

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Dominic Joseph Maga, D.O.,	:	
Appellant-Appellant,	:	
v.	:	No. 11AP-862
Ohio State Medical Board,	:	(C.P.C. No. 11CVF-03-3714)
Appellee-Appellee.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on April 19, 2012

Charles E. McFarland, for appellant.

Michael DeWine, Attorney General, and *Michelle T. Sutter*,
for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Appellant, Dominic Joseph Maga, D.O. ("Maga"), appeals the judgment of the Franklin County Court of Common Pleas affirming the decision of appellee, Ohio State Medical Board ("Medical Board"), to indefinitely suspend Maga's Ohio medical license, with a minimum suspension of 180 days. For the following reasons, we affirm the trial court's judgment.

{¶ 2} Maga assigns the following assignments of error:

[I.] When the Ohio State Medical Board failed to examine additional facts and circumstances for the presence of moral turpitude beyond a federal misdemeanor conviction by indefinitely suspending Maga's medical license, the trial court abused its discretion in upholding the suspension.

[II.] When the Ohio State Medical Board decision to indefinitely suspend Maga's medical license failed to be in accordance with the law, the trial court abused its discretion in upholding the suspension.

[III.] When the Ohio State Medical Board indefinitely suspended Maga's medical license by misapplying the term "moral turpitude" in O.R.C. §4731.22(B)(13) to Maga's federal misdemeanor conviction for failing to file income tax returns, the trial court abused its discretion in upholding the suspension.

{¶ 3} Maga was originally licensed in Ohio in 1972 to practice osteopathic medicine and surgery. Maga worked as an emergency room physician. A notice of opportunity was given to Maga, dated October 13, 2010, from the Medical Board. The notice proposed disciplinary action against Maga based upon five misdemeanor counts of willful failure to file income tax returns for which he was convicted by a jury in federal court on August 6, 2009 in the Southern District of Ohio. The district court judge imposed an 18-month term of incarceration.

{¶ 4} On December 21, 2010, Maga was given a hearing before a Medical Board appointed hearing examiner. The hearing examiner concluded that Maga's willful failure to file five consecutive tax returns, in violation of 26 U.S.C. 7203, constituted misdemeanor offenses involving moral turpitude. Under R.C. 4731.22(B)(13), the convictions warranted discipline by the Medical Board. The hearing examiner issued a report and recommendation recommending that Maga be indefinitely suspended with reinstatement contingent upon a period of probation and other conditions after at least 180 days. A hearing was held before the Medical Board and an entry of order was mailed March 11, 2011 adopting the recommendations of the hearing examiner. Maga appealed to the Franklin County Court of Common Pleas pursuant to R.C. 119.12. Both sides filed briefs and the trial court issued a decision on August 9, 2011 with a final order on September 12, 2011. The court affirmed the actions of the Medical Board. Maga timely appealed on October 17, 2011.

{¶ 5} Pursuant to R.C. 119.12, a reviewing trial court must affirm the order of an administrative agency if it is supported by reliable, probative, and substantial evidence and is in accordance with law. *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111

(1980). "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. "Substantial" evidence is evidence with some weight; it must have importance and value. *Our Place, Inc. v. Liquor Control Comm.*, 63 Ohio St.3d 570, 571 (1992).

{¶ 6} If a preponderance of reliable, probative, and substantial evidence exists, the common pleas court must affirm the administrative agency's decision. *Dudukovich v. Lorain Metro. Hous. Auth.*, 58 Ohio St.2d 202, 207 (1979).

{¶ 7} Considerable deference should be accorded to an agency's interpretation of rules the agency is required to administer. Further, an administrative rule that is issued pursuant to statutory authority has the force of law unless it is unreasonable or conflicts with a statute covering the same subject matter. *State ex rel. Celebrezze v. Natl. Lime & Stone Co.*, 68 Ohio St.3d 377 (1994).

{¶ 8} In reviewing an order of an administrative agency, an appellate court's role is more limited than that of a common pleas court reviewing the same order. It is incumbent on the common pleas court to examine the evidence. Such is not the charge of the appellate court. The appellate court is to determine only if the common pleas court has abused its discretion. *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.*, 40 Ohio St.3d 257, 261 (1988). "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 9} Moreover, when reviewing a medical board's order, courts must accord due deference to the board's interpretation of the technical and ethical requirements of the medical profession. The purpose of the General Assembly in providing for administrative hearings in particular fields was to facilitate such matters by placing the decision on facts with boards or commissions composed of people equipped with the necessary knowledge and experience pertaining to a particular field. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621-22 (1993).

