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AN INSPECTOR OF THE BOARD OF PHARMACY CANNOT REMOVE A PRESCRIPTION FOR NARCOTICS OR BARBITURATES FROM A PHARMACISTS RECORDS WHICH HE IS REQUIRED TO KEEP BY LAW FOR USE AS EVIDENCE— §§3719.05, 3719.26, R.C.

SYLLABUS:

An inspector of the state board of pharmacy would not have the authority under Sections 3719.05, 3719.26, and 3719.27, Revised Code, to remove from the records required to be kept by a pharmacist under the provisions of those sections, a prescription for narcotics or barbiturates for use as evidence, except when such evidence is taken as a result of lawful search incident to a lawful arrest of the pharmacist so required to keep such records, for a violation of the law which would cause such records to be useful as evidence.

Columbus, Ohio, May 31, 1962

Dr. Rupert Salisbury, Executive Secretary,
State Board of Pharmacy
21 West Broad Street, Columbus 15, Ohio

Dear Sir:

I have your request for my opinion which reads as follows:

“The State Board of Pharmacy wishes to obtain your opinion in regard to the legality of removal of a particular prescrip-

tion from a pharmacist's prescription file for use in evidence in legal proceedings.

"Section 3719.05 (A) provides that '. . . the narcotic prescription shall be retained on file . . . for a period of two years so as to be readily accessible for inspection by any public officer or employee engaged in the enforcement of sections 3719.01 to 3719.22, inclusive, of the Revised Code . . .'

"Section 3719.27 of the Barbiturate Act provides that 'Persons required . . . to keep (Barbiturate) files or records shall upon the written request of an officer or employee designated by the state board of pharmacy, make such files or records available to such officer or employee, at all reasonable hours, for inspection and copying. . .'

"The question is, is it legal for a pharmacy board inspector to remove such prescription for use in evidence, substituting therefore, in the pharmacist's prescription file a written notice that the particular prescription copy included, has been removed by the inspector for use as evidence.

"Is this a proper, legal procedure under the drug laws cited or in any other statutes pertaining to the accumulation of evidence?"

Regarding a prescription for a narcotic drug, Section 3719.05, Revised Code, reads, in part, as follows:

"(A) A pharmacist may dispense narcotic drugs to any person upon a written or oral prescription given by a practitioner. Each written prescription shall be properly executed, dated, and signed by the person prescribing on the day when issued and bearing the full name and address of the patient for whom, or of the owner of the animal for which, the narcotic drug is dispensed, and the full name, address, and registry number under the federal narcotic laws of the person prescribing. If the prescription be for an animal, it shall state the species of animal for which the drug is prescribed. The pharmacist filling the prescription shall write the date of filling and his own signature on the face of the prescription. The prescription shall be retained on file by the owner of the pharmacy in which it is filled for a period of two years, so as to be readily accessible for inspection by any public officer or employee engaged in the enforcement of sections 3719.01 to 3719.22, inclusive, of the Revised Code. Each oral prescription shall be recorded by the pharmacist and such record shall show the name and address of the patient for whom, or of the owner of the animal for which, the narcotic drug is dispensed, the full name, address, and registry number under

the federal narcotic laws of the practitioner prescribing, the name of the narcotic drug dispensed, the amount dispensed, and the date when dispensed. Such record shall be retained on file by the owner of the pharmacy in which it is filed for a period of two years. No prescription shall be refilled.

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Regarding a prescription for barbiturates, Section 3719.26, Revised Code, provides in part :

“(A) Persons, other than carriers, to whom section 3719.25 of the Revised Code is applicable shall :

“(1) Make a complete record of all stocks of barbiturates on hand on August 12, 1949, and retain such record for not less than two calendar years immediately following such date ;

(2) Retain each commercial or other record relating to barbiturates maintained by them in the usual course of their business or occupation, for not less than two calendar years immediately following the date of such record.

(B) Pharmacists shall, in addition to complying with division (A) of this section, retain each prescription for a barbiturate received by them, for not less than two calendar years immediately following the date of the filling or the date of the last refilling of such prescription, whichever is the later date.

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The authority of an inspector of the state board of pharmacy to examine the records of a pharmacist maintained under Section 3719.26, *supra*, is found in Section 3719.27, Revised Code, which reads as follows :

“Persons required, by section 3719.26 of the Revised Code, to keep files or records shall, upon the written request of an officer or employee designated by the state board of pharmacy, make such files or records available to such officer or employee, at all reasonable hours, for inspection and copying, and accord to such officer or employee full opportunity to check the correctness of such files or records, including opportunity to make inventory of all stocks of barbiturates on hand. No person shall fail to make such files or records available or to accord such opportunity to check their correctness.”

It will be seen from the above that an inspector of the state board of pharmacy may, pursuant to Section 3719.05, *supra*, have access to the file of prescriptions maintained by a pharmacist showing the dispensing of narcotic drugs by such pharmacist, and such inspector under Section

3719.27, *supra*, may inspect and copy the records of a pharmacist pertaining to the dispensing of barbiturates. I find no additional statutory provisions pertaining to the authority of such an inspector which would be applicable to the question involved in your request.

It is difficult to determine from the statement in your request the proposed use of the "evidence" to be taken by the inspector. I assume that said evidence is not taken as a result of a lawful arrest of the pharmacist for a violation of the provisions of Chapter 3919., Revised Code. There can be little doubt that subsequent to such an arrest an officer may make a reasonable search of the premises at which the arrest was made and take into his possession any evidence found which bears upon the crime. 79 Corpus Juris Secundum 840, Search and Seizure, Section 67. For the purpose of this opinion, I am assuming that such is not the purpose of the taking of the evidence mentioned in your request.

Examining the above quoted statutory provisions, it is obvious that the legislature did not expressly grant to the inspectors in question the general authority to not only examine the file of pharmacists, but to take records from such files. In determining whether a liberal construction of said statutory language could enable such authority to be implied from the express language quoted above, your attention is called to 50 Ohio Jurisprudence 2d, 210, Statutes, Section 230, which reads, in part, as follows:

"Consistency in statutes is of prime importance, and it is the duty of the court to attempt to harmonize and reconcile laws. That is, a statute or section should, if possible, be so construed as to harmonize and reconcile its provisions with other laws or sections so that all of them may stand. Accordingly, the rule is that all laws newly enacted by the General Assembly must be presumed to harmonize with existing statutes on kindred subjects neither expressly nor impliedly repealed. Moreover, a construction of a statute which destroys the consistency thereof is to be avoided.

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In addition to providing in Sections 3719.05 and 3719.26, *supra*, requiring a pharmacist to maintain the records set forth therein for a period of two years, Section 3719.99, Revised Code, provides that the failure of a pharmacist to so maintain such records is a crime, punishable by both a fine and imprisonment. It is axiomatic that in criminal law, ignorance of the law is no excuse. Similarly, the fact that a person is mis-

guided either by legal advice or as a result of information given to him by a public official as to the meaning of a law, is no excuse for violation of the same. 15 American Jurisprudence, 12, Criminal Law, Section 309.

I may also point out that the rules of evidence generally provide for the admission into evidence of documents only after a person who has control of such documents has properly identified them, and in most cases identification by an inspector of the state board of pharmacy would not be sufficient to permit the acceptance into evidence of a prescription taken by him from the files of a pharmacist. Furthermore, the law has provided a method to require the production of such records, i.e., a subpoena duces tecum may be served upon the pharmacist. In this regard, your attention is called to 42 Ohio Jurisprudence 75, Witnesses, Section 60, which reads, in part, as follows:

“The subpoena may also direct the person it names to bring with him any book, writing, or other thing under his control, which he may be compelled to produce as evidence. And the parties have the right to make an examination of such books and documents before final judgment upon the merits. The process under which this result is accomplished is the writ of subpoena duces tecum of the common law. The writ requires the person named therein to do something else than testify, namely, to appear and bring with him a certain book or writing particularly described which may contain evidence that it is the purpose of the writ to reach. It is a process of the same kind as the subpoena ad testificandum except that it includes this clause of requisition for the witness to bring with him and produce as evidence such books, writings, or other things, which are under his control. It is a writ of compulsory obligation and effect in the law, and had its origin in the right of the court to resort to means competent to compel the production of written, as well as oral, testimony, which right was essential to the very existence and constitution of a common-law court.

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It will be noted from the foregoing, that there is available an adequate means whereby, pursuant to a court order, a subpoena duces tecum, the records of the pharmacist may be required to be produced in court and thereafter received into evidence. It will also be noted that if such records were in the hands of an inspector of the pharmacy board, such inspector, not having received such records in an original transaction, would, in all likelihood be unable to completely identify them, and there-

fore such records would, upon proper objection, be inadmissible as evidence.

Furthermore, since there is no provision in Chapter 3719., Revised Code, which relieves the pharmacist of the obligation of maintaining such records, if the pharmacist were to turn said records over to an inspector, such pharmacist would be in violation of the criminal provisions of Section 3719.99, Revised Code. However, if such pharmacist were to produce said records pursuant to a lawful court order, and such records were thereupon received into evidence, I am of the opinion that such pharmacist would be excused from the penal provisions of Section 3719.99, Revised Code, as far as the records so submitted into evidence were concerned. In this connection, your attention is called to 15 American Jurisprudence 22, Criminal Law, Section 329., which reads as follows:

“The orderly administration of the law should not expose a litigant to punishment for not doing an act commanded by statute where a court, acting within its jurisdiction and authority, has issued an injunction commanding him to refrain from doing it.”

From the foregoing, it will be seen that if Sections 3719.05, 3719.26, and 3719.27, *supra*, are construed to grant the authority to an inspector of the pharmacy board to take from a pharmacist the records which he is required to keep under said sections, such pharmacist will be violating the penal provisions of Section 3719.99, Revised Code. Whereas, if said sections are construed so as to limit the authority of such an inspector to the terms expressly set forth in said sections, such pharmacist will not be required to violate the penal provisions of Section 3719.99, Revised Code, nor will the ability to properly receive into evidence the records in question be at all impaired.

Accordingly, considering the requirement aforementioned that provisions of law should be harmonized, I am of the opinion and you are advised that an inspector of the state board of pharmacy would not have the authority under Sections 3719.05, 3719.26, and 3719.27, Revised Code, to remove from the records required to be kept by a pharmacist under the provisions of those sections, a prescription for narcotics or barbiturates for use as evidence, except when such evidence is taken as a result of lawful search incident to a lawful arrest of the pharmacist so required to

keep such records, for a violation of the law which would cause such records to be useful as evidence.

Respectfully,

MARK McELROY

Attorney General