

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
KENTUCKY

United States v. Michael

260 F. Supp. 3d 845 (W.D. Ky. 2017) · Decided May 15, 2017

SUMMARY

The court denied defendants Philip E. Michael II and Meds 2 Go Express Pharmacy, Inc.’s motion to dismiss Count 1 of a second superseding indictment charging conspiracy to unlawfully distribute and dispense controlled substances over the Internet. The court held that the indictment sufficiently alleged the time, means, objects, and knowing participation required for a conspiracy charge. It further held that Fioricet, containing the Schedule III controlled substance butalbital, remained subject to the prescription requirement for purposes of criminal prosecution notwithstanding an administrative exemption in 21 C.F.R. § 1308.32.

CASE DETAILS

COURT	United States District Court for the Western District of Kentucky
WRITING FOR THE COURT	Charles R. Simpson III, Senior District Judge
JURISDICTION	Kentucky
DECIDED	May 15, 2017
DISPOSITION	other
PROCEDURAL POSTURE	Defendants moved to dismiss Count 1 of the Second Superseding Indictment for insufficiency of the indictment and on the ground that Fioricet was exempt from the Controlled Substances Act's prescription requirements.
STANDARD OF REVIEW	On a motion to dismiss an indictment, the court construes the indictment as a whole, accepts its factual allegations as true, and determines whether it contains the elements of the offense and sufficiently apprises the defendants of the accusation. The government need not prove its case in response to a motion to dismiss.
PRECEDENTIAL VALUE	Published federal district court memorandum opinion; persuasive authority within the district and nonbinding authority elsewhere.
PARTIES	Philip E. Michael, II, Meds 2 Go Express Pharmacy, Inc. v. United States

TOPICS

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criminal law

criminal procedure

controlled substances

health law

statutory interpretation

QUESTIONS PRESENTED

1. Whether Count 1 of the Second Superseding Indictment sufficiently alleged the essential facts of a conspiracy to unlawfully distribute and dispense controlled substances.
2. Whether Fioricet remained a controlled substance notwithstanding 21 C.F.R. § 1308.32.
3. Whether 21 C.F.R. § 1308.32 authorized dispensing Fioricet without a valid prescription for purposes of criminal prosecution under 21 U.S.C. § 841(h)(1).
4. Whether the rule of lenity required dismissal because of alleged uncertainty concerning the effect of the exemption regulation.

HOLDINGS

1. Count 1 sufficiently charged a conspiracy to unlawfully distribute and dispense controlled substances because it alleged the time period, location, means, objects, participants, and unlawful conduct comprising the alleged agreement.
2. Fioricet remained a Schedule III controlled substance because it contained butalbital, a derivative of barbituric acid listed in Schedule III.
3. The exemption in 21 C.F.R. § 1308.32 did not authorize the distribution or dispensing of Fioricet without a valid prescription or through an unregistered online pharmacy for purposes of criminal charges under 21 U.S.C. § 841(h)(1).
4. The rule of lenity did not require dismissal of Count 1 because the statutory and regulatory language did not create the type of grievous ambiguity necessary to invoke lenity.

KEY QUOTATIONS

“What is required of the indictment, however, is merely a recitation of facts sufficient to inform the defendants of the crime with which they are charged.” (849)

“The Exempting Regulation does not authorize the distribution of Fioricet without a valid prescription or through an online pharmacy that lacks DEA registration for the purposes of criminal charges under 21 U.S.C. § 841(h)(1).” (854)

FACTUAL BACKGROUND

The Second Superseding Indictment alleged that, from approximately October 2010 through April 2012, Michael, Euton Laing, Meds 2 Go, and others participated in an Internet-based scheme to sell, distribute, and dispense prescription drugs without valid prescriptions. The alleged scheme involved online medical

questionnaires, purported physician consultations that did not occur, prescriptions issued without meaningful patient contact, and fulfillment by pharmacies including Meds 2 Go. Count 1 identified Fioricet, containing butalbital, as a Schedule III controlled substance and alleged that the defendants distributed it through the Internet without valid prescriptions.

PROCEDURAL HISTORY

The United States charged Philip E. Michael II, Meds 2 Go Express Pharmacy, Inc., and others in a conspiracy involving the online distribution and dispensing of controlled substances without valid prescriptions. Michael and Meds 2 Go moved to dismiss Count 1. The district court denied the motion, concluding that the indictment sufficiently described the charged conspiracy and that the applicable exemption regulation did not authorize dispensing Fioricet without a valid prescription.

DISPOSITION

other

CASES CITED

- Hamling v. United States, 418 U.S. 87, 177 (1974)
- Russell v. United States, 369 U.S. 749, 761, 767 (1962)
- United States v. Hess, 124 U.S. 483, 487 (1888)
- United States v. Debrow, 346 U.S. 374, 376 (1953)
- Evans v. United States, 153 U.S. 584, 587-88 (1894)
- Batchelor v. United States, 156 U.S. 426 (1895)
- Cochran v. United States, 157 U.S. 286, 290 (1895)
- United States v. Reed, 77 F.3d 139, 140 n.1 (6th Cir. 1996) (en banc)
- United States v. Davis, 306 F.3d 398, 411 (6th Cir. 2002)
- United States v. Ihenacho, 716 F.3d 266, 277 (1st Cir. 2013)
- United States v. Bhutani, 266 F.3d 661, 670 (7th Cir. 2001)
- United States v. Pearce, 912 F.2d 159, 161-62 (6th Cir. 1990)
- United States v. Blakeney, 942 F.2d 1001, 1009-10 (6th Cir. 1991)
- United States v. Ellzey, 874 F.2d 324, 328 (6th Cir. 1989)
- United States v. Bavers, 787 F.2d 1022, 1026 (6th Cir. 1985)
- United States v. Hughes, 891 F.2d 597, 601 (6th Cir. 1989)
- United States v. Oz, 2017 WL 342069 (D. Minn. Jan. 23, 2017)
- United States v. Oz, 2016 WL 1183041 (D. Minn. Mar. 28, 2016)
- United States v. Akinyoyenu, 199 F. Supp. 3d 106, 109-18 (D.D.C. 2016)
- United States v. Riccio, 43 F. Supp. 3d 301, 304-06 (S.D.N.Y. 2014)
- Lamie v. United States Trustee, 540 U.S. 526, 534 (2004)
- Contemporary Industries Corp. v. Frost, 564 F.3d 981, 985 (8th Cir. 2009)

- United States v. Smith, 573 F.3d 639, 650-53 (8th Cir. 2009)

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