

**BEFORE THE KANSAS STATE BOARD OF PHARMACY**

In the Matter of )  
 )  
Katie Surowski, R.Ph, )  
 )  
Respondent. )  
\_\_\_\_\_ )

Case No. 07-52

Filed

SEP 17 2009

KANSAS STATE  
Board of Pharmacy

**SUMMARY ORDER RESTRICTING LICENSEE FROM  
DISPENSING ANY PRESCRIPTION IN KANSAS**

This matter is before the Kansas State Board of Pharmacy (the "Board") pursuant to the Consent Order entered by the Board upon the stipulated agreement of Licensee Katie Surowski, R.Ph. ("Licensee") and made effective during the five (5) year period from December 12, 2007 through December 11, 2012.

In relevant part, the Consent Order directed Licensee to participate in the Committee on Impaired Provider Practice ("CIPP") program from December 12, 2007 to December 12, 2012 and placed Licensee's Kansas license to practice pharmacy (No. 1-13879) on probation for the duration of this five (5) year period. See Consent Order at pp. 3-4. Paragraph 25 of the Consent Order further expressly states:

"Respondent agrees that if the Board receives any report showing that Respondent is out of compliance with any of the terms of this consent order, the Board, in its sole discretion, without the necessity of a hearing, may order Respondent to be restricted from dispensing any prescription in Kansas for the entirety of the period of probation or during the part of the probationary period

remaining after the Board receives the report of non-compliance.”

*See* Consent Order at p. 4.

The Board has received reports that Licensee is not in compliance with her obligation to participate in the CIPP program through December 11, 2012. These reports include Licensee’s written admission that she has not entered treatment as recommended and that she understands if she is “kicked out” of the CIPP program as a result of her failure to participate in such treatment.

Under the circumstances, the Board finds that Licensee Katie Surowski, R.Ph. has consented to the issuance of this order without prior notice or opportunity to be heard; that Licensee not complied with her obligation to participate in the CIPP program until December 12, 2012 as required under the Consent Order; and that such noncompliance warrants an immediate order restricting Licensee Katie Surowski, R.Ph. (Kansas License No. 1-13879) from dispensing any prescription in the State of Kansas for the remainder of her probationary period.

IT IS, THEREFORE, ORDERED AND DECREED that Katie Surowski, R.Ph. (Kansas License No. 1-13879) shall be immediately restricted from dispensing any prescription in the State of Kansas through December 11, 2012.

Pursuant to the provisions of K.S.A. 77-542(a), if Licensee desires to contest this agency action, a written request for a hearing must be filed with the Kansas State Board of Pharmacy, Landon State Office Building, 900 S.W. Jackson Street, Room 560, Topeka, KS 66612-1231, within eighteen (18) days after the date this Summary Order was mailed. In the event Licensee does not request a hearing, this Summary Order shall

become a final order immediately upon expiration of the deadline for filing a written request for a hearing. If this Summary Order becomes a final order, any petition for judicial review shall be mailed or personally delivered to Debra Billingsley, Executive Secretary, Kansas State Board of Pharmacy, Landon State Office Building, 900 S.W. Jackson Street, Room 560, Topeka, KS 66612-1231.

Dated this 4th day of September, 2009.

Kansas State Board of Pharmacy

By: Shirley T. Arck  
Shirley T. Arck, Pharm. D.  
Investigative Member


**CERTIFICATE OF SERVICE**

I hereby certify that a genuine copy of the above and foregoing **SUMMARY ORDER RESTRICTING LICENSEE FROM DISPENSING ANY PRESCRIPTION IN KANSAS** was deposited in the United States mail, postage prepaid, on this 11 day of September, 2009, addressed to Licensee and the Board's General Counsel as follows:

Katie Surowski, R.Ph.  
1836 Cassell Road  
Manhattan, Kansas 66502

Randall J. Forbes  
Frieden & Forbes  
555 South Kansas Ave., Suite 303  
Topeka, Kansas 66603

Debra Billingsley  
Debra Billingsley  
Executive Secretary  
Kansas State Board of Pharmacy

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No. 100,121

## IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,

*Appellant,*

v.

KATHERINE SUROWSKI,

*Appellee.*

## SYLLABUS BY THE COURT

1. Several statutes are examined, and it is held that Lortab, which contains the narcotic hydrocodone, a schedule III drug listed in K.S.A. 65-4109(d), is not included among the drugs whose unlawful possession is classified as a misdemeanor under the controlled substance statutes.

2. Under the plain language of K.S.A. 2008 Supp. 65-4160(a), possession of narcotics is a felony. Because Lortab contains hydrocodone, which is a narcotic, the unlawful possession of Lortab is a proscribed felony under K.S.A. 2008 Supp. 65-4160(a).

Appeal from Geary District Court; DAVID R. PLATT, judge. Opinion filed July 17, 2009. Reversed and remanded.

*Tony Cruz*, assistant county attorney, and *Steve Six*, attorney general, for appellant.

*Linda M. Barnes-Pointer*, of Junction City, for appellee.

Before McANANY, P.J., GREEN and CAPLINGER, JJ.

CAPLINGER, J.: The State challenges the order of the district court dismissing Count I against defendant Katherine Surowski. The State argues the district court erroneously concluded that the unlawful possession of Lortab is a misdemeanor under K.S.A. 65-4019(d) rather than a felony under K.S.A. 2006 Supp. 65-4160(a). We agree, and we find that under the plain language of K.S.A. 2006 Supp. 65-4160(a), possession of narcotics is a felony. Because neither party disputes that Lortab contains hydrocodone, a narcotic, the district court erred in finding that possession of Lortab is not a felony under K.S.A. 2006 Supp. 65-4160(a).

*Factual and procedural background*

Count II charged Surowski with theft in violation of K.S.A. 21-3701(a)(1). Count I charged that

Surowski

"unlawfully, feloniously and intentionally possessed, or exerted control over, an opiate drug [to wit: *hydrocodone, a schedule II substance identified at K.S.A. 65-4107(b)(1)(N)*], in violation of K.S.A. 2006 Supp. 65-4160(a): POSSESSION OF HYDROCODONE, a drug severity level 4, nonperson felony."

At the preliminary hearing, Kelly Goracke, a Wal-Mart manager, testified that Surowski was observed diverting hydrocodone from the Junction City Wal-Mart pharmacy where she was employed as a licensed pharmacist. Goracke further testified that Surowski subsequently admitted to taking 20-40 pills per month.

Following the preliminary hearing, Surowski moved to dismiss Count I, arguing that although she was charged with possession of a schedule II narcotic under K.S.A. 65-4107(b)(1)(N), she admitted only to possessing Lortab, a schedule III narcotic listed in K.S.A. 65-4109(d)(4). Surowski contended she was improperly charged with a felony under K.S.A. 2006 Supp. 65-4160(a) because possession of a schedule III narcotic is only a class A misdemeanor under K.S.A. 65-4127c.

The State argued that because both hydrocodone and Lortab, which contains hydrocodone and acetaminophen, are narcotics, and because K.S.A. 2006 Supp. 65-4160 makes it a felony to possess *any* narcotic, Surowski was appropriately charged with a felony.

The district court agreed with Surowski, finding that possession of Lortab, hydrocodone, a schedule III drug listed in K.S.A. 65-4109(d), is a misdemeanor rather than a felony. The court therefore dismissed Count I and invited the State to refile an amended charge.

#### Discussion

In this appeal of the dismissal of Count I, the State challenges the district court's determination that unlawful possession of Lortab constitutes a misdemeanor rather than a felony under K.S.A. 65-4160(a).

We conduct a de novo review of the evidence when considering a trial court's probable cause finding. *State v. Kraushaar*, 264 Kan. 667, 670, 957 P.2d 1106 (1998). Further, we exercise unlimited review over a question of statutory interpretation. *Foster v. Kansas Dept. of Revenue*, 281 Kan. 368, 374, 130 P.3d 560 (2006). In conducting this review, we are mindful of the fundamental rule of statutory construction, *i.e.*, the intent of the legislature governs when that intent can be ascertained from the statute. Further, when a statute is plain and unambiguous, we must give effect to the intention of the legislature rather than determine what the law should or should not be. *State v. Moler*, 269 Kan. 362, 363, 2 P.3d 773 (2000).

Surowski was charged with a felony under K.S.A. 2006 Supp. 65-4160(a), which provides:

"Except as authorized by the uniform controlled substances act, it shall be unlawful for any person to possess or have under such person's control any opiates, opium or narcotic drugs, or any stimulant designated in subsection (d)(1), (d)(3) or (f)(1) of K.S.A. 65-4107 and amendments thereto. Any person who violates this subsection shall be guilty of a drug severity level 4 felony." (Emphasis added.)

The district court concluded that a substance must be listed in K.S.A. 65-4107(d)(1), (d)(3), or (f)(1) in order to constitute a felony under K.S.A. 65-4160(a). We disagree.

Initially, we note that the title of K.S.A. 2006 Supp. 65-4160 indicates its application to several

categories of drugs: "Unlawful acts relating to possession of opiates, opium, narcotic drugs or designated stimulants; penalties." (Emphasis added.) The text of K.S.A. 2006 Supp. 65-4160(a) is equally clear, indicating its application to: (1) opiates, (2) opium or narcotic drugs, and (3) stimulants designated in K.S.A. 65-4107(d)(1), (d)(3), or (f)(1) (i.e., amphetamine, methamphetamine, and immediate precursors to amphetamine and methamphetamine). The statute does not suggest, as the trial court found, that a substance must be listed in K.S.A. 65-4107 in order to constitute a felony, except as it pertains to certain stimulants.

Significantly, both parties agree that Lortab is a narcotic and not a stimulant, and thus it appears unlawful possession of Lortab constitutes a felony under 65-4160(a).

Nevertheless, Surowski argues that because Lortab is a schedule III drug identified in K.S.A. 65-4109(d) (4) (hydrocodone), rather than a schedule II drug identified in K.S.A. 65-4107, unlawful possession of Lortab is merely a misdemeanor. However, K.S.A. 65-4109 makes no reference to punishment and does not state that possession of a schedule III drug constitutes a misdemeanor. Likewise, K.S.A. 65-4107, with violation of which Surowski was originally charged, makes no reference to punishment and does not state that possession of a schedule II drug constitutes a felony. And, as discussed, K.S.A. 2006 Supp. 60-4160(a) provides that possession of "narcotics" constitutes a felony and refers to K.S.A. 65-4107 only as it pertains to certain stimulants.

We reject Surowski's suggestion that the drug schedules create a graduated system of punishment wherein schedule III drugs generally are classified as misdemeanors and schedule II drugs generally are classified as felonies. To hold otherwise would require that we infer language not found in the relevant statutes.

In addition, we note that K.S.A. 65-4162, which provides that the possession of certain substances is a misdemeanor, makes no reference to Lortab or other schedule III substances listed under K.S.A. 65-4109(d). Rather, the statute specifically refers to other K.S.A. 65-4109 substances, including, (1) depressants designated in K.S.A. 65-4109(b) and (c), (2) stimulants designated in K.S.A. 65-4109(e), (3) hallucinogens designated in K.S.A. 65-4109(g), and (4) anabolic steroids designated in K.S.A. 65-4109(f). The statute does not include substances listed under K.S.A. 65-4109(d), including Lortab, hydrocodone. Simply stated, if the legislature intended for the unlawful possession of schedule III substances listed in K.S.A. 65-4109(d) to constitute a misdemeanor, it could have included those substances in K.S.A. 65-4162.

Surowski also suggests that possession of what she terms "microscopic quantities" of a controlled substance should not be a felony. The State counters that proof of the possession of any amount of a controlled substance is sufficient to sustain a conviction even though such amount may not be measurable or useable. In support of this assertion, the State cites *State v. Brown*, 245 Kan. 604, 613-14, 783 P.2d 1278 (1989). However, *Brown* concerned whether possession of a small amount of an illegal substance is sufficient to establish intent to possess--not whether it supports prosecution as a felony.

In fact, our legislature has enacted a statutory provision relating to the issue raised by Surowski. K.S.A. 65-4164 provides that the unlawful possession the substances listed in K.S.A. 65-4113 is a misdemeanor. However, neither hydrocodone nor Lortab is included in K.S.A. 65-4113, which refers only to schedule V drugs containing a small amount of narcotics. Thus, Surowski may not avail herself of K.S.A. 65-4164.


In summary, under the plain language of K.S.A. 2006 Supp. 65-4160(a), possession of narcotics is a felony. Because neither party disputes that Lortab, which Surowski is alleged to have possessed,

contains a narcotic, the district court erred in finding that possession of Lortab is not a proscribed felony under K.S.A. 2006 Supp. 65-4160(a). Thus, the district court's dismissal of Count I is reversed.

Finally, although we have reversed the district court's determination that possession of Lortab is not a felony K.S.A. 2006 Supp. 65-4160(a), we note that on remand the State must nevertheless amend its complaint to charge the appropriate crime. As discussed, the original complaint specified that Surowski possessed "an opiate drug [to wit: hydrocodone, a schedule II substance identified at K.S.A. 65-4107(b)(1)(N)]," in violation of K.S.A. 2006 Supp. 65-4160(a). However, assuming the charge remains the same, the complaint must charge Surowski with felony possession of the narcotic drug Lortab, a schedule III substance identified at K.S.A. 65-4109(d)(4), in violation of K.S.A. 2006 Supp. 65-4160(a).

Reversed and remanded.

END

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Comments to: [WebMaster, kscases@kscourts.org](mailto:WebMaster_kscases@kscourts.org).

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URL: <http://www.kscourts.org/Cases-and-Opinions/opinions/ctapp/2009/20090717/100121.htm>.

**BEFORE THE KANSAS STATE BOARD OF PHARMACY  
900 SW JACKSON, STE. 560  
TOPEKA, KS 66612-1597**

IN THE MATTER )

OF )

KATIE SUROWSKI, R.Ph. )

RESPONDENT )

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Case No. 07-52

CONSENT ORDER

NOW, on this 12th day of December, 2007, the captioned case comes before the Kansas State Board of Pharmacy (Board) by agreement of Respondent, Katie Surowski, for the purpose of resolving this matter. The Board appears by Derenda J. Mitchell, Assistant Attorney General. Katie Surowski appears in person. The Board, upon mutual consent of the Respondent, finds as follows:

1. Respondent currently holds a pharmacist license number 1-13879.
2. The Board has jurisdiction over Respondent and is authorized to enter into this Consent Order in all respects.
3. Respondent admits to violations of the provisions of the Pharmacy Act of the State of Kansas, K.S.A. 65-1626 et seq., and of the rules and regulations of the Board, promulgated at K.A.R. 68-1-1a et seq.
4. Respondent was caught with narcotics at her work at the Wal-Mart pharmacy in Junction City, Kansas.
5. Respondent admits to "taking" Loritabs from her employer to ease the pain from migraines.



6. "Unprofessional conduct" means the unlawful possession of drugs and unlawful diversion of drugs to others. K.S.A. 65-1626(hh).

9. K.S.A. 65-1627(a)(3) provides for discipline for unprofessional conduct.

10. K.S.A. 65-1627(a) authorizes the Board to revoke, suspend, place in a probationary status, or deny a renewal of any license of any pharmacist for violations of K.S.A. 65-1627(a)(3).

11. Respondent is subject to discipline for unprofessional conduct.

12. In addition, the Board may issue a civil fine for violation of the provisions K.S.A. 65-1627 in an amount not to exceed \$5,000 for each violation.

13. In order to avoid the expense of a full adjudicatory hearing and to avoid the possibility of discipline greater than that issued herein, Respondent voluntarily enters into this agreement.

14. Respondent understands and waives all rights to notice, a hearing, an adjudication of facts and law, or any manner of review or reconsideration of the findings made herein.

15. Respondent further agrees and waives any right to review, reconsideration, appeal, or modification of any findings.

16. The Board retains the full right to discipline Respondent for any and all violations of the Kansas Pharmacy Act and any regulations promulgated thereunder.

17. Respondent consents to this Consent Order and understands that it is a final order of the Board, without rights of review, reconsideration, appeal or modification or to a formal notice of hearing.

18. In order to comply with this Consent Order, Respondent must first sign and return the Consent Order with her signature affixed to the Consent Order.

19. Respondent appeared personally at the Board's December 12, 2007 meeting and verbally promised to comply with the terms of this order.

20. The Board approved the consent order in reliance on her verbal assurances and promises to comply.

21. Respondent agrees to be under probation for a period of five years to conclude on December 12, 2012.

22. Respondent further agreed and has entered into an evaluation and treatment program as directed from time to time by the Committee on Impaired Pharmacy Practice (CIPP) and as approved from time to time by the Board and shall continue to cooperate fully with the recommendations and requirements of the persons managing or implementing the CIPP or as required by the Board.

23. Respondent understands and agrees that participation in the CIPP is totally at Respondent's expense.

24. Respondent further agrees that she will participate in the CIPP program from December 12, 2007 to December 12, 2012.

23. Respondent further agrees that during her probation from December 12, 2007 to December 12, 2012 she will refrain from ever serving as a pharmacist in charge.

24. Respondent further agrees that during her probation from December 12, 2007 to December 12, 2012, she will cease and desist from ever working alone in a pharmacy.

25. Respondent agrees that if the Board receives any report showing that Respondent is out of compliance with any of the terms of this consent order, the Board, in its sole discretion, without the necessity of a hearing, may order Respondent to be restricted from dispensing any prescription in Kansas for the entirety of the period of probation or during the part of the probationary period remaining after the Board receives the report of non-compliance.

26. The Respondent further agreed that the CIPP and any provider who evaluates or treats Respondent during her probation shall provide full and complete access to any and all records and documentation regarding Respondent's participation in any treatment program.

27. Respondent agreed and waived any right of hearing, appeal, notice, modification, reconsideration or review of any kind in this matter.

28. Respondent agreed and waived any right of privilege or confidentiality in the records submitted to or requested by the Board about Respondent and her involvement in with the CIPP or any provider treating Respondent through the CIPP.

29. Respondent agreed and it is hereby ordered that should the Board determine, in good faith, but in its sole and exclusive discretion, that the Respondent fails to comply with this order that the Board may initiate any proceeding authorized by law to discipline Respondent for his actions leading up to this order or any future actions.

WHEREFORE, THIS VOLUNTARY ORDER IS HEREBY MADE THE FINAL ORDER OF THE BOARD effective on the date indicated in the certificate of service.

Entered in Shawnee County, Kansas, December 12, 2007.

\_\_\_\_\_  
Chair, Kansas Board of Pharmacy

Approved by :

\_\_\_\_\_  
Katie Surowski

\_\_\_\_\_  
Date

**Certificate of Service**

This is to certify that on the \_\_\_ day of \_\_\_\_\_, 2008, a true and correct copy of the above and foregoing was sent by regular first-class mail, postage prepaid, addressed to:

Katie Surowski  
1836 Cassell Road  
Manhattan, Kansas 66502

Derenda Mitchell  
Assistant Attorney General  
Memorial Building  
120 SW 10<sup>th</sup> Street  
Topeka, KS 66612  
Disciplinary Counsel to the Board

Randall Forbes  
General Counsel to the Board  
Frieden and Forbes  
555 S. Kansas Ave.  
Topeka, KS 66601

\_\_\_\_\_  
On Behalf of the Board