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IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

RECORD NO. 811716

DAVID JIMMY McCUTCHEON,

Appellant

v.

COMMONWEALTH OF VIRGINIA,

Appellee

JOINT APPENDIX

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COMMONWEALTH OF VIRGINIA)

) To-Wit: JANUARY 8, 198[illegible]
OBTAINING CONTROLLED DRUGS BY USE OF A FALSE NAME, POSSESSION MARIJUANA, WID

CITY OF PORTSMOUTH)

IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH:

38861

FIRST COUNT:

The Grand Jury charges that: on or about September 4, 19 80, in the City of Portsmouth David J. McCutcheon did obtain Hydromorphone, a Schedule II controlled substance, by using a false name,

SECOND COUNT: on or about September 4, 1980, in the City of Portsmouth, David J. McCutcheon did manufacture, sell, give, distribute, and possess with intent to manufacture, sell, give, and distribute Marijuana,

against the peace and dignity of the Commonwealth of Virginia.

Va. Code § 18.2-258.1, 18.2-248.1

(2)

A1

ASSIGNMENTS OF ERROR

1. The Court erred in failing to strike the Commonwealth's evidence because the Commonwealth failed to produce sufficient evidence to prove their case beyond a reasonable doubt.

2. The Court erred in failing to strike the Commonwealth's evidence because the Commonwealth only showed that the defendant obtained drugs from a doctor and that he used a false name but the evidence did not show that the defendant obtained the drugs by the use of a false name. (underlining ours)

3. The statute under which the defendant was convicted is unconstitutionally vague.

DEFENDANT: Yes, sir.

THE COURT: Let the record show all three waive trial by jury.

(Witnesses excluded from courtroom.)

* * * * * * * * *

DR. ROBERT J. SWAN, Witness called by Attorney for the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. DAVIS:

Q Please state your name, Doctor, for the record.

A Robert J. Swan.

Q And Dr. Swan, are you a medical doctor?

A Yes.

Q And where is your office located?

A 5000 Portsmouth Boulevard.

Q During last summer, the summer of 1980, did you have the occasion to come in contact with the person who represented to you the name of Jimmy David Johnson?

A Yes, sir.

Q Is that person in the courtroom today?

A Yes; that's the defendant there.

Q When did you first have contact with Mr. Johnson?

A I saw him first on January 15th of 1980.

Q What was the reason you were seeing him at that time?

A Well, he came in, complaining of severe headaches, and he had fractured his right arm in an automobile accident, and the fracture had injured his radial nerve.

He had a paralysis of his right arm, and he had pain in that arm, too.

Q After January of 1980, did you have occasion to see him more times?

A Yes. I saw him off and on for, well, it was precisely a year. I saw him until January 15, 1981.

Q Did there come a time during the course of your seeing Mr. Johnson when you became somewhat suspicious of him?

A Yes.

Q Exactly what made you suspicious of Mr. Johnson?

A Well, I didn't know it, but on or about the time that this Mr. McCutcheon was a patient, his brother, Larry McCutcheon, was also a patient; and when we billed Larry at a Suffolk address for services rendered, the statement came back marked "No such address", and my wife has a good memory. She recognized the street address

as Mr. Johnson's address; and --

Q At that time you became suspicious that his name was not Johnson?

A Yes.

Q What actions did you take in regards to those suspicions?

A Well, I had other people by that name that came --

MR. BONDURANT: We would object to other people.

THE COURT: Go ahead.

A There were some other people -- this all happened so fast -- for one reason or another, having the need of the same substance; so frankly, I was looking around to see who put the finger on me.

Q What was the substance in question?

A It's a drug called Dilaudid.

Q In regards to the defendant in this case, did you finally notify the Portsmouth Detective Bureau about your suspicions?

A Yes.

Q I'm going to show you, Doctor, a particular prescription, and ask you whether or not you can identify this particular prescription?

A That's my prescription blank, and that's my

writing, and that's my signature.

Q What is the date on that prescription?

A September 4, 1980.

Q Do you recall who you wrote that prescription for?

A Jimmy D. Johnson.

Q Is that the defendant in this case?

A Yes, sir.

Q Is that the name he represented to you on that day?

A Yes.

Q What was that prescription written for?

A It was written for Dilaudid, four milligrams. It's a pain killer, very closely related to Heroin, I understand.

MR. DAVIS: Your Honor, the Commonwealth would move to introduce this prescription into evidence at this time.

THE COURT: The prescription will be marked Commonwealth's Exhibit 1.

MR. DAVIS:

Q Was he under your care from the time you saw him in January, on until the time you bought this prescription for him?

A Yes.

Q Were you aware of him being under the care of any other doctors at that time?

A I understand he was seeing Dr. Durica for his fractured arm.

Q I'm going to show you a list of some other prescriptions that were in the name of Jimmy McCutcheon, and ask if you can identify these drugs for us.

MR. BONDURANT: If Your Honor, please, we would object to this. What this is, apparently, is that somewhere along the line, some other legal prescription drugs were found in his possession.

Now, he is not charged with anything but what he is charged with today, and the fact that he has any legal prescriptions in his possession, I submit should not be a subject of inquiry in this case, and cannot prove anything.

THE COURT: All he's asking for so far is what the drugs are.

MR. BONDURANT: He has to introduce evidence that has some probative value.

THE COURT: You will tie it in later?

MR. DAVIS: Yes, sir.

THE COURT: Overruled.

MR. BONDURANT: He can't tie it in later. He's not charged with possession of these drugs.

THE COURT: He says he will tie it in later. You may proceed.

MR. DAVIS:

Q Referring to this list, there is a prescription of Dilaudid on April 15, 1980. Did you prescribe that to him, or would that have been from some other doctor?

A No; I didn't give him a prescription on April 15th of '80.

Q Had you given him a similar prescription on a date in April?

A Yes. I gave him one on April 24, 1980.

Q What was that prescription?

A For Dilaudid.

Q What about item number B on this list, Clinoril 200?

A Clinoril.

Q What type of drug is that?

A It's one of the newer anti-arthritic type drugs. It's a non-controlled drug.

Q What about the next one, item C?

A Motrin; that's all anti-inflammatory, anti-arthritic, non-controlled drug.

Parest-400; that's a strong sedative drug.

Q That was given in August 1980. Had you given him a similar type drug?

A The Parest-10, on August 28th; here's August; I wrote a prescription of August 5, 1980, for Dilaudid, and --

Q And again on September 4th?

A Yes.

Q Would that be a similar type drug?

A No. Parest is a sedative. Actually, Dilaudid, outside of being a pain killer, is a euphorium, not a sedative. It's more of an upper.

MR. BONDURANT: Once again, we object and move to strike that out, now that it has come in.

THE COURT: I don't see where it's any value to this case. I will sustain your motion at this time.

MR. DAVIS: The Commonwealth would, at a later time, introduce vials of this evidence.

The Commonwealth would offer it as a motive for using a false name.

THE COURT: We will see, but at this time, it's out.

MR. DAVIS:

Q At any time did this man, prior to September 4, 1980, ever tell you that his proper name was David Jimmy McCutcheon?

A No, sir.

Q At all times prior to that, did he represent to you his name was Jimmy Johnson?

A Yes.

MR. DAVIS: Answer any questions Mr. Bondurant would ask you, sir.

CROSS-EXAMINATION

EXAMINED BY MR. BONDURANT:

Q Dr. Swan, you say you first started treating this man in January 1980; is that right?

A Yes, sir.

Q And you checked into his medical -- took a medical history from him, did you not?

A Yes.

Q And you found he had been previously treated by Dr. Durica for some injuries received in an auto accident; is that right?

A Yes.

Q And he came to you because he had, in addition some broken bones, he had some neurological damage as a result of the auto accident?

A Well, he was complaining of the headaches. I'm not sure -- let's see.

Q That's right; he had severe headaches?

A Yes; severe headaches.

Q Didn't he also have a fracture of the right arm, with paralysis?

A Right.

Q Which was the result of neurological damage?

A Right.

Q Which was something that Dr. Durica, who is an orthopedic surgeon, would refer over to a neurologist?

A Yes.

Q What you were treating him for in the nature of headaches and paralysis in the right arm was definitely a neurological problem?

A Yes.

Q Regardless of the name he gave you, it's true that Dilaudid was a proper drug to prescribe under the circumstances, to relieve some of the pain he was experiencing; is that correct?

A Yes. It was warranted. He stated he was allergic to Codeine and Tylenol.

Q You found objective signs, did you not, that he actually did have a history of a fractured arm and paralysis in the right arm?

A Yes, sir.

Q So when you prescribed the Dilaudid back on January 15, 1980, you continued to refill the prescription at reasonable intervals when needed; is that correct?

A Yes, sir.

Q And come around September or some time before then, you got some information that his brother's address and his address were the same, but they were two different names?

A Well, it was much earlier on, that that occurred.

Q And you told the police about it?

A Yes.

Q And then, as a matter of fact, you later learned, did you not, from Mr. McCutcheon here, that his brother had been in trouble for abusing some drugs; and didn't Mr. McCutcheon tell you he was embarrassed to use his brother's name?

A Yes; he told me that in October of '80.

Q As a matter of fact, when you called the police and told them that you had these suspicions, later on the police made arrangements with you to send somebody over to your office to be in your office at the time when you saw Mr. McCutcheon?

A No. Actually, the police officer was a patient

of mine. It just happened that their appointments coincided. It wasn't planned.

Q Didn't he call somebody that was outside? Wasn't he in there and he called somebody waiting to follow Mr. McCutcheon?

A The police officer's appointment was on the same day as Mr. McCutcheon. They were not planned.

Q As far as you know?

A As far as I know.

Q Mr. McCutcheon came to you on that day, which was the 4th of September?

A Right.

Q And you saw him, and he was still suffering from some of these problems he had before?

A Right.

Q And you gave him a prescription introduced in evidence, with the name of Johnson on it?

A Right.

Q And it was for Dilaudid?

A Right.

Q And regardless of the name he gave you, he needed it for his symptoms, did he not?

A That's correct.

Q And it didn't matter to you that he gave you the name of Jimmy D. Johnson when you prescribed it,

because he needed it; isn't that correct?

A Right.

Q And you were not tricked or in any way induced in giving him the Dilaudid by him giving you the name Jimmy D. Johnson?

A No.

Q I show you the prescription with the address on here and some writing on there; whose is that; do you know?

A The handwriting?

Q It's not yours?

A No. That's probably the pharmacist's.

Q Yours is in the blue?

A Right.

Q Are you testifying from your records on Mr. McCutcheon?

A The records and recollection.

Q Could I take a look at what you are testifying from?

A Sure. This is a complete edition, and this is just my notes.

Q I notice, from looking at your first office notes, when you first examined him back on January 15th, you did find a right wrist drop in the right arm; there was some atrophy of the muscles, both of which are

positive or objective signs or some problem in that right arm?

A There was no doubt he had a bad radial nerve paralysis in the right arm.

Q And after the September 4, 1980 visit, Mr. McCutcheon continued to be your patient, did he not?

A Yes, sir.

Q And he told you, after September 4, 1980, that his correct name was McCutcheon; I believe you already testified to that?

A Yes, sir.

Q And when he came to see you on occasions after September 4, 1980, he used the name McCutcheon, and he presented himself, did he not, with the same physical problems and symptoms?

A Right.

Q As he had before?

A Right.

Q And you continued to prescribe for him Dilaudid, because it was still a proper drug to be prescribed under the circumstances, regardless of the name?

A Right.

MR. BONDURANT: That's all I have.

REDIRECT EXAMINATION

EXAMINED BY MR. DAVIS:

Q Were you aware, during the time you were treating him, during the month of 1980, that he was receiving any Dilaudid or other types of drugs from other physicians?

A No, sir. The only one I was aware of that might be prescribing for him was Dr. Durica.

Q If you had known that the defendant was getting other drugs from other doctors, would that perhaps have changed the type of prescriptions you were giving him?

A If I had known he was getting any of the same drugs I was prescribing for him, yes; different drugs, no.

MR. BONDURANT: I move to strike that.

THE COURT: I understand his procedure. I don't think it's necessary to answer, because the answer is obvious to me.

MR. DAVIS:

Q Is there any way for you to check on a patient, other than by his name, to know whether he is receiving drugs from anywhere else?

A No, sir.

MR. DAVIS: I have nothing else.

RECROSS-EXAMINATION

EXAMINED BY MR. BONDURANT:

Q You didn't check and didn't have any reason to check in this case, with a clearing house?

A Unfortunately, there is no such thing. It would save us all a lot of grief.

Q What Mr. Davis just said to you, then, if I understood you correctly, if you had known his correct name, you would have checked it out?

A No, sir. He was talking about if I knew of any other doctors that were treating Mr. McCutcheon.

Q That doesn't have anything to dowith whether he used his name or another name.

A You asked the question.

THE COURT: I don't think the doctor would prescribe it, knowing another doctor had prescribed it, because that would be a double dose.

MR. BONDURANT: That's common sense.

THE COURT: That's what the whole thing is, common sense.

MR. DAVIS: The only way he could check with the other doctors is to use the patient's name.

THE COURT: He said he didn't check a

clearing house, because there is no clearing house.

MR. BONDURANT: That's all.

* * * * * * * * *

BEN GOLDBLATT, Witness called by Attorney for the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. DAVIS:

Q Please state your name for the record, please.

A Ben Goldblatt.

Q What is your profession?

A Pharmacist.

Q And where is your pharmacy located?

A Naval Pharmacy, 4714 Portsmouth Boulevard.

Q Is that in the City of Portsmouth?

A Yes.

Q Were you working in that location on September 4, 1980, as a pharmacist?

A Yes.

Q I'm going to show you Commonwealth's Exhibit Number 1, and ask you whether or not you can identify this item.

A I filled this.

Q And what did you give for this prescription, sir?

A Dilaudid, 400 milligrams.

Q Is that a drug which requires a prescription?

A Yes, it does; a Class II drug.

Q Did you actually see the person who you gave these drugs to?

A No. I filled them, and the clerk takes care of the prescriptions. I don't pay attention to individuals.

Q Do you recall who the clerk was on this day?

A Sir?

Q Do you recall who the clerk was on that day?

A Kathy Parker.

Q And were you familiar with that name before?

A No.

Q With the name on this prescription?

A (Witness shakes head in the negative.)

MR. DAVIS: Answer any questions Mr. Bondurant would ask you.

MR. BONDURANT: No questions.

* * * * * * * * *

KATHY PARKER, Witness called by Attorney for the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. DAVIS:

Q Would you please state your name for the Court.

A Kathy Parker.

