

COURT OF APPEALS  
DELAWARE COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

ESTELLA XU

Defendant-Appellant

:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. W. Scott Gwin, J.

Hon. Patricia A. Delaney, J.

Case No. 15 CAA 11 0094

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Court of Common  
Pleas, Case. No. 15CRI010029A

JUDGMENT:

Affirmed/Reversed in Part and  
Remanded

DATE OF JUDGMENT:

December 16, 2016

APPEARANCES:

For Plaintiff-Appellee

DOUGAS DUMOLT  
140 North Sandusky Street  
Delaware, OH 43015

For Defendant-Appellant

TERRENCE K. SCOTT  
250 East Broad Street  
Suite 1400  
Columbus, OH 43215

*Farmer, P.J.*

{¶1} On January 23, 2015, the Delaware County Grand Jury indicted appellant, Estella Xu, on one count of engaging in a pattern of corrupt activity in violation of R.C. 2923.32 and eight counts of promoting prostitution in violation of R.C. 2907.22. All these counts carried human trafficking specifications pursuant to R.C. 2941.1422 and forfeiture specifications pursuant to R.C. 2941.1417. Appellant was also indicted on three counts of practicing medicine without a certificate in violation of R.C. 4731.41 and three counts of money laundering in violation of R.C. 1315.55, all containing forfeiture specifications pursuant to R.C. 2941.1417. Said charges arose from activities involving three massage parlors. Appellant was charged along with two codefendants, her sister, Qing Xu, and Qing's husband, Xiaoshuang Chao.

{¶2} On March 9, 2015, appellant filed a motion for relief from prejudicial joinder from being tried along with her codefendants. A hearing was held on April 1, 2015. By judgment entry filed May 5, 2015, the trial court denied the motion.

{¶3} A jury trial commenced on August 12, 2015. The jury found appellant guilty as charged. By judgment entry filed October 27, 2015, the trial court merged some of the counts and sentenced appellant to an aggregate term of ten years in prison.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE TRIAL COURT ABUSED ITS DISCRETION BY PERMITTING ESTELLA XU'S TRIAL TO BE JOINED WITH CODEFENDANTS QING XU'S AND XIAOSHUANG CHAO'S TRIAL. FIFTH AND FOURTEENTH AMENDMENTS TO THE

UNITED STATES CONSTITUTION; ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION; CRIM.R. 8(B); CRIM.R. 14."

II

{¶6} "THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT THE PRACTICING MEDICINE-WITHOUT-A-LICENSE CONVICTION UNDER R.C. 4731.41 IS A STRICT LIABILITY OFFENSE AND PREVENTED ESTELLA XU FROM PRESENTING A COMPLETE DEFENSE WHEN IT EXCLUDED THE ADMISSION OF HER CALIFORNIA MASSAGE-LICENSE CERTIFICATE, WHICH WOULD HAVE PROVIDED THE JURY AN OPPORTUNITY TO ASSESS HER MENTAL STATE. FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16, OF THE OHIO CONSTITUTION."

III

{¶7} "THE TRIAL COURT COMMITTED PLAIN ERROR IN VIOLATION OF MS. XU'S RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION, ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION, AND R.C. 2941.25, WHEN IT IMPOSED POSTRELEASE CONTROL FOR MERGED COUNTS 3, 4, 6, 7, 8, 9, 11, 12, 14, AND 15."

I

{¶8} Appellant claims the trial court erred in denying her motion to sever her trial from the trials of the other two codefendants, as the defendants had defenses that contradicted each other and could not be fully explored in a joint trial. Appellant also claims the trial court improperly excluded evidence of her California massage therapy license. We disagree.

{¶9} Crim.R. 14 governs relief from prejudicial joinder and states the following in pertinent part:

If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires. In ruling on a motion by a defendant for severance, the court shall order the prosecuting attorney to deliver to the court for inspection pursuant to Rule 16(B)(1) any statements or confessions made by the defendants which the state intends to introduce in evidence at the trial.

{¶10} Crim.R. 8(B) governs joinder of defendants and states the following:

Two or more defendants may be charged in the same indictment, information or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses, or in the same course of criminal conduct. Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count.

{¶11} The decision to grant severance rests in a trial court's sound discretion. *State v. Torres*, 66 Ohio St.2d 340 (1981). In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217 (1983).

{¶12} A hearing on the motion was held on April 1, 2015. At the start of the hearing, the trial court qualified an interpreter and all defense counsel indicated their satisfaction with the interpreter. April 1, 2015 T. at 5-9. The trial court then entertained the merits of the motion which included arguments of possible finger-pointing of one against the other and the spillover of potentially prejudicial evidence. *Id.* at 10-14. We note the spillover argument is diminished in merit since one of the codefendants, Mr. Chao, was acquitted of the charges.

{¶13} In its May 5, 2015 judgment entry denying the motion to sever, the trial court stated the following:

The Defendants are all charged in a RICO count of Engaging in a Pattern of Corrupt Activity involving the operation of massage parlors for purposes of prostitution. As in all cases involving an enterprise, different individuals may have different levels of participation or involvement.

