STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

PLYMOUTH ROAD DENTAL, P.C.,

Defendant-Appellee.

UNPUBLISHED
November 13, 2007

No. 270039
Ingham Circuit Court
LC No. 05-000381-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ANITA N. SYKES, D.D.S.,

Defendant-Appellee.

No. 270040
Ingham Circuit Court
LC No. 05-000382-FH

Before: Talbot, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

In these consolidated cases, plaintiff appeals as of right the circuit court's order granting defendants' motion to quash the information resulting in the dismissal of 16 charges of Medicaid fraud, MCL 400.607(1). We affirm the dismissal of the one count that plaintiff does not challenge and reverse and remand this case for trial on the remaining charges.

Defendants, Plymouth Road Dental, P.C. and Anita N. Sykes, D.D.S., were initially accused in separate complaints of 22 counts of Medicaid fraud, MCL 400.607(1). The counts in each complaint were identical for each defendant. Defendants were bound over for trial on 16 counts of Medicaid fraud by the district court following the conclusion of the preliminary examination.[1] At the preliminary examination, the office manager of Plymouth Road Dental,

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[1] Of the initial 22 counts of fraud, plaintiff dismissed six counts and did not seek a bind over on one count. On appeal, plaintiff concurs that count 10 should not have been bound over to the
(continued…)

Lisa Chiselom, testified regarding the billing process and the manner for recording services by Sykes and other dentists in the practice, which entailed the dentist writing on a form the services rendered and initialing the entry.

Also testifying at the preliminary examination was Dr. Thomas Haupt, a dentist under contract with the Attorney General to examine Medicaid patients. The evidence of fraud submitted by plaintiff was based on Haupt's examination and testimony regarding discrepancies between invoices submitted by defendants for five patients and the actual dental work or services that had been performed. Haupt detailed several instances where restoration work that was billed had not been done or where restorative work completed was less extensive than the records indicated.

Defendants moved to quash the information in the circuit court following the district court's bind over. The circuit court quashed the information and dismissed all charges based on a failure to meet the probable cause standard. The trial court ruled, in relevant part:

> There is no direct evidence of any specific wrongful intent on the part of the doctor, and none is claimed. I mean, simply, these billings came in; they violate the act. But given what the statute clearly requires, and it seems to me that there has to be some modicum of showing that this is something beyond an error, mistake, and the language given to us by the Legislature is systematic or persistent tendency to cause inaccuracies.
>
> We don't have a whole lot. I think I will assume, however, for the purposes of this motion that Dr. Sykes has more than four or five patients. I mean, one presumes that the doctor probably sees, you know, 15, 20, 25 patients a day, if they're like most of the dentists that I know, which means that over the period of a year, they probably see four or five thousand patients. Four or five thousand billings over the period of a year. We have nine here, nine wrongful billings, if you want to put it in that context.

Emphasizing the limited number of claims involved the trial court implied that it could more reasonably be inferred that defendants had inadvertently submitted erroneous billings rather than demonstrating a pattern of error sufficient to establish the knowledge element necessary for prosecution under the Act. In addition, the trial court found as persuasive, regarding the absence of wrongful intent, that some of the billings submitted were for lesser amounts than was due for the services actually rendered.

On appeal, plaintiff contends the trial court erred in quashing the bind over and dismissal of all the charges. "This Court reviews for an abuse of discretion both a district court's decision to bind a defendant over for trial and a trial court's decision on a motion to quash an information." *People v Fletcher,* 260 Mich App 531, 551-552; 679 NW2d 127 (2004). Following the conclusion of a preliminary examination, a defendant must be bound over for trial if probable cause exists that the defendant committed the charged offense. *People v Orzame,*

(…continued)

circuit court.

224 Mich App 551, 558; 570 NW2d 118 (1997). Probable cause is determined to exist "where the court finds a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person to believe that the accused is guilty of the offense charged." *Id.* (citations omitted). The prosecutor is not required to establish guilt beyond a reasonable doubt at the preliminary examination. Rather, "there must exist evidence of each element of the crime charged or evidence from which the elements may be inferred. It is not the function of the magistrate to discharge the accused when the evidence is conflicting or raises a reasonable doubt with regard to guilt. Such questions are for the trier of fact." *People v Flowers,* 191 Mich App 169, 179; 477 NW2d 473 (1991) (citations omitted).

To establish a claim under the Medicaid False Claim Act, MCL 400.607, a prosecutor must demonstrate:

> (1) the existence of a claim, (2) that the accused makes, presents, or causes to be made or presented to the state or its agent, (3) the claim is made under the Social Welfare Act, 1939 PA 280, M.C.L. § 400.1 *et seq.;* M.S.A. § 16.401 *et seq.*, (4) the claim is false, fictitious, or fraudulent, and (5) the accused knows the claim is false, fictitious or fraudulent. [*Orzame, supra* at 558 (citation omitted).]

The dispute here is whether defendants knowingly submitted false claims under the Act. The terms "knowing" and "knowingly" are defined in MCL 400.602(f) as meaning "that a person is in possession of facts under which he or she is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the payment of a [M]edicaid benefit." The statutory provision also includes a caveat or exception to exclude from the definition of "knowing" or "knowingly" "conduct which is an error or mistake unless the person's course of conduct indicates a systematic or persistent tendency to cause inaccuracies to be present." *Id.*

Both the trial court and defendants emphasize that there are only nine erroneous billings for four or five patients, totaling slightly in excess of $300 in dispute. The trial court determined that the minimal number is insufficient to demonstrate either a "systematic or persistent tendency to cause inaccuracies" in defendants' billing given the potential number of billings submitted within a year. In addition, the trial court determined that the undercharges that occurred, when viewed in the context of the relatively few billing errors, are contrary to an inference that defendants knowingly engaged in false billing practices.

We disagree. When viewed strictly from a procedural standpoint, the examining magistrate needed to find only a reasonable ground of suspicion, and not guilt beyond a reasonable doubt. We determine that the evidence presented supports a finding of probable cause because the record permits a reasonable fact finder to determine that there were nine instances of purposeful or knowing deceit by defendants in their billings. The actual number of errors that are alleged, and the relatively small dollar figure they represent, is irrelevant and does not automatically convert or allow for the assumption, as proffered by the trial court, that the errors must have comprised only inadvertent mistakes. As previously determined by this Court, "if a defendant contractually agrees to abide by billing procedures and has access to the applicable manuals and documentation controlling those procedures, deviations from the established procedures are presumed to be intentional or provide evidence that the defendant knew the submitted claims were false." *Orzame, supra* at 560. Consequently, if defendants

"have used billing codes that did not accurately represent the actual services rendered to the agents at the clinic, defendants are presumed to be 'in possession of facts under which [they are] aware or should be aware of the nature of [their] conduct.'" *Id.* at 562, citing MCL 400.602(f). "[C]laims submitted for noncompensable services such as unnecessary tests and nonmedical expenses, as well as billings for services not performed, qualify as fraudulent claims." *Id.* at 562, citing *In re Wayne Co Prosecutor,* 121 Mich App 798, 802; 329 NW2d 510 (1982). Based on the evidence presented to the district court, we find that sufficient evidence existed to bind defendants over on 15 counts of Medicaid fraud.

On appeal, defendants raise an additional argument regarding federal preemption as an alternative basis for affirmance. Defendants argue that the federal anti-kickback statute, 18 USC 1347, preempts the low *mens rea* requirement of MCL 400.607. Specifically, defendants cite to the recent case of *State v Harden,* 938 So 2d 480 (Fla, 2006) to demonstrate that a state statute with a lower *mens rea* requirement is preempted by federal law because it serves to criminalize conduct which federal law intends to protect or preclude from prosecution. While we are not required to resolve this issue to dispose of this case, we address defendants' argument for the sake of judicial economy as we can anticipate that it will likely arise again on remand or reconsideration.

Notably, 18 USC 1347 applies only to conduct that is done "knowingly and willfully" as compared to the commensurate Michigan statute, which only addresses conduct that is "knowing" or "knowingly" performed. Contrary to defendants' argument, an important distinction exists between the Michigan statute and the preempted Florida statute. Unlike the Florida statute, violation of the Michigan statute cannot be premised on mere negligence due to the existence of MCL 400.602(f), which defines the terms "knowing" and "knowingly" and precludes prosecution for inadvertent mistakes unless they indicate a "systematic or persistent tendency to cause inaccuracies."

Consequently, *Harden* is distinguishable from the present case because, unlike the anti-kickback statutes at issue in *Harden*, MCL 400.607 does not criminalize conduct which federal law intends to protect from prosecution and does not present an obstacle to accomplishing the purpose of the federal law. Although the federal anti-fraud statute does not have a special definition for the term "knowingly" and, therefore, appears to necessitate a higher *mens rea* requirement, this cannot be construed to reflect a congressional intent to immunize from state prosecution the conduct criminalized by MCL 400.607, as defined by MCL 400.602(f), which involve a systematic or persistent tendency to over bill Medicaid. We concur that a state statute criminalizing merely negligent or isolated and inadvertent overcharging of Medicaid could undermine the congressional purpose in establishing Medicaid by discouraging honest medical providers from participating in the Medicaid program and the provision of services to low-income individuals. However, the reach of MCL 400.607 is much narrower because it expressly excludes conduct that is an error or mistake unless there is demonstrated a systematic or persistent tendency for repetitive inaccuracies. Thus, isolated or ordinary negligence is excluded from the reach of MCL 400.607. While it is unrealistic to expect even the most conscientious medical providers to never inadvertently make a billing error, it is reasonable to expect and require medical providers to exercise sufficient care and effort in their billing practices to avoid systematic or persistent problems.

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly