

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EROL UCER, M.D.,

Defendant-Appellant.

UNPUBLISHED

July 16, 1996

No. 178558

LC No. 93-048609

Before: Markey, P.J., and McDonald and M.J. Talbot,* JJ.

PER CURIAM.

Defendant was convicted by jury of eleven counts of health care fraud under §3 of the Health Care False Claim Act ("HCFCA") MCL 752.1003(1); MSA 28.547(103), for submitting false Blue Cross/Blue Shield claims. The trial court sentenced defendant to ninety days' imprisonment for his convictions and placed defendant on probation for forty-eight months.¹ Defendant now appeals of right. We affirm.

Defendant, a psychiatrist, came under suspicion for fraudulent billing practices at his clinic. Defendant was submitting claims to Blue Cross under billing code 90844 that required a psychiatrist to conduct a face-to-face psychotherapy session for forty-five to fifty minutes. Defendant was billing under this code but actually seeing patients for approximately fifteen minutes or less.

The first issue to be decided is whether the procedure code manual ("MUPC")² for Medicaid and Blue Cross claims was unconstitutionally vague. Although defendant attempts to engage this Court in a lengthy analysis of the MUPC, the fact remains that defendant was convicted under the HCFCA, making any constitutional discussion of the MUPC relevant only to the issue of notice. Section (1) of the HCFCA, MCL 752.1003(1); MSA 28.547(103)(1), provides:

* Circuit judge, sitting on the Court of Appeals by assignment.

(1) a person shall not make or present or cause to be made or presented to a health care corporation or health care insurer a claim for payments of health care benefits knowing the claim to be false.

MCL 752.1002; MSA 28.547(102) supplies the applicable definitions:

(a) "Claim" means any attempt to cause a health care corporation or health care insurer to make the payment of a health care benefit.

* * *

(c) "False" means wholly or partially untrue or deceptive.

* * *

(f) "Health Care Insurer" means any insurance company authorized to provide health care insurance in this state.

* * *

(h) "Knowing" and "knowingly" means 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 health care benefit. "Knowing" or "knowingly" does not include 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.

This Court has noted that it is illegal to submit a false claim to a health care corporation or insurer. *People v Payne*, 177 Mich App 464, 467-468, 442 NW2d 675 (1989). A review of facts elicited at trial indicates that defendant submitted a plethora of false claims throughout the years and that these billing inconsistencies were brought to defendant's attention. As a result, defendant was properly convicted under the HCFCA.

Nevertheless, a brief review of the MUPC reveals that it is clear and unambiguous. The MUPC guidelines are to be reviewed de novo in accord with principles of statutory construction. See generally, *People v Williamson*, 205 Mich App 592, 595; 517 NW2d 846 (1994). When analyzing statutes for vagueness, the entire text of the statute should be examined and its words should be given their ordinary and plain meaning. *People v Munn*, 198 Mich App 726, 727; 499 NW2d 459 (1993). Statutes are presumed constitutional and are construed so unless their unconstitutionality is clearly apparent. *People v Hayes*, 421 Mich 271, 284; 364 NW2d 635 (1984); *People v Hartstuff*, 213 Mich App 338, 343-344; 539 NW2d 781 (1995). In order to provide fair notice of proscribed conduct, a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited. *People v Hicks*,

149 Mich App 737, 741; 386 NW2d 657 (1986). Vagueness challenges must be examined in light of the facts at hand. *People v Premen*, 210 Mich App 211, 214; 532 NW2d 872 (1995).

A de novo review of the MUPC itself, in addition to pertinent testimony regarding its interpretation, suggests that the manual provided ample notice in terms of Blue Cross provider billing procedures. Billing code 90841's corresponding "Remarks" instructs the reader to "Use 90843 or 90844 for Regular Business and Medicaid." Thus, a provider has two coding options for regular business: 90843 or 90844. Witness testimony confirms this.³ Defendant's staff testified that they were to bill patients for full sessions regardless of the patient's actual time with defendant. Billing discrepancies were brought to defendant's attention by his employees, yet he continued to submit fraudulent claims to Blue Cross.

When reading the MUPC in conjunction with the facts of this case, see *Premen, supra*, at 214, it is apparent that the billing procedures were not vague, as they instructed providers to either bill under procedure code 90843 for twenty to thirty minute therapy sessions or procedure code 90844 for forty-five to fifty minute sessions. The record is replete with examples of defendant's violations of this billing procedure. Under these circumstances, we find that the MUPC is not unconstitutionally vague.

Defendant also argues that the trial court erred in refusing to give his proposed jury instructions. Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). Even if somewhat imperfect, no error will be found if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.* No error will be found if the charge as a whole covers the substance of the omitted instruction. *People v Bender*, 124 Mich App 571, 575; 335 NW2d 85 (1983). A review of the given instructions reveals that the instructions as a whole conveyed concepts embodied in defendant's proposed instructions. The instructions here were entirely appropriate, fairly presented the issue to be tried, and protected defendant's rights. *Bell, supra*.

Defendant next raises the question whether the trial court erred in denying his motion to suppress evidence. We conclude that it did not. A trial court's ruling on a motion to suppress will not be reversed on appeal unless clearly erroneous. *People v Toodle*, 155 Mich App 539, 543; 400 NW2d 670 (1986). Defendant's claim that his former office manager, Gina Seymour, acted as a state agent when she allegedly "stole" incriminating information is without support. Fourth Amendment search and seizure protections are not triggered where a search and seizure has been conducted by a private person. US Const, Am IV; *People v McKendrick*, 188 Mich App 128, 141; 468 NW2d 903 (1991). The record reveals that Seymour acted without state assistance when she procured the incriminating documents. As a result, her actions do not require Fourth Amendment protections. *Id.*

Moreover, ample probable cause can be gleaned from the affidavit in support of the search warrant. Probable cause exists to issue a search warrant when the facts and circumstances would permit a person of reasonable prudence to conclude that the evidence of a crime or contraband sought is in the stated place. *People v Chandler*, 211 Mich App 604, 612; 536 NW2d 799 (1995). The

allegations contained in the affidavit outlined the materials sought and the nature of defendant's offenses. The allegations collectively provided a substantial basis for the trial court to conclude that the evidence sought would be found in defendant's office. *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992).

Defendant's assertion that the search warrant was improperly issued because it violated the psychiatrist-patient privilege is also without merit. It is the patient, not the physician, who is the holder of this privilege, and no patient attempted to invoke it at trial. See *Scott v Henry Ford Hosp*, 199 Mich App 241, 243; 501 NW2d 259 (1993). Further, defendant and his patients waived their privacy interest by virtue of the terms of participation in the Medicaid and Blue Cross programs.

Defendant's pendant claim, that the affidavit was defective because it failed to inform the magistrate of the statutorily protected nature of the documents at issue, is without support and is therefore waived. See *People v Sowders*, 164 Mich App 36, 49; 417 NW2d 78, (1987). Despite defendant's additional assertion that the trial court should have employed an alternative discovery method under the HCFCA, MCL 752.1008; MSA 28.547(108), and 10 of the Medicaid Fraud Statute, MCL 400.610; MSA 16.614(1), defendant fails to demonstrate how the availability of these options operated to void the procedure implemented by the state.

Defendant also claims that there was insufficient evidence to support his convictions. We review the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the offense were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992). Testimony from defendant's former patients and employees in addition to obvious inconsistencies between defendant's Blue Cross claims forms and appointment book persuades us that a rational trier of fact could conclude that defendant knew of the fraudulent billing procedures and authorized the continuance of this practice. *Id.* Accordingly, sufficient evidence existed to sustain defendant's HCFCA convictions.

Defendant's final claim, that the trial court erred in admitting a summary chart containing Cheryl Dawson's "conclusory" remarks, is without support. Therefore, it is considered waived on appeal. *Sowders, supra.*

In light of our decision to affirm defendant's convictions, we lift the stay of proceedings entered pursuant to defendant's claim of appeal and cancel defendant's appeal bond, thereby requiring that defendant complete his sentence.

Affirmed.

/s/ Jane E. Markey
/s/ Gary R. McDonald
/s/ Michael J. Talbot

¹ On October 5, 1994, this Court granted defendant's motion for bond and postponed imprisonment as defendant was able to post bail pending resolution of this appeal.

² The MUPC includes both Medicaid and Blue Cross billing codes.

³ Ester Regan, a DSS assistant to the director of Medical Services Administration, explained that code 90841, found in the MUPC, was considered a "non-covered code," meaning that Medicaid and Blue Cross would not cover any procedure carried out under that particular code number. The covered codes, she explained, were designated 90843 and 90844. Cheryl Dawson, an investigator with Blue Cross, also testified that procedure code 90844 contemplated a face-to-face physician/patient encounter. Defense witness James Groen, the assistant director for program policy with the Medical Services Administration, conceded that billing code 90844 required a doctor to spend a minimum of forty-five to fifty minutes with his patient.