{¶ 10} Maga's first assignment of error asserts that the trial court abused its discretion affirming the Medical Board's order when the Medical Board failed to examine

additional facts and circumstances for the presence of moral turpitude beyond a federal misdemeanor conviction.

{¶ 11} Disciplinary action against physicians by the Medical Board is governed by R.C. 4731.22(B)(13), which provides in part:

The board, by an affirmative vote of not fewer than six members, shall, to the extent permitted by law, limit, revoke, or suspend an individual's certificate to practice, refuse to register an individual, refuse to reinstate a certificate, or reprimand or place on probation the holder of a certificate for one or more of the following reasons:

(13) A plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a misdemeanor involving moral turpitude[.]

{¶ 12} Maga was convicted under 26 U.S.C. 7203, "Willful failure to file a return, supply information, or pay tax." 26 U.S.C. 7203 reads:

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor[.]

{¶ 13} It is undisputed that Maga was convicted of five counts of 26 U.S.C. 7203. Maga argues that these convictions alone do not constitute misdemeanors involving moral turpitude and that the Medical Board is required to find more evidence to conclude that Maga's actions in fact involved moral turpitude.

{¶ 14} Maga quotes our decision in *Rossiter v. Ohio State Med. Bd.*, 10th Dist. No. 01AP-1252 (Apr. 25, 2002):

[W]here moral turpitude is disputed, an independent review of the circumstances underlying criminal convictions is necessary to determine if they manifest the requisite lack of social conscience and depravity beyond any established criminal intent. [*Disciplinary Counsel v. King*, 37 Ohio St.3d 77, 78 (1988)].

{¶ 15} Maga erroneously argues that more evidence is required from the hearing officer beyond Maga's criminal convictions to prove moral turpitude. *Rossiter* is distinguishable from this case. We required that more evidence be reviewed in the *Rossiter* case because "[w]ith no analysis or citations, the trial court concluded that one who is convicted of failing to file income tax returns as required by federal law is guilty of a crime of moral turpitude." The offenses in *Rossiter* were the failure to file a single quarterly withholding form regarding the physician's employees and a single individual tax return. Maga, in contrast, willfully failed to file any tax returns for five consecutive years.

{¶ 16} Further, the actual rule set forth by the Ohio Supreme Court in *Disciplinary Counsel v. King*, 37 Ohio St.3d 77, 78 (1988), provides:

An examination of the plain language of DR 1-102(A)(3) reveals that the rule prohibits lawyers from engaging in illegal acts *involving* moral turpitude; it does not restrict its reach to illegal acts *of* moral turpitude. Accordingly, we hold that all the circumstances surrounding illegal conduct should be considered when determining whether a DR 1-102(A)(3) violation has occurred. (Emphasis sic.)

{¶ 17} The respondent in *King*, a lawyer, was disciplined under DR 1-102(A)(3) (engaging in illegal conduct involving moral turpitude).

{¶ 18} Where moral turpitude is disputed, the circumstance surrounding the illegal conduct should be considered. However, the elements of a conviction can be all the necessary circumstances to show moral turpitude in situations where a physician or lawyer has repeatedly violated the law. For instance, the elements leading to a misdemeanor conviction of five counts of domestic violence might constitute moral turpitude. We required an analysis of the surrounding circumstance in *Rossiter* because the trial courts finding of moral turpitude based on the conviction alone of failing to file only two federal forms, one an employee withholding form, could be found to involve less than moral turpitude.

{¶ 19} Maga also argues that the trial court erred by referring to immaterial facts that give no indication of any elements of moral turpitude. If the circumstances of a misdemeanor conviction are considered, they are not limited to underlying criminal

conviction but can encompass circumstances surrounding the conviction. The court in *King* made clear that the surrounding circumstances of the sexual affair in that case were factors in determining moral turpitude and not limited to the underlying circumstance of King calling the underage girl when told not to. Maga asserts that the trial court failed to conduct an independent review, and only considered the fact that Maga was convicted of a crime. It is clear from the decision that the trial court did look at the circumstances of the case. The trial court noted that "to deny a duty to file based upon a tax coding and to argue no culpability based on this interpretation, flies in the face of reason." (Sept. 9, 2011 Decision on Merits of Appeal, at 4-5.) No evidence indicated Maga relied on the professional advice of an accountant or an attorney or had some other reasonable excuse for failing to file income tax forms for five years.

{¶ 20} Therefore, Maga's arguments that the trial court's failure to conduct an independent review is grounds for reversal is without merit.

{¶ 21} The first assignment of error is overruled.

{¶ 22} Maga's second assignment of error asserts that the trial court abused its discretion in upholding the Medical Board's order because it is not in accordance with the law. Again, Maga argues that his offenses do not constitute moral turpitude. This argument is not well-taken as the hearing officer, the Medical Board, and the trial court all properly found moral turpitude as discussed above.

{¶ 23} Acts of moral turpitude, although not subject to exact definition, are characterized by baseness, vileness, or the depravity in private and social duties which man owes to his fellow man, or to society in general. *Cincinnati Bar Assn. v. Shott*, 10 Ohio St.2d 117, 130 (1967); *Disciplinary Counsel v. Burkhart*, 75 Ohio St.3d 188, 191 (1996). Such acts must be measured against the accepted standards of morality, honesty, and justice prevailing upon the community's collective conscience, as distilled by a similarly principled judiciary. *Id.*

{¶ 24} This court has before found that moral turpitude is generally defined as an "[a]ct or behavior that gravely violates moral sentiment or accepted moral standards of [the] community and is a morally culpable quality held to be present in some criminal offenses as distinguished from others." *Davidson v. State Med. Bd. of Ohio*, 10th Dist. No. 97APE08-1036 (May 7, 1998), quoting Black's Law Dictionary 698 (6 Ed.1991).

{¶ 25} The Medical Board stated in the incorporation of the report and recommendation, its rationale for finding moral turpitude:

Dr. Maga reasoned that his actions were not morally wrong because his individual master file contained a code that according to his research meant "1040 not required." However, the IRS alerted Dr. Maga in 2000 that the code was used for various different reasons, that it was not constant, and most importantly, it was "not an official determination by the Internal Revenue Service as to whether or not a taxpayer is required to file a return." At this point, Dr. Maga should have consulted an accountant, attorney, or the IRS for further clarification. Yet, it appears that Dr. Maga's "strength of his convictions, right or wrong" and "unconventional" beliefs got the better of him [referencing letters of support presented by Maga].

(Report and Recommendation, at 4.)

{¶ 26} The Medical Board even referenced Ohio Supreme Court precedent to show that Ohio has adopted a violation of 26 U.S.C. 7203 to constitute conduct involving moral turpitude, at least with an attorney. *Office of Disciplinary Counsel v. Bowen*, 38 Ohio St.3d 323 (1988).

{¶ 27} The trial court, in affirming the Medical Board's decision, examined the evidence and presented more reasoning why moral turpitude was found. The trial court stated that moral turpitude may shock the consciousness and "the term also encompasses matters of a more garden variety. A single breach of a law or of societal mores may not suffice. Repetitive conduct by an educated individual over a course of years does suffice to fit the definition as applied by the Board." (Decision on Merits of Appeal, at 7.) The trial court explained its reasoning why Maga's actions constituted moral turpitude. A great number of citizenry "would likely find an individual, who is in a prestigious profession, who earns far more than the average and who intentionally deprives the treasury of money due for at least five distinct years, to be a scofflaw who has exhibited moral turpitude." (Decision on Merits of Appeal, at 6-7.) The trial court did not abuse its discretion in affirming that moral turpitude existed.

{¶ 28} The second assignment of error is overruled.

{¶ 29} Maga's third assignment of error asserts that R.C. 4731.22(B)(13) is void for vagueness. Questions of law are reviewed de novo. The void-for-vagueness doctrine does not require statutes to be drafted with scientific precision. Rather, it permits a statute's certainty to be ascertained by application of commonly accepted tools of judicial construction, with courts indulging every reasonable interpretation in favor of finding the statute constitutional. The bar is not a high one, and a civil statute that is not concerned with the first amendment is only unconstitutionally vague if it is so vague and indefinite as really to be no rule or standard at all or if it is substantially incomprehensible. *Buckley v. Wilkins*, 105 Ohio St.3d 350, 2005-Ohio-2166, ¶ 19. R.C. 4731.22(B)(13) reads: "A plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a misdemeanor involving moral turpitude."

{¶ 30} Maga argues that moral turpitude has not been objectively defined by statute and therefore is unreasonably at the mercy of the subjective views of various courts and agencies. This argument is not well-taken. It is obvious that the legislature did not wish to define every situation that involves moral turpitude. This task was delegated to the Medical Board through R.C. Chapter 4731. It falls to the Medical Board to determine which offenses warrant license suspension. The fact that there may be difficulty in determining whether certain offenses are within the meaning of the statute does not render a statute void for vagueness. *Jordan v. De George*, 341 U.S. 223, (1951). R.C. 4731.22(B)(13) is not void for vagueness.

{¶ 31} The third assignment of error is overruled.

{¶ 32} Having overruled all of Maga's assignments of error, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

FRENCH and DORRIAN, JJ., concur.