Q Back in September of 1980, where were you employed?

A Naval Pharmacy.

Q Is that the same pharmacy at which Mr. Goldblatt is a pharmacist?

A Yes, it is.

Q That is located on Portsmouth Boulevard, in the City of Portsmouth?

A Right.

Q I'm going to show you Commonwealth's Exhibit Number 1, and ask you whether or not you can identify this particular prescription?

A Yes.

Q And do you recall who gave you this prescription?

A Yes.

Q Is that person in the courtroom today?

A Yes.

Q Would you please point him out?

A Sitting over there.

THE COURT: Which one is it?

A The one in the jacket.

THE COURT: Let the record show she identified the defendant.

MR. DAVIS:

Q Is there any doubt in your mind that that is the person who presented you that prescription?

A No.

Q After he handed you that prescription, what did you do with it?

A Gave it to the pharmacist.

Q Did you receive something back from the pharmacist?

A The prescription.

Q Who did you give that to?

A This guy. (Indicating defendant.)

MR. DAVIS: Answer any questions Mr. Bondurant would have.

CROSS-EXAMINATION

EXAMINED BY MR. BONDURANT:

Q Were there some police in there?

A Not that I know of.

Q Detectives or anybody?

A Not that I know of.

Q Was anybody in there that you know of, except you and Mr. Goldblatt and this man?

A Just customers.

MR. BONDURANT: That's all I have.

* * * * * * * * *

DETECTIVE J. C. TURNER, Witness called by Attorney for the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. DAVIS:

Q Please state your name for the record.

A Detective J. C. Turner, assigned to Vice and Narcotics Squad, Portsmouth Police Department.

Q Were you so assigned last September of 1980?

A Yes, sir, I was.

Q On that date did you have the occasion to be in the progress of an investigation of the defendant in this case?

A Yes, sir, I was.

Q Tell the Court what action you took on September 4th in regards to your investigation.

A Detective Slaughter received a phone call from Dr. Swan that a subject was there to purchase a prescription. He had gone to see the doctor and got a prescription.

Myself and several other detectives in the squad put a surveillance on the doctor's office, and when the defendant come out and got in his vehicle and proceeded to leave, we received a phone call as soon as he left the doctor's office that a prescription had been given to the defendant.

We followed him, and he went to the Naval Pharmacy right down the street, on Portsmouth Boulevard.

I went inside and acted as if I were shopping around. The defendant had already given the clerk the prescription.

I waited around. It was about five or six minutes, maybe a little bit longer, the clerk called the name of Mr. Johnson.

The defendant, Mr. McCutcheon walked up and paid for a prescription and walked outside, and when we stopped him in his vehicle, he was getting in his vehicle outside the pharmacy.

Q Who stopped him?

A Detective Hartung and myself.

Q Was Detective Fremd there?

A Yes. We originally stopped him and several detectives from a distance off approached.

Q At that time did you have an opportunity to see Commonwealth's Exhibit Number 1 -- no, you wouldn't have seen this -- did you find something? What actions did you take, once you approached the defendant?

A I approached him, advised him who I was -- police officers -- we were conducting an investigation. This was approximately two p.m.

I approached him and advised him who I was, and asked him what was in the pill bottle he had just gotten.

He took it out and said, "I didn't know I broke the law. I did use a false name."

He got out of the vehicle and we patted him down and made sure he had no weapons on him or anything.

Q Did he later give you consent to search his automobile?

A Yes, he did. He handed the pill bottle, the vial he had just had filled, to Detective Hartung, and it had the name on there, Mr. Johnson -- let me see -- the exact name he used on it is, I think it was, James Johnson.

Q It was not the proper name?

A No, sir, it was not. We asked him for consent

to search his automobile, and he did consent to the search of the vehicle.

THE COURT: Any question about the permission?

MR. BONDURANT: Yes, sir.

CROSS-EXAMINATION

EXAMINED BY MR. BONDURANT:

Q Detective Turner, I believe you say that you were inside the drug store; is that right?

A Yes, sir, I was.

Q And you were acting on a call that you had gotten from Dr. Swan's office?

A Yes, sir.

Q Have you gotten the call?

A It come through the dispatcher.

Q You waited outside and saw Mr. McCutcheon come out, and followed him to the Naval Pharmacy?

A Yes.

Q You went inside and acted like you were shopping around?

A Yes, sir.

Q Somebody called out, Mr. Johnson?

THE COURT: How about going into the consent to search.

MR. BONDURANT: I was also trying to get

to the arrest.

THE COURT: We are talking about the consent to search.

MR. BONDURANT:

Q Had you arrested him when you asked to search his car?

A Yes, sir. He had been arrested and advised of his rights, orally.

Q Now, when did you arrest him, as soon as you walked up to his car?

A Once he handed Detective Hartung the pill vial with the little bag that had the name on there of a fictitious name.

Q What did you say, "You are under arrest"?

A I couldn't swear to it, but I believe Detective Hartung placed him under arrest at that time, and advised him of his rights.

Q Are you sure of that?

A I remember him arresting him and advising him of his rights.

After he handed him the vial, Detective Hartung looked at it, and it was in my presence with Detective Fremd.

Q Detective Hartung said, "You are under arrest", and read him his rights?

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A Yes.

Q Isn't it true that one of you -- I don't know which one -- said to him, "We want to search your car. We have a right to search it anyway"?

A No, sir. We told him we would like to search his vehicle, and asked him would he give us consent to search his vehicle.

Q Did he have any guns anywhere around?

A He had one.

Q That's what you found later on, in the trunk?

A Yes, sir.

Q You had him under arrest, in your control and custody, didn't you?

A Yes.

MR. DAVIS: It's not a question of a search incident to an arrest; it's a question of consent to search.

THE COURT: I think that's what he's going into.

MR. BONDURANT:

Q You had him in your custody, and you could have taken him downtown?

A Yes.

Q And you could have gotten a search warrant?

A Yes, sir.

Q Actually, you could have gotten a search warrant before that time?

A Yes, sir.

Q You had time to?

A Yes, sir.

Q Didn't somebody tell him that you all could have gotten a search warrant, and he might as well let you search anyway?

A No, sir. I don't recall that. We arrested him and advised him of his rights and asked for consent to search his vehicle, because there was an ongoing investigation prior to this.

Q And you thought he might have some other drugs in the car?

A Yes, sir; and he consented to the search, and we recovered other drugs in the vehicle.

Q What did he say?

A After we advised him of his rights and explained to him the consent, that he did not have to consent to the search if he didn't want us to search the car, we couldn't; and if he wanted us to search his car, we would have to have consent from him; and he said, "Yes; you can search my vehicle"; and at that time he give us the keys and we opened the trunk.

He moved away from the vehicle, and a couple of detectives went into the vehicle, and one went to the rear and one to the trunk.

Q You didn't advise him of his rights, did you?

A No; Detective Hartung --

Q Did he read it or do it orally?

A Orally.

Q Do you know what he advised him of?

A Yes, sir; you have a right to remain silent; you have a right to have an attorney free, if you cannot afford one. Do you understand these rights fully, and do you have any questions about these rights; and he said no. He explained his rights. He knew his rights. He was aware of them.

Q He understood them?

A Yes.

Q Is that when you all said, "Can we search your car?"

A We asked for consent afterwards; yes, sir.

Q Did he ask for a lawyer?

A No, sir; not until later on in the investigation; and once he was at headquarters, he was advised of his rights per the PD form; that he had the right to remain silent; that anything he said could be used against him in a court of law; and that he had a

right to an attorney.

MR. BONDURANT: That's all the questions I have. I would like to put Mr. McCutcheon on to testify to what happened.

* * * * * * * * *

DAVID J. McCUTCHEON, Defendant, having been first duly sworn, was examined and testified as follows:

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EXAMINED BY MR. DAVIS:

Q Detective Turner, at the time of the search of the car, you testified that Detective Hartung had received the prescription vial from him?

A Yes, sir.

Q Did he keep that in his possession until Detective Fremd arrived on the scene?

A Yes, sir. Everybody converged on the subject at one time. I was already out on foot, along with Detective Hartung.

He had gotten the pill vial and looked at it and handed it over to Detective Fremd, because he was designated as evidence man.

Q Was it ever opened up before that time?

A No, sir.

Q Did Detective Fremd also search the trunk?

A Yes, sir. He recovered all the items that were seized from the vehicle.

Q Is the person you had all the contact with in the courtroom today?

A Yes, sir; in the brown leather coat, sitting at defense table.

MR. DAVIS: Answer any questions Mr. Bondurant would have for you.

CROSS-EXAMINATION

EXAMINED BY MR. BONDURANT:

Q Back to where we were when you were in the drug store there, I believe you followed him out after you had seen him go up to the counter, pay the money and get the prescription?

A Yes.

Q And he sat in his car?

A He was approaching his vehicle. I had walked to the door and was waiting for him to get into his car.

Q So you got him before he got there?

A He was getting in the car, in the process of getting in the front seat.

Q And you intercepted him and surrounded him?

A Yes.

Q You told him he was under arrest; you asked him what was in those pills?

A Yes.

Q And he voluntarily --

A He stated he didn't know he was breaking the law.

Q That's when you all had guns trained on him?

A Yes, sir.

Q How many?

A I believe there were four of us. The reason we had the guns out --

Q I'm not asking you the reason why. I'm asking you if you did it.

A Yes.

Q It was after that, I believe, that the rights were given and you searched the car?

A After the consent; yes, sir.

Q I'm not sure what you just said about Detective Hartung and Detective Fremd, who did what in the way of the search. First of all, they went in the trunk; right; they got his keys and went in the trunk of his car?

A They opened all four doors of the car. The defendant by them was placed some distance from the car,

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where he couldn't get nothing in the car.

I looked in the driver's seat, behind the steering wheel. I looked right in the immediate area where he was sitting.

Detectives Hartung and Fremd went to the rear of the vehicle.

Q You don't know what they saw with their own eyes?

A No, sir; not until I finished my search of the inside of the vehicle.

Q So when you went around to the back, Hartung and Fremd had retrieved something?

A Yes, sir. They left it out. They took photographs as the stuff was laying in the car.

Q What did they do with it now?

A What do you mean?

Q You said something about Fremd was the evidence man, and Hartung got some stuff and gave it to Fremd.

A The only thing Hartung handled was the pill vial which the defendant handed him. When they opened the trunk, they found the marijuana and photographs were taken, and the evidence man collected the evidence.

Q Who was the evidence man?

A Detective Skip Fremd.

Q So Fremd is actually the one who took the evidence in his possession?

A Yes, sir.

Q The only thing you were testifying to earlier, to Mr. Davis, is that the prescription drug was handed not to you, but to Hartung?

A Yes.

Q And Hartung took it in his hand and gave it to Fremd?

A Yes.

Q You assume that?

A No, sir. I saw that.

Q Did it all happen in one transaction?

A Yes, sir. I was standing there alongside.

Q One more time, who actually searched the trunk?

A Detectives Hartung and Fremd. I was the photographer. I took the pictures as the stuff was pointed out.

MR. BONDURANT: That's all the questions I have.

THE COURT: Return to the witness room, and do not discuss the case with anybody until it's over.

* * * * * * * * *

DETECTIVE H. L. FREMD, Witness called by Attorney for the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. DAVIS:

Q Please state your name.

A Detective H. L. Fremd, II; assigned to Vice and Narcotics Squad, Portsmouth Police.

Q Were you so assigned last September 4, 1980?

A Yes, I was.

Q On that day did you have occasion to become involved in the investigation of the defendant in this case?

A Yes, I did; Mr. McCutcheon.

Q Did that bring you to the Naval Pharmacy in the City of Portsmouth?

A Yes, it did.

Q Did you have the opportunity to conduct a search of the defendant's vehicle?

A Yes, I did.

Q First of all, I'm going to ask you to identify this photograph, what it shows. Can you identify what this photograph shows?

A Yes. This is a view of the trunk of

Mr. McCutcheon's car.

Q Look at the bag in there. Is that how the bag was when you first went in the car?

A Yes, it was.

Q Is this the left corner of the trunk?

A If you stand at the rear of the vehicle, it's the left corner of the rear of the vehicle.

MR. DAVIS: The Commonwealth would move to introduce this photograph, Your Honor.

THE COURT: Commonwealth's Exhibit 2.

MR. DAVIS:

Q Prior to searching the trunk, did you receive a vial from Detective Hartung?

A Yes, I did.

Q And tell the Judge how that transaction took place.

A Myself and Detective Hartung were stationed outside the Naval Pharmacy, right after Mr. McCutcheon went into it.

We followed him from the doctor's office over to the pharmacy, and we parked on the same side of the street, approximately a hundred feet from his vehicle, and watched him go in; and as he came out, we approached him, and Detective Turner came out behind him from

A37

inside, and we placed him under arrest, and the pills -- a pill vial -- which was bought there at the pharmacy was inside the pharmacy bag in his left pocket, and was taken out, given to Detective Hartung; and in turn he gave it to me. We were all standing right there.

Q Did you see it when it was given to Detective Hartung?

A Yes.

Q Do you have that with you today?

A Yes, I do.

Q Do you have the prescription vial that you recovered from the defendant?

A Yes; this envelope here marked number one contains the vial with thirty-one pills.

Q Would you please open that up, Detective?

(Witness opens envelope.)

Q Did you keep it in your exclusive control from the time you received it?

A Yes. I retained it in my custody, personally packaged it and took it to the Crime Lab in Norfolk, where I picked it up again.

Q Did you receive a drug analysis on that vial?

A Yes, I did.

MR. DAVIS: Your Honor, the Commonwealth at this time would move to

A35

1 introduce the prescription vial in the name
2 of Jimmy D. Johnson, dated September 4, 1980,
3 Naval Pharmacy.
4 MR. BONDURANT: Could I ask the Officer a
5 couple of questions?
6 THE COURT: Yes. This will be
7 Commonwealth's Exhibit Number 3.

A39

Q Detective Fremd, did you, in the course of your searching that bag, have the occasion to find some other pill bottles?

A Yes, I did.

Q Do you have those vials with you?

A Yes, I do.

MR. BONDURANT: We object again. He is not charged with anything else.

THE COURT: I think he has a good reason. I would like to know whose names were on them.

MR. BONDURANT: I don't think it matters whose name was on them. All it does is put innuendo on top of innuendo.

First of all, his name is on them, but even if somebody else's name was on them, he is not charged with it. It's prejudicial to let something like this in.

THE COURT: Whose name is on them?

MR. DAVIS: Jimmy McCutcheon, David McCutcheon, Jimmy McCutcheon and Mr. McCutcheon.

THE COURT: All right. I won't let them in. I have got what I wanted to know.

MR. BONDURANT: We are not contesting that his name is McCutcheon anyway.

THE COURT: That's all right. I will sustain the motion.

MR. DAVIS: I would argue they are more than bottles. The Commonwealth's position is, these bottles are all prescriptions which Dr. Swan has testified to as to the nature of the drugs.

THE COURT: He has already testified that's the whole thing.

MR. DAVIS: These are all from separate physicians, and I believe they are incriminating and material to this matter.

THE COURT: I sustain the objection.

MR. DAVIS:

Q Did you also find other things that were not in vials?

A Also in the bag was a Spanish made .25 caliber semi-automatic pistol.

MR. BONDURANT: Objection.

THE COURT: Sustained.

MR. DAVIS: The charge involved, we have various items which are known to be used in the drug trade, and obviously, very much one of these is a pistol, along with the calculator and other paraphernalia; and

the Commonwealth would move to introduce this in evidence.

THE COURT: It's locked in his trunk, and I don't know if he will ever get it back, but it's not proper at this time.

MR. DAVIS: It was in the trunk with the marijuana and the pills.

THE COURT: I will sustain the objection.

MR. DAVIS:

Q Did you find anything else in the trunk?

A I found two other vials of empty bottles with names on them.

Q What names were on those bottles?

A One from Dr. Sutelan, in the name of Mr. McCutcheon, and another one from Dr. Sutelan in the name of J. D. McCutcheon.

MR. BONDURANT: Objection again.

THE COURT: I have got the picture. I won't let them in. Sustained.

MR. DAVIS:

Q Did you find the bag that the drugs were purchased in?

A Yes. When the drugs were handed to me, they were inside the bag, this prescription bag, from the pharmacy, which I initialed, and also the receipt

A42

from the pharmacy.

Q Showing the purchase price of the drugs?

A Yes.

MR. DAVIS: The Commonwealth would introduce these, Your Honor.

THE COURT: Commonwealth's Exhibit 7.

MR. DAVIS:

Q Whose car were all these things found in?

A These were found in the vehicle, 1973 Lincoln, four-door, Virginia license UNW-636, registered to J. D. McCutcheon, the one he was operating.

Q Is this the person who was at the car when you searched it?

A Yes, sir; Mr. McCutcheon.

Q This all happened in the City of Portsmouth?

A Yes, it did.

MR. DAVIS: Answer any questions Mr. Bondurant may have.

RECROSS-EXAMINATION

EXAMINED BY MR. BONDURANT:

Q How do you know it was registered to Mr. McCutcheon?

A I ran a registration check at the time of the search. We are required -- any vehicles we take into custody and impound -- we have to fill out a police

A43

vehicle impound report, required by our policy and procedure; and I checked the registration on the car, and it was registered to Mr. McCutcheon.

Q You saw the registration?

A Yes, sir.

Q You don't know how many people had access to it; you don't know how many people besides him had access to it, do you?

A I have no idea.

Q When you went in the trunk, you showed us a photograph of a clean, empty trunk, with a bag in it and a CB; correct?

A No.

Q You didn't show me that photograph?

A I didn't show you a picture of a clean, empty trunk. You are just looking at one corner of the trunk. It shows at least four other items in there.

Q Actually, there were a lot more than that in there?

A You are looking at a portion, wires, CB and funnel.

Q Wasn't there a bunch of plumbing tools filling up the trunk, too?

A Yes. The rest of the trunk had a lot of other stuff in it.

A44

Q Didn't you move it?

A No. If you look at the picture, you can see where one picture starts and the other one lets off.

Q So the bag wasn't attempted to be hidden away or secreted?

A No, sir.

Q It was just sitting there like that?

A Yes.

Q I believe you said that you took these four bags of marijuana and put a tape, lengthwise around each one?

A I just taped them up and put them in the bag. The lab chemist would tape it up again.

Q Didn't you write all this writing on here?

A My writing is underneath. You can barely see it. They sealed it again.

Q The H on it and the lab numbers are not yours?

A No.

Q That is one and a half ounces, approximately?

A Whatever way it's stated on the lab report; I don't weigh it.

Q And in your experience as a detective, what department are you in?

A I'm with the Portsmouth Police Department.

Q What department, division?

A45

A I'm in plain clothes division. I'm assigned to Vice and Narcotics.

Q In your experience in the Vice and Narcotics Squad, that isn't an unusual amount for a person who uses marijuana to have, is it?

A It's hard to say. I see so many different amounts.

Q Would you call these nickel bags?

A No, sir. A nickel bag is usually -- those are nickel and dime bags.

Q This is a larger bag?

A Yes.

Q It may just be me, but it looks like these are different sizes?

A Yes. They look different to me, too.

Q They are not all the exact same size?

A No, sir.

Q In other words, the total amount, whatever it is, isn't divided into four equal divisions, from what you can eyeball?

A I see such a variety of different bags.

THE COURT: He is talking about are these equally distributed.

A No, sir. They don't appear to be.

A46

MR. BONDURANT:

Q And you kept both the bags of marijuana and the prescription drugs in your possession, and when did you take it to the lab?

A I will have to check my signature on the custody. I turned them over to the lab on the twenty-third.

Q September 23, 1980?

A Yes.

Q Between September 4, 1980 and September 23, 1980, where were they kept?

A We have a locked supply room up in the detective bureau, and at that time we had individual lockers, similar to what you might see in an airport, and they might have only one key to that; and I placed it in there and kept the key with me at all times.

Q You put them in your locker and kept the key with you?

A Yes, sir.

Q No one else had access to it?

A No one else can get to it.

Q You took them directly to the lab and kept them in your personal possession until that time?

A When I took them from the locker.

Q When you picked them up, when was that?

A47

A I have to again check the return. I picked them up from the chemist on 10/27/80.

Q Is this your initial right here?

A No, that is not. That's the certificate. The initial is up there, usually, when it's received by the clerk of the court.

Q Is there anything on here to show when you picked them up on 10/27/80?

A No.

Q That's your own record?

A This is a copy of the request, with the signature.

Q You signed one when you put it in and one when you took it out?

A Yes. It shows chain of custody while going to the lab for services.

Q And you kept them in your possession until you brought them to court?

A No, sir. When they are brought back from the lab, they are then turned in to property and evidence.

Q And they are held there under somebody's supervision?

A Yes. The procedure is the people who run property and evidence, each time they are removed, they must be signed out.

A48

Q And you picked them up and brought them here?

A I did at low court. In high court, they are brought over here.

Q Do you have the registration to the motor vehicle that you testified about?

A I don't believe so. I believe the only thing I have is my own copy that I made of the impound sheet.

Let me check for a second. No, I don't. I just looked at it at the time.

Q Was it a current registration; do you recall?

A I would assume so. I don't recall. I do recall running it on the computer and it coming back current in his name, through DMV.

Q And when you all asked him would he volunteer to let you search his trunk, he said all right, go ahead; is that right?

A Yes.

MR. BONDURANT: That's all I have.

* * * * * * * * *

MR. DAVIS: Commonwealth would rest, Your Honor.

MR. BONDURANT: Your Honor, we move to strike the Commonwealth's evidence, first of all, on the first charge of obtaining Hydromorphone,

a Schedule II drug, by false name.

Your Honor, the statute makes it against the law to -- "It shall be unlawful for any person to obtain or attempt to obtain any drug, or attempt to procure the prescription of any controlled substance or marijuana, by the use of a false name or the giving of a false name or false address."

THE COURT: He did both, apparently. The evidence before me is that he used a false name and a false address, and that was one thing that brought it to -- maybe he didn't use a false address.

MR. BONDURANT: I think his brother used the false address.

The point is that the doctor testified, and the Commonwealth has got to carry the burden all the way, and I don't think there is any question he used a false name.

However, the Commonwealth has to prove that he obtained the drug by using a false name, and Dr. Swan has clearly testified that the fact that he used his name did not in any way have anything to do with him giving the drug, because as a matter of fact, he gave him the

A50

same drug afterwards, when he used his real name, McCutcheon.

THE COURT: The whole thing, though, he was taking the same drug from another doctor. Dr. Swan testified to that. He was getting it from Dr. Durica.

I didn't let all the vials come in, but it was obvious what he was doing. He certainly got it from Dr. Durica and from Dr. Swan; and your motion to strike is overruled.

MR. BONDURANT: There is no evidence in this record that he was getting it from Dr. Durica, other than before he came to Dr. Swan.

THE COURT: The evidence before me, he gave a false name to get the drugs. That is the evidence before me.

He gave a name of Johnson, and his name is McCutcheon; and that was a false name.

MR. BONDURANT: All right, sir. In addition, we move to strike the evidence as to the felony charge.

THE COURT: I agree with you. I don't think that's enough marijuana. I think anybody could smoke it up in a few minutes. I don't think it's enough for a felony, and I agree with

A51

you there.

I will sustain the motion to strike as to the intent to distribute.

MR. BONDURANT: I want to put my client on, but I would like to call Dr. Swan back.

THE COURT: I think probably your defense -- well, I'm not saying what your defense is -- but what you have brought out so far would probably go to the mitigating circumstances.

If you want the record from Mrs. Jolly, I think she's got the record there, instead of calling Dr. Swan back.

MR. BONDURANT: I would like to have the opportunity to check the record and make my decision.

THE COURT: Do you want to go to lunch and do it at lunchtime?

MR. BONDURANT: I would like to finish, but I do need some time to check the record. I think the discrepancy is that the doctor clearly stated that McCutcheon was referred to him by Dr. Durica, and Dr. Durica was seeing him before.

If Dr. Durica gave him a medication before then, and then Dr. Swan got him after then and gave him the same medication, there is

A52

no proof he got it because of his name.

THE COURT: He said he wouldn't be giving it to him if another doctor was giving him the same prescription.

MR. BONDURANT: But there is no evidence that any doctor was giving him the same prescription.

THE COURT: He got a prescription under a false name. That's what the statute says.

MR. BONDURANT: He also got it under his correct name; and my point is that the statute is written by the legislature to prevent people from going in and using a false name and tricking the doctor into giving him drugs.

Dr. Swan said this man, no matter what name he presented, had physical symptoms calling for these drugs.

He gave it to him because he called himself Johnson; and he gave it to him because he called himself McCutcheon.

THE COURT: The language of the statute, what you are saying, goes into the mitigation of the punishment.

MR. BONDURANT: But the statute, Judge, says it's against the law to get it by using a false name. It doesn't say it's against the law to

get it and use it by using a false name.

THE COURT: No, sir. If you want to put any evidence on, it's up to you.

MR. BONDURANT: I would like to take enough time to review the doctor's testimony on that point, and give me the opportunity to call him back.

(Portions of Dr. Swan's testimony read by the Court Reporter.)

THE COURT: It doesn't change my opinion. Motion to strike is overruled.

If you want to put on any evidence, it's up to you.

* * * * * * * * *

DAVID J. McCUTCHEON, Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. BONDURANT:

Q State your name.

A Jimmy David McCutcheon.

Q Where are you now living?

A I live at 5652 Darby Close.

Q And are you employed?

A Yes, I am, now.

A54

Q Where?

A Churchland Plumbing.

Q And did you, last year or a year and a half ago, have an automobile accident?

A Yes, I did. I wrecked a three quarter ton Dodge wagon.

Q What kind of injuries did you receive?

A I broke my arm, fractured two ribs, two black eyes, busted side the head; these nerves and all; I don't know the proper name for it.

Q Did you go to a doctor?

A Yes, I did.

Q What doctor did you go to?

A Dr. Durica.

Q What did Dr. Durica treat you for?

A He treated me for the broken bones.

Q What did he give you, if anything?

A He just give me different medications. He's never give me no Dilaudid.

Q Did Dr. Durica refer you to Dr. Swan?

A Yes.

Q When you went to Dr. Swan, what did he give you?

A Dilaudid.

Q What name did you use when you went to

A-56

Dr. Durica?

A Jimmy David McCutcheon.

Q And that actually is your name?

A Yes.

Q What name did you use when you went to Dr. Swan?

A Jimmy David Johnson.

Q Could you explain to the Judge why you used that name?

A I had a brother that was a junkie, and he abused drugs; and I was ashamed of him; that's why.

Q When Dr. Swan gave you Dilaudid, did you sell it or take it yourself?

A I took it myself, for pain.

Q And at any time were you receiving any Dilaudid from any other doctor, for any other injuries?

A Not right then; later on, I got it one time when this was busted open across here; my whole head was busted open. I think it was just a few of them; it was two milligrams.

Q They were Dilaudid, and they were for pain?

A Yes, they were.

Q Who gave you those?

A I can't think of the other doctor's name.

Q Did you use the name, McCutcheon, then?

A56

A Yes.

Q Did you at any time induce Dr. Swan to give you any medication whatsoever, by giving him a false name? Did you give him a false name to get him to give you drugs?

A I give him a false name to get the drugs, because like I say, I was embarrassed to use my real name. I needed the drugs for pain.

Q Did you give him a false name that was not for your symptoms?

A No, I didn't.

Q The police arrested you outside the pharmacy; is that correct?

A Yes, it is.

Q Was it when you were walking to your car; is that correct, or getting ready to get in your car?

A I was inside my car.

Q Did they approach you with guns pulled?

A That's all I seen, was guns.

Q Is it true that you handed them the bottle and said, "I didn't know I did anything wrong"?

A The bottle was laying on the seat, and they told me to get out of the vehicle. They had the badges in one hand and the pistols in the other.

Q So you did what they said?

A57

A Yes.

Q You gave them the bottle?

A I don't know if I gave it to them. I think they picked it up after I got out.

Q You said you didn't think you did anything wrong?

A Right after we got to talking.

Q Is that true, that you didn't think you did anything wrong?

A That's true.

Q Did you give them the consent to search your car?

A Yes, I did.

Q Did they find this marijuana in there?

A Well, they pulled it out. I'm sure it was there.

Q How did that get in there?

A That morning I was taking the trash out. Where I live at, you have got all kinds of people there. I took the trash out and seen a bag laying beside the bushes, and I picked the bag up and looked at it and seen what was in it.

Q Was it those four separate bags?

A Yes. They was in a brown paper bag. I took it and locked it up in the trunk, because I didn't want

my kid or anybody else to find it.

Q Had your kid had any problem with the drugs at that time?

A Yes. He was caught in school smoking some marijuana with other kids, and I have caught him with some and flushed it down the toilet.

Q Was that the same morning you got arrested, you put it in your trunk?

A Not that particular morning; no. I put it in the trunk -- what I was going to do was face him with it and ask him was it his marijuana, and where he got it from and all; but anyway, it was late, and as time went back, I had a doctor's appointment.

MR. BONDURANT: That's all I have.

Answer Mr. Davis.

CROSS-EXAMINATION

EXAMINED BY MR. DAVIS:

Q Mr. McCutcheon, you were under the doctor's care of Dr. Swan, from January of 1980 until the present time; is that right; you are still under his care?

A Right.

Q During that time, he was prescribing you the drug Dilaudid on a regular basis; it was almost every month he was giving you Dilaudid?

A That's true.

A59

Q I want you to take a look at a couple of other vials by a couple of other doctors. These vials are also prescription drugs which you have received; is that not true?

A Yes, it is; but different milligrams and at different times.

Q They are Dilaudid?

A Yes, it is.

Q And one item in particular was prescribed by Dr. Choudhury and one by Dr. Warth?

A Yes.

Q You received these at the same time you were receiving Dilaudid from Dr. Swan?

A No. It was in that year period; right.

Q It was exactly the same month that you were receiving Dilaudid from Dr. Swan?

A I don't know if it was or not. I got them.

Q When you gave Dr. Warth and Dr. Choudhury your name, you gave the name as David McCutcheon on one occasion and Jimmy McCutcheon on the other occasion?

A Right. It's supposed to be Jimmy David; they put David down there.

Q Why is it you felt you give this doctor your correct name and not Dr. Swan?

A One was, when I was in the emergency room,

AGD

I gave them my driver's license. The reason I gave him the false name to start with was because my brother was a junkie.

Q Was it perhaps because you wanted to hide the fact that you were receiving Dilaudid on more than one prescription?

A No.

MR. DAVIS: The Commonwealth would introduce these vials into evidence.

THE COURT: Commonwealth's Exhibit 8.

MR. DAVIS:

Q You indicate that your brother is a junkie, and that he abuses pills; but isn't it also correct that you abuse pills quite a bit yourself? Isn't it correct that you also abuse pills?

A I don't abuse pills.

Q Do you have another explanation for all the pills found in the bag in the trunk of your car?

A Yes, I do. Bring them up here where I can see them. I can't see them from there.

Sleeping pills, bone bills for calcium; I have arthritis in both shoulders; this is for arthritis; all these here.

Q What are these?

A I don't know.

Q Aren't these speed?

A I don't know what they are.

Q How did these get into that little bag?

A I don't know.

Q You don't know. Jimmy Johnson isn't your correct name?

A No, sir.

Q Now, in regards to the marijuana that was found, you know what marijuana is, don't you?

A Yes; I know what it is. I mean, I'm not that familiar with it.

Q But you know when you see marijuana that it is marijuana?

A No. At the particular time I didn't know exactly what it was.

Q When you picked up those four bags, you didn't know what it was?

A I didn't know what it was.

Q Why did you take it into your protective custody?

A I had my doubts what it was.

Q Is it not true you knew it was marijuana?

A No; I didn't know exactly what it was.

Q When you had a conversation with the detectives earlier, did you know it was marijuana when

they were talking to you?

A They told me it was marijuana.

Q You didn't tell them it was marijuana?

A I don't think so.

Q But you were going to keep it, whatever it was, away from your kids; is that your story?

A Yes; my kid or anybody else's kid.

Q You found it out near the trash?

A Yes.

Q Why didn't you just throw it in the trash?

A I wanted to confront my kid with it and make sure he didn't have no parts of it. I wanted to find out.

Q You are telling this Court you didn't know it was marijuana?

A I didn't know exactly what it was. I had thought it was marijuana.

Q So you put the marijuana in along with your gun and along with the calculator and along with all these other pill bottles?

A Yes, I did. I locked them up in my trunk.

Q When did you do this?

A That same morning.

Q That very same morning, on November 4th, or September 4th?

A63

A Yes.

Q And why is it that you kept all these drugs in the trunk of your car?

A Because my kid, you know, was messing with dope and marijuana, and he had broke in my bedroom a couple of times, and I didn't want him to get any kind of drugs; so I locked them up in the trunk. It's the safest place for it.

Q You lock things up in the trunk, even when you don't know what they are?

A I don't know what they are.

Q You just put anything you find in the trunk of your car?

A Anything like pills, for safekeeping.

Q Is that also why you kept the empty bottles in the trunk of your car?

A Yes.

Q Even when they are empty, you keep them in the car also?

A Yes.

Q Do you have to go out to your car every time you take a pill?

A No. Most of the time I take the whole thing inside and bring it out the next day when I go to work.

Q Do you take your gun inside with you, too?

A Yes, sir; everything is in the bag.

Q What purpose does that calculator serve you?

A See, I do plumbing work. I have to have it to estimate jobs with. I go out daytime, nighttime, to estimate jobs. You got to have a calculator to figure how much money it's going to take to do it.

MR. DAVIS: I have no further questions.

EXAMINED BY THE COURT:

Q Does your son go to school?

A Yes, sir. He goes to Maury High School now, but at that time he went to Churchland Junior High School.

Q How long have you and your wife been separated?

A Three years; he was up here with me and he got in trouble over some drugs.

Q When was that?

A He was taken to court the seventh. He was -- it was in January -- but way before then when he got in trouble.

Q He went to visit your wife then?

A It was a court order. He was going to Beaumont.

Q When did he go with your wife, in January of '80?

A '81.

A65

THE COURT: That's all.

REDIRECT EXAMINATION

EXAMINED BY MR. BONDURANT:

Q Is this the hospital bill that you brought me for your son?

A That's only one of them.

Q This is from December 31, 1980 until January 7, 1981?

A Right. Prior to that he was taking treatment at Maryview every week for almost a year.

Q Is this the bill from Maryview, along with the other problem?

A Yes.

Q And how old are you, Mr. McCutcheon?

A Thirty-six.

THE COURT: Defendant's Exhibit A.

MR. BONDURANT:

Q You say you took the drugs out of your medicine cabinet and put them in the bag, that you were receiving legally from doctors?

A Right.

Q And what Mr. Davis has referred to, are these legal prescriptions?

A Right.

Q Do you have arthritis in your shoulder?

A66

A I sure did, for five years.

Q The Dilaudid introduced in evidence just now, one is in April and one is in May, from Dr. Choudhury and Dr. Warth or somebody from Virginia Beach; these two right here?

A Right.

Q Were you receiving these at the same time that Dr. Swan gave you that medication on the 4th of September?

A It was the same time.

Q Was it the same year?

A The same year.

Q About the same month?

A I don't know.

Q They seized these out of your car and brought them to court today?

A Right.

Q They are empty?

A Right.

Q Were they empty on September 4th?

A Right.

Q So you weren't taking these at the same time you were taking the ones Dr. Swan gave you?

A No.

Q And your brother was a patient of Dr. Swan's

at one time?

A Yes, sir.

Q His name is McCutcheon?

A Right.

Q He wasn't a patient of Dr. Choudhury and Dr. Warth, was he?

A No.

Q I show you a prescription from Dr. Swan to Jimmy McCutcheon, dated October 22, 1980, for Dilaudid. Again, this was after you were arrested; is that correct?

A Yes, sir.

Q Was this for the same symptoms you had been having, that Dr. Swan gave you these for?

A Yes.

MR. BONDURANT: We move to introduce that, Judge.

THE COURT: Defendant's Exhibit B.

MR. BONDURANT: That's all the questions I have.

RECROSS-EXAMINATION

EXAMINED BY MR. DAVIS:

Q Are you denying, Mr. McCutcheon, that you received Dilaudid from Dr. Swan for the most of January and all the way through September; you were receiving Dilaudid every month, weren't you?

A68

A No.

Q I have the record.

A I'm denying it.

Q Are you denying that you received Dilaudid from him all those months?

A Say the month again.

Q From January through September 1980, you were receiving Dilaudid?

A No, I wasn't.

Q He was incorrect from his notes?

A Yes.

Q He was incorrect, that on the 24th of April he prescribed you forty pills of Dilaudid?

MR. BONDURANT: He just asked him, isn't it true that every month you got --

THE COURT: Was it every month?

MR. DAVIS: Every month, Judge.

A No, it wasn't, either.

MR. DAVIS: On April 24th -- there was another date in May that I recall myself.

MR. BONDURANT: I don't recall any of those.

THE COURT: Do you have the record there?

MR. DAVIS: I would have to call the

doctor back.

THE COURT: Never mind.

MR. DAVIS:

Q Did you tell Dr. Swan that you had seen Dr. Sutelan?

A He's an ear specialist.

Q Did you tell him that he had prescribed you prescription drugs?

A He was treating me for two different things.

Q Did you tell Dr. Swan that you were being prescribed drugs?

A No. It's two different drugs, two different reasons.

Q Did you tell Dr. Swan you were prescribed drugs by Dr. Warth?

MR. BONDURANT: I object to that.

THE COURT: He opened the door. He is proving something to me.

MR. DAVIS:

Q Did you tell Dr. Swan you received prescription drugs from Dr. Thomas in July 1980?

A No, I didn't. That's two different reasons. That's for arthritis.

Q You used different names on both occasions, didn't you?

A70

A Yes.

Q So in the course of those nine months that Dr. Swan was seeing you, you saw at least five different physicians and received prescription drugs from five different physicians, Dr. Warth, Dr. Thomas, Dr. Sutelan, Dr. Swan and Dr. Durica?

A Yes; but all different reasons.

Q The name you gave Dr. Swan was Jimmy Johnson, so he wouldn't know?

MR. BONDURANT: That's a conclusion.

THE COURT: Not only is it a conclusion, but it's very dangerous to his health, because everybody wants to know a medical history. This man is not being fair to himself.

MR. BONDURANT: I don't think there's anything wrong. I agree with that, except for the fact, the reason I asked Dr. Swan is there such a thing as a clearing house, if the guy said his name was Jesus Christ, there is nothing Dr. Swan could do to try to check on it.

THE COURT: He checked on it. He found it. You missed one thing he said. He did check on it, and he had a reason to check on it.

MR. BONDURANT: I don't know what you are talking about.

THE COURT: Why did he call the police?

MR. BONDURANT: That's his prerogative. I think he testified he did it because he gave the wrong address.

MR. DAVIS: I have no other questions.

MR. BONDURANT: That's all we have.

* * * * * * * * *

THE COURT: I think this man is being unfair to himself and the doctors and the whole community. What he has done is illegal, and it's certainly dangerous from the medical standpoint.

MR. BONDURANT: The statute is very, very unclear; and in addition to that, I'm renewing my motion to strike and adding a new reason to that: That the statute is unconstitutional on the grounds it's too vaguely written.

I agree with Your Honor that he is unfair to himself and all that; but the question of whether or not he is a felon because he got a drug that he needed and deserved, that's what bothers me.

The possession is one thing, but to convict him of a felony on something like this, I think it's just not enough.

THE COURT: The legislature says it's enough, and in my opinion, it is very clear, by use of a false name, and it's clear he admitted he gave a false name.

On Indictment 30,861, charging you with obtaining drugs under a false name, I find you guilty, which is a felony; and on the second count, I find you guilty of possession of marijuana, a misdemeanor.

MR. BONDURANT: I would like a presentence report.

THE COURT: On motion of your attorney, I will refer it for a presentence report.

* * * * * * * * * *

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MR. DAVIS: The Commonwealth would also

introduce the certificate of analysis which was filed with the Corut in the requisite number of days, with regard to Item Number 1, Commonwealth's Exhibit Number 3, the results being that the tablets contained Hydromorphone, a Schedule II drug.

THE COURT: Commonwealth's Exhibit 4.

A74

on probation.

Stand up, Mr. McCutcheon. On Indictment Number 30,861, you having been found guilty of obtaining drugs with false prescription, do you want to make a statement before I pronounce sentence?

Nothing being said, I sentence you to three years in the State penitentiary.

On the possession of marijuana, I sentence you to thirty days in jail, but that shall run concurrently with the three years.

If you want to appeal and you cannot afford an attorney, I will appoint Mr. Bondurant to perfect your appeal.

MR. BONDURANT: He can't afford one.

THE COURT: Let the record show I will appoint Mr. Bondurant to perfect the appeal. Mrs. Jolly, prepare the record.

MR. BONDURANT: Will you set a bond?

THE COURT: Fifty thousand dollars.

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A75

April 7, 1981

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH ON THE 7TH DAY OF APRIL IN THE YEAR OF 1981.

COMMONWEALTH OF VIRGINIA	)	Upon an Indictment for OBTAINED CONTROLLED DRUGS FALSELY & POSSESSION OF MARIJUANA, CRIMINAL DOCKET NO. 30861 APRIL term, 1981
V.	)	
DAVID JIMMY McCUTCHEON	)	

ATTORNEY FOR THE COMMONWEALTH: LARRY DAVIS
ATTORNEY FOR THE ACCUSED: WALTON BONDURANT

( ) HERETOFORE APPOINTED BY THE COURT (xx) OF DEFENDANT'S OWN CHOOSING

FELONY TRIAL ORDER

This day came the Attorney for the Commonwealth, and David Jimmy McCutcheon age 36 who stands indicted for a felony, to-wit: Obtained Hydromorphone-, a Schedule II Controlled substance, by using a False name and possess with intent to manufacture, sell, give, and distribute Marijuana., a Schedule II Controlled Substance,

and came also Walton Bondurant, his attorney, said attorney being of the defendant's own choosing.

Whereupon, the accused was arraigned, and after private consultation with his counsel, tendered in person, his plea of "Not Guilty" to the indictment. And thereupon, after having been first advised by his attorney and by the Court, of his right to a trial by jury, and with the concurrence of the Attorney for the Commonwealth, and of the Court here entered of

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record, the Court proceeded to hear and determine the case without the intervention of a jury, as provided by law. And the Court having fully heard the evidence and argument of counsel, finds the accused guilty of of Count One of the Indictment and Not Guilty of Count Two of the indictment.

April 7, 1981

The Court, on motion of the defendant, by counsel, before fixing punishment or imposing sentence, directs the Probation Officer of this Court to investigate and report to the Court as prescribed by law , and this case is Continued.

The Court certifies that the accused and his counsel, were present, in person, at every stage of the proceedings. ~~Xxxxxxxx services said attorney is allowed an attorney's fee of xxxxxxxxxxx pursuant to Section 19.2-163 of the Code of Virginia~~

Court Reporter - Leslie F. Jolly

~~And the accused is remanded to jail.~~

And the bond of the accused, together with surety thereon, is continued in effect.

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A COPY, TESTE: [illegible], CLERK OF THE CIRCUIT COURT OF THE CITY OF [illegible], VIRGINIA