

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
MEDICINE,)
)
Petitioner,)
)
vs.) Case No. 12-1575PL
)
CHRISTOPHER CARTER, M.D.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On October 9, 2012, a duly-noticed hearing was conducted pursuant to section 120.57(1), Florida Statutes (2012), in Tallahassee, Florida, before Administrative Law Judge Lisa Shearer Nelson of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Laura L. Glenn, Esquire
John B. Fricke, Jr., Esquire
Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Christopher Carter, M.D., pro se
Inmate No. 20674-017
Federal Correctional Institution
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STATEMENT OF THE ISSUE

The issue to be resolved is whether Respondent, Dr. Christopher Carter, M.D. ("Respondent" or "Dr. Carter"), was convicted of, pled guilty, or pled nolo contendere to a crime directly related to the practice or the ability to practice medicine, in violation of section 456.072(1)(c), Florida Statutes (2009), and if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On February 20, 2012, the Department of Health ("the Department" or "Petitioner") filed a one-count Amended Administrative Complaint charging Respondent with having pleaded guilty to one count of possession of child pornography in violation of 18 U.S.C. §§ 2252(a)(5)(b) and 2252A(b)(2). Respondent disputed the allegations in the Amended Administrative Complaint and requested a hearing pursuant to section 120.57(1), Florida Statutes. On May 1, 2012, the case was referred to the Division of Administrative Hearings for assignment of administrative law judge.

The case was originally noticed for hearing to be commenced July 24, 2012. At the request of Petitioner, the case was continued until October 24, 2012, and proceeded as scheduled. Respondent, who is incarcerated, participated telephonically. The Department requested and received Official Recognition of

Florida Administrative Code Rule 64B8-8.001. On September 17, 2012, Petitioner filed a Motion to Amend the Amended Administrative Complaint, in order to clarify and narrow the factual allegations; no additional factual allegations or charges were sought to be added. The Motion was granted by Order dated October 2, 2012, and the case proceeded on the Second Amended Administrative Complaint.

At hearing, Petitioner presented no live witnesses. Petitioner's Exhibits 1, and 4 through 8 were admitted into evidence. Respondent testified on his own behalf, and sought to introduce three exhibits. Respondent's Exhibit 1, however, was the results of a polygraph test apparently taken by Respondent. Consistent with the holding in Lieberman v. Dep't of Prof'l Reg., 573 So. 2d 349, 351-52 (Fla. 5th DCA 1990), this exhibit was not admitted into evidence and the undersigned has not reviewed it. The other two proposed exhibits submitted by Respondent were also rejected.

A one-volume Transcript of the proceedings was filed with the Division of Administrative Hearings on October 18, 2012. Respondent filed his Proposed Recommended Order on October 29, 2012, and Petitioner filed its Proposed Recommended Order on November 1, 2012. Both submissions have been carefully considered in the preparation of this Recommended Order. All

references to Florida Statutes are to the 2009 codification unless otherwise indicated.

FINDINGS OF FACT

1. The Department is the state agency charged with the licensing and regulation of health care professionals pursuant to section 20.43 and chapter 456, Florida Statutes. The Board of Medicine is the professional licensing board charged with final agency action with respect to discipline against medical doctors pursuant to chapter 458, Florida Statutes.

2. At all times material to the allegations in the Second Amended Administrative Complaint, Respondent was licensed as a physician by the State of Florida, having been issued license number ME 82836.

3. On April 19, 2010, the United States Attorney for the Northern District of Florida filed a one-count Information against Respondent, alleging that Respondent knowingly possessed material containing images of child pornography as defined in 18 U.S.C. § 2256(8)(A), namely, "visual depictions of sexually explicit conduct, the production of which involved the use of minors engaging in sexually explicit conduct, having been mailed, shipped and transported using any means . . ." in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and 2252A(b)(2).

The case was filed in the Gainesville Division of the United States District Court, Northern District of Florida, and docketed as Case No. 1:10CR19 MMP/AK.

4. On May 14, 2012, a Plea and Cooperation Agreement ("Plea Agreement") was filed wherein Respondent agreed to plead guilty to the charge recited in the Information. He also agreed to cooperate "fully and truthfully with the United States Attorney and his designated representatives . . . including providing complete and truthful debriefings and testimony at grand jury, trial, and as otherwise requested, involving any matter under investigation."

5. As part of the Plea Agreement, Respondent was advised that he would be required to register as a Sex Offender and keep the registration current in the state of his residence, the location of his employment, and if a student, the location of his school.

6. The Plea Agreement also specifies that, subject to provisions not at issue in this proceeding, any statements, agreements or other evidence provided by Respondent may be used against him in the federal proceeding or any other action.

7. The Statement of Facts filed with the Plea Agreement stated the following:

This case is the result of a Peer-to-Peer file sharing investigation initiated by

the North Florida Internet Crimes Against Children (ICAC) Task Force.

On September 11, 2009, special software was utilized to locate computers sharing images of child pornography utilizing the Gnutella network. One computer offering to participate in the distribution of child pornography had an Internet Protocol (IP) address which corresponded with an Internet Service Provider (ISP) in Gainesville, Florida. A publicly available listing of the files offered for distribution by the computer at the IP address was reviewed. They included sexually explicit file names describing sexual acts with children. In addition to the file names, the unique SHA values were reviewed and confirmed that the files had previously been identified as depicting child pornography. . . .The files identified by their SHA values were examined and observed to be sexually explicit images of minor children engaged in sexual acts. A check of the IP address offering to distribute child pornography showed the same IP had been recorded one hundred and forty-two times between March 5, 2009, and October 28, 2009, offering different child pornography files for distribution.

An Internet search for the origin of the IP address found it to be issued to a cable modem subscriber with Bellsouth Internet of Atlanta, Georgia. A subpoena sent to them revealed that the IP had been assigned to an account in Gainesville, Florida. The account contained information identifying the account holder at a residence located at 5818 NW 45th Drive Gainesville, FL 32653. The account holder was identified as CHRISTOPHER SCOTT CARTER.

A federal search warrant was obtained for the CARTER residence. Six known video files depicting child pornography were

included in the search warrant and identified by their file titles and SHA hash values.

8. The names of the files are included in the Statement of Facts filed in conjunction with the Plea Agreement and need not be repeated here. Suffice it to say that the file titles indicate that the images are of children from one to ten years old portrayed in sexual activity, and some included violent imagery.

9. The Statement of Facts also indicated that computer equipment seized from Respondent's residence included a Compaq Presario desktop computer belonging to Respondent, upon which the file sharing software was confirmed. The forensic examiner was able to locate the SHA values and associated file paths corresponding to the six videos described in the search warrant.

10. On July 21, 2010, an Amended Judgment was filed, accepting Respondent's guilty plea and adjudicating him of one count of possession of child pornography. Respondent was sentenced to prison for a period of 48 months, followed by supervised release for life.

11. The sentence requires that Respondent register as a sex offender with the appropriate agency in the state where he lives, works, or is a student. Standard Conditions of Supervision include the following:

7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except a prescribed by a physician:

* * *

9. the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

* * *

13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

12. The Additional Conditions of Supervised Release imposed by the court include the following:

The defendant shall have no unsupervised contact with minor children, except the defendant's own child.

The defendant shall not possess any pornographic material, adult or child.

The defendant shall relinquish his pilot's license, nor shall he obtain a new pilot's license without the Court's approval.

The defendant shall notify any employer of the offense of conviction.

The defendant shall not occupy a vocation or volunteer in a position in which he had direct contact with minor children.

* * *

The defendant shall participate in a program of mental health counseling to include sex offender counