

NEW YORK COURT OF APPEALS ROUNDUP

CRIMINAL DECISION DEMONSTRATES GROWING EFFECT OF OPIOID CRISIS

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The Court of Appeals issued a decision at the end of last month arising out of the growing opioid crisis that raises issues concerning the appropriate standards for recklessness and causation in criminal actions. In a near unanimous opinion written by Judge Eugene M. Fahey in *People v. Li*, the Court of Appeals upheld the manslaughter convictions of a physician who prescribed opioids to two individuals who subsequently died from overdoses. Judge Rowan D. Wilson authored a dissent in which he expressed concern that the majority's holding would dramatically expand the potential criminal liability of prescribing physicians. Regardless of whether one agrees with the analysis of the majority or the dissent, this case evidences the growing effect that the opioid crisis is having on our society, including with respect to criminal jurisprudence.

Defendant was a board-certified doctor in anesthesiology and pain management and was accused of running what is commonly known as a "pill mill" in Queens where he would prescribe medically unnecessary high doses of opioids and other drugs with little or no examination of his patients. When two of defendant's patients died in December 2009 and September 2010, respectively, from overdoses of a combination of oxycodone and Xanax (alprazolam) shortly after filling prescriptions for those drugs issued by defendant, defendant was arrested, charged and convicted of 198 crimes including manslaughter, reckless endangerment, criminal sale of a prescription, grand larceny and falsifying business records. The Appellate Division, First Department, unanimously affirmed the convictions, and the Court of Appeals granted leave to appeal.

On appeal, defendant challenges only two of his 198 convictions—the two convictions for manslaughter arising out of the 2009 and 2010 deaths of his patients. Defendant raised two principal arguments on appeal: (1) that, as a matter of law, an individual cannot be convicted of a homicide offense for providing controlled substances that result in an overdose death, and (2) that his manslaughter convictions were not supported by legally sufficient evidence.

As to the first argument, defendant relied on a Second Department case subsequently affirmed by the Court of Appeals without opinion, *People v. Pinckney*, 38 A.D.2d 217 (2d Dept. 1972), *aff'd*, 32 N.Y.2d 749 (1973). In that case, the Second Department upheld the dismissal of homicide charges against a defendant who sold heroin to an individual who died after injecting the drugs defendant sold to him. In affirming the dismissal, the Second Department reasoned that while the legislature had enacted penalties for the sale of dangerous

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drugs, it had not amended the Penal Law's homicide provisions to include homicide through the sale of dangerous drugs.

The majority decision here rejected defendant's reliance on *Pinckney* and noted that the Court of Appeals' affirmance without opinion in that case rendered the decision of marginal precedential value and did not imply agreement with all aspects of the Second Department's opinion. The majority further noted that the *Pinckney* case presented very different factual circumstances, and they took issue with the Second Department's conclusion that the failure to include a specific provision in the Penal Law for homicide through the sale of controlled substances meant that the Legislature must have intended to foreclose any homicide prosecution on that basis.

The majority also found that defendant's homicide convictions were adequately supported by the evidence with respect to both recklessness and causation. With respect to recklessness, the majority found that there was sufficient evidence that defendant was aware of and consciously disregarded a substantial and unjustifiable risk that the decedents would abuse their prescriptions and die as a result. The majority reviewed the evidence, both with respect to the two decedents specifically and with respect to defendant's treatment of patients more generally. The evidence included, inter alia, that patients were not required to make appointments and were required to pay in cash, that defendant saw extremely large numbers of patients in a single day, that physical examinations were cursory or non-existent, and that defendant continued to prescribe opioids to patients even after being warned by family members and hospitals that the patients had overdosed. While defendant did not receive similar warnings with respect to either of the decedents, he prescribed large doses of opioids to them with little or no examination or effort to diagnose the cause of the patients' pain, and prescribed anti-anxiety drug Xanax to both of them without any indication that either patient suffered from anxiety or needed Xanax for any medical reason.

The majority also found that there was sufficient evidence of causation. To prove causation, the People must establish that defendant's actions were a contributory cause of death and that the fatal result was reasonably foreseeable. The evidence at trial established, among other things, that each decedent died of an overdose of the type of drugs prescribed for them by defendant. The majority rejected defendant's claim that the decedents' ingestion of the drugs in amounts greater than prescribed was an intervening cause or an unforeseeable event but rather found that it was the "direct and foreseeable result of defendant's reckless conduct." Accordingly, they affirmed the manslaughter convictions.

Judge Wilson's dissent did not take issue with the finding of recklessness, but disagreed that there was sufficient evidence of causation. Judge Wilson observed that defendant's actions were clearly criminal, as evidenced by the fact that he is not contesting 196 of his 198 convictions, and there was evidence that would have rendered an overdose death of other patients foreseeable—particularly where defendant had been specifically informed that the patient had already suffered an overdose. But Judge Wilson found that such evidence was lacking with respect to the two decedents. He took issue with the majority's reliance on evidence with respect to other patients and argued that the majority was effectively endorsing a rule that when a physician is generally reckless in prescribing drugs, and it is foreseeable that some patient may die, causation is automatically established when any patient dies. The majority rejected that characterization and asserted that they simply disagree with their dissenting colleague as to whether, viewing the evidence in the light most favorable to the People, there was sufficient evidence for the jury to find that defendant was aware of and disregarded a substantial and unjustifiable risk that the decedents would abuse their prescriptions and die as a result.

Judge Wilson's dissent notes that, nationwide, there have been only a very small number of doctors convicted of homicide relating to the distribution of controlled substances. In light of the Court of Appeals ruling in *Li*, that may change going forward.

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