant information. Defendant also avers that the Government asked Reisfield to subsequently conduct a second review of a limited set of materials, demonstrating that the Government is aware that Readfield's original opinion was biased. Defendant further contends that this subsequent review failed to remedy Readfield's bias, arguing that it is impossible for a person to reach a second conclusion without taking into account biasing information he or she previously reviewed. To support his arguments, Defendant presented testimony from Daniel Murrie at the hearing.[1] The Government responds that Defendant's motion

[1] Murrie is a professor at the University of Virginia as well as the University of Virginia School of Law and a director of psychology at the University of Virginia's Institute of Law, Psychiatry, and Public Policy. Murrie discussed contextual bias and explained that when unnecessary contextual information is provided to an expert rendering an opinion, the information is likely to bias the expert's opinion. Murrie testified that an expert generally requires a very narrow set of facts to render an opinion and explained that any information that is extraneous to

is devoid of any legal authority directly supporting the exclusion of expert testimony based on confirmation bias and that Defendant has failed to demonstrate that Readfield's opinion was in fact biased.

While the Court does not question the credibility of Murrie or doubt the existence of confirmation bias and contextual bias or their potential impact on experts' opinions, the Court concludes that neither the receipt of contextually biasing information by Reisfield nor the phenomena of confirmation bias supports the disqualification of Reisfield. Defendant seeks to disqualify Reisfield based on the factual basis of his opinion—a quintessential matter for cross-examination under the *Daubert* standard. *See Daubert*, 509 U.S. at 596. Defendant argues that he cannot cross-examine Reisfield on the biasing materials that were provided to him because it would require revealing the biasing—and highly prejudicial information—to the jury, thus depriving Defendant of a fair trial. The Court disagrees. As the Government correctly pointed out, cross-examination is available—whether defense counsel chooses to utilize cross-examination for strategic purposes is a separate issue. Furthermore, Defendant has failed to provide this Court with any legal authority supporting the disqualification of an expert based on the effects of contextual or confirmation bias. Accordingly, Defendant's Motion to Disqualify Gary M. Reisfield will be denied.

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the expert's analysis, including whether the expert is being asked to testify for the prosecution or the defense or the specific question presented to an expert, may bias the expert's ultimate conclusion. Murrie also discussed confirmation bias, which Murrie claims is a universally accepted phenomena. According to Murrie, confirmation bias is the idea that once an individual forms a hypothesis or a theory on a matter, the individual subconsciously tends to find that additional evidence supports the hypothesis, while neglecting or undervaluing information that does not support their previously formed hypothesis. Murrie also opined that once a person reaches a conclusion based on a set of information, it is impossible—even upon examining a new set of materials and conducting another analysis—for the expert to completely eliminate any biasing information from their analysis. In other words, an expert is simply not able to conduct a new review and reach a conclusion that is completely unaffected by the previously discovered biasing information.

B. Motion to Dismiss for Prejudicial Pre-Indictment Delay

Defendant argues that the Indictment should be dismissed because the Government negligently delayed the prosecution of this case, which has caused him to suffer prejudice. Specifically, Defendant contends that because there was a significant delay between the events giving rise to the Indictment—which occurred around 2011—and the issuance of the Indictment—which occurred in 2016—evidence has been lost or destroyed and key eyewitnesses have died, thereby prejudicing Defendant. This Court disagrees with Defendant's contention that mere negligence by the Government is sufficient to support dismissal of the Indictment.

The Due Process Clause requires dismissal of an indictment if the defendant demonstrates that the delay "caused substantial prejudice to [the] defendant's rights to a fair trial and that the delay was *an intentional device to gain [a] tactical advantage over the accused*." *Doggett v. United States*, 505 U.S. 647, 666 (1992) (emphasis added); *see also United States v. Farias*, 836 F.3d 1315, 1325 (11th Cir. 2016) ("In order to establish that the government's delay in bringing the indictment . . . violated his due process rights, [the defendant] was required to establish both (1) that the delay actually prejudiced his defense, and (2) that it resulted from a deliberate design by the government to gain a tactical advantage over him."). Defendant has failed to show that the delay was an intentional device employed by the Government to gain a tactical advantage over him. That several key witnesses have died and that evidence has been lost or destroyed due to the passage of time fails to demonstrate any intent by the Government. Accordingly, Defendant's Motion to Dismiss for Prejudicial Pre-Indictment Delay is due to be denied.

C. Defendant's Motion to Dismiss the Indictment for Vagueness

Defendant asks the Court to dismiss the Indictment, arguing that it merely provides generic allegations rather than particularized facts and, consequently, fails to apprise Defendant of the charges brought against him. The Government responds that the Indictment is sufficient: each

count of the Indictment presents the essential elements of the offense, notifies Defendant of the charge, and enables Defendant to rely on any judgment on each count as a bar to double jeopardy.

"The court may dismiss a criminal prosecution on grounds of 'a defect in the indictment.'" *United States v. Bourlier*, No. 3:10cr30/MCR, 2011 WL 30301, at *1 (N.D. Fla. Jan. 4, 2011) (quoting Fed. R. Crim. P. 12(b)(3)(B)). "However, an indictment is sufficient as long as it sets forth 'a plain, concise, and definite written statement of the essential facts constituting the offense charged.'" *Id.* (quoting Fed. R. Crim. P. 7(c)(1)). "An indictment is sufficient if it: (1) presents the essential elements of the charged offense, (2) notifies the accused of the charges to be defended against, and (3) enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense." *United States v. Steele*, 147 F.3d 1316, 1320 (11th Cir. 1998) (en banc) (quotation omitted). Generally, "the sufficiency of the indictment should be determined from the face of the indictment, and an indictment is sufficient if it charges the language of the statute." *Bourlier*, 2011 WL 30301, at *1.

Contrary to Defendant's arguments, the Court concludes that the Indictment should not be dismissed for vagueness. "The [I]ndictment here sufficiently alleges the language of the statute—i.e., that [Defendant] knowingly and intentionally dispensed [and distributed a] controlled substance[] in violation of § 841(a)(1)." *Id.*; *see also* (Doc. 1 at 1–2). Notably, the language of the Indictment in this case is nearly identical to the language of the indictment in *United States v. Steele*. *Compare* (Doc. 1 at 1–2), *with Steele*, 147 F.3d at 1317. In *Steele*, the Eleventh Circuit, sitting en banc, determined that the indictment satisfied the three requirements articulated above and, therefore, was not defective. 147 F.3d at 1320. Here, the Indictment provides even more information than the indictment in *Steele* because for each count, it provides the specific date that the alleged conduct occurred as well as the initials of the specific patient to whom Defendant allegedly prescribed oxycodone. Thus, in accordance with Eleventh Circuit precedent, the Court

finds that the Indictment is sufficient. Defendant's Motion to Dismiss the Indictment for Vagueness will be denied.

D. Defendant's Motion Regarding the Proper "Standard of Care" Testimony

Defendant asks the Court to exclude any testimony regarding the proper "standard of care" and whether Defendant's conduct complied with the standard. Defendant argues that to be convicted, the Government must prove that he "dispensed controlled substances for other than legitimate medical purposes in the usual course of professional practice, and that he did so knowingly and intentionally." *United States v. Azmat*, 805 F.3d 1018, 1035 (11th Cir. 2015) (quotation omitted). Defendant contends that pursuant to this legal standard, he cannot be convicted for committing malpractice or deviating from the standard of care. Thus, Defendant avers that any testimony discussing the standard of care and Defendant's conduct in relation to the standard would be highly prejudicial and misleading to the jury. The Government responds that the jury may properly consider evidence that Defendant deviated from the standard of care.

"To convict a licensed physician under section 841(a)(1), it [is] incumbent upon the government to prove that he dispensed controlled substances for other than legitimate medical purposes in the usual course of professional practice, and that he did so knowingly and intentionally." *United States v. Joseph*, 709 F.3d 1082, 1094 (11th Cir. 2013) (quotation omitted). To prove that a defendant dispensed controlled substances for other than legitimate medical purposes in the usual course of professional practice, testimony regarding the appropriate standard of care and whether, in the witness's opinion, the defendant's conduct deviated from that standard is permissible. *See id.* at 1097 ("Experts for both the prosecution and the defense testified about the accepted standard of medical practice, and it was for the jury to resolve the conflicting testimony and determine whether [the defendant] had acted in accord with the accepted standard of medical practice."); *United States v. Bourlier*, 518 F. App'x 848, 852 (11th Cir. 2013) (affirming the district court's ruling that there was sufficient evidence to support the defendant's conviction

under § 841(a)(1) where there was expert testimony presented about the standard of care for prescribing controlled substances under Florida law as well as evidence about the Florida Board of Medicine's rules regarding the prescription of controlled substances and where portions of the Florida Administrative Code that addressed the use of controlled substances for pain management were read into the record because that evidence coupled with evidence of the defendant's prescribing practices could have caused a jury to conclude that the defendant was acting other than for a legitimate medical purpose and not in the usual course of professional practice); *United States v. Johnston*, 322 F. App'x 660, 667 (11th Cir. 2009) (stating that the expert "testified as to the appropriate standard of care in the medical field" where defendant was charged with violating § 841(a)(1) and (b)(1)(C)).

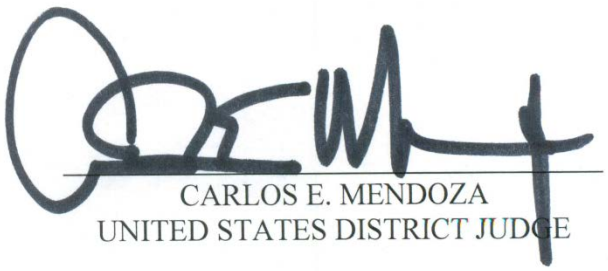
Further, "[t]he Eleventh Circuit has indicated, consistent with Supreme Court precedent, that it is appropriate to instruct the jury to focus on whether the doctor acted 'in accordance with a standard of medical practice generally recognized and accepted in the United States.'" *United States v. Bourlier*, No. 3:10cr30/MCR, 2011 WL 3837314, at *3 (N.D. Fla. Aug. 26, 2011) (quoting *United States v. Moore*, 423 U.S. 122, 139 (1975)), *aff'd*, 518 F. App'x 848 (11th Cir. 2013); *see also Joseph*, 709 F.3d at 1095. This demonstrates that Defendant's position that standard of care evidence is impermissible simply cannot be correct. To the extent Defendant argues that evidence relating to the standard of care could confuse the jury and result in an improper conviction, Defendant's concerns can be remedied with jury instructions. *See Bourlier*, 2011 WL 3837314, at *3 (upholding the defendant's conviction where evidence about the defendant's conduct in relation to the standard of care was presented and noting that "the court specifically cautioned the jury that [the defendant] was not on trial for medical malpractice or negligence"). Thus, Defendant's Motion Regarding the Proper "Standard of Care" Testimony will be denied.

III. CONCLUSION

For the reasons stated herein, it is **ORDERED** and **ADJUDGED** as follows:

1. Defendant's Motion to Disqualify Gary M. Reisfield (Doc. 77) is **DENIED**.
2. Defendant's Motion to Dismiss for Prejudicial Pre-Indictment Delay (Doc. 80) is **DENIED**.
3. Defendant's Motion to Dismiss the Indictment for Vagueness (Doc. 81) is **DENIED**.
4. Defendant's Motion Regarding the Proper "Standard of Care" Testimony (Doc. 84) is **DENIED**.

DONE and **ORDERED** in Orlando, Florida on June 8, 2018.



CARLOS E. MENDOZA
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14182-DD

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

JOHN MATTHEW GAYDEN, JR.,

Defendant - Appellant.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before MARTIN, ROSENBAUM, and TALLMAN,* Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

* Honorable Richard C. Tallman, United States Circuit Judge for the Ninth Circuit, sitting by designation.

ORD-42