The Defendants failed to affirmatively show prejudice by joinder. The Court is not convinced the jury cannot make a reliable judgment about the relative culpability of each Defendant. Nor did counsel for the Defendants establish that their defenses were mutually exclusive.

{¶14} We concur with the trial court's analysis that because both women were charged with engaging in a pattern of corrupt activity, the spillover effect argument was negated. We will address the exclusion of appellant's California massage therapy license in the next assignment of error.

{¶15} Upon review, we find no undue prejudice sufficient to sever the trials. The trial court did not abuse its discretion in denying the motion for severance.

{¶16} Assignment of Error I is denied.

## II

{¶17} Appellant claims the trial court incorrectly found R.C. 4731.41, practicing medicine without a certificate, was a strict liability statute requiring no mens rea to be proven. We disagree.

{¶18} R.C. 4731.41 governs practice of medicine and surgery without certificate. Subsection (A) states the following:

No person shall practice medicine and surgery, or any of its branches, without the appropriate certificate from the state medical board to engage in the practice. No person shall advertise or claim to the public to be a practitioner of medicine and surgery, or any of its branches, without a certificate from the board. No person shall open or conduct an office or other place for such practice without a certificate from the board. No person shall conduct an office in the name of some person who has a certificate to practice medicine and surgery, or any of its branches. No person shall

practice medicine and surgery, or any of its branches, after the person's certificate has been revoked, or, if suspended, during the time of such suspension.

A certificate signed by the secretary of the board to which is affixed the official seal of the board to the effect that it appears from the records of the board that no such certificate to practice medicine and surgery, or any of its branches, in this state has been issued to the person specified therein, or that a certificate to practice, if issued, has been revoked or suspended, shall be received as prima-facie evidence of the record of the board in any court or before any officer of the state.

{¶19} In *State v. Wilson*, 5th Dist. Delaware No. 90-CA-38, 1991 WL 115985, \*2 (June 13, 1991), citing *State v. Cheraso*, 43 Ohio App.3d 221 (11th Dist.1988), this court reviewed a statute on strict liability and concurred that " 'no person shall ...' was plainly indicative of a legislative intent to impose strict liability." However, we note in its jury instructions, the trial court gave a charge on the mens rea of recklessness. T. at 2082-2083.

{¶20} As for the California massage therapy license, it appears appellant attempted to argue that she was mistaken and believed her California license was valid in Ohio, therefore her action was reckless. T. at 134-140. Appellant also appears to have conceded that the California license was not valid in Ohio and there was no reciprocity between Ohio and California. *Id.*

{¶21} A "mistake of law" "happens when a person, having full knowledge of the facts comes to an erroneous conclusion as to their legal effect. It is a mistaken opinion or inference, arising from an imperfect or incorrect exercise of judgment on facts as they are real." 73 Ohio Jurisprudence 3d, Payment and Tender, Section 74, at 295 (1986). *See Consolidated Management, Inc. v. Handee Marts, Inc.*, 109 Ohio App.3d 185,189 (8th Dist.1996). "It is well-settled that the mistake-of-law defense is not recognized in Ohio." *State v. Pinkney*, 36 Ohio St.3d 190, 198 (1988).

{¶22} Upon review, we find R.C. 4731.41 is a strict liability statute, and appellant received the benefit of any doubt as to this issue via the jury charge on "reckless."

{¶23} Assignment of Error II is denied.

### III

{¶24} Appellant claims the trial court erred in imposing postrelease control for merged Counts 3, 4, 6, 7, 8, 9, 11, 12, 14, and 15. We agree.

{¶25} In its judgment entry filed October 27, 2015, the trial court stated the following:

The defendant is notified that as part of this sentence after completion of the prison term, she shall be subject to a mandatory period of supervision, Post-release Control of five years as to Counts One, Two, Three, Four, Five, Six, Seven, Eight, and Nine, and she may be subject to an optional period of supervision, Post-release Control of three years as to Counts Ten, Eleven, Twelve, Thirteen, Fourteen, and Fifteen.



{¶26} The trial court merged Counts 2, 3, and 4 together, Counts 5, 6, 7, 8, and 9 together, Counts 10, 11, and 12 together, and Counts 13, 14, and 15 together. The state elected sentencing on Counts 2, 5, 10, and 13.

{¶27} The state argues the trial court did not impose postrelease control, but merely notified appellant of postrelease control. However, the state concedes postrelease control cannot be aggregated and only one period of postrelease control applies i.e., five years. The trial court is ordered to file a nunc pro tunc entry correcting the postrelease control notification.

{¶28} Assignment of Error III is granted.

{¶29} The judgment of the Court of Common Pleas of Delaware County, Ohio is hereby affirmed in part and reversed in part, and the matter is remanded to said court for further proceedings consistent with this opinion

By Farmer, P.J.

Gwin, J. and

Delaney, J. concur.

SGF/sg 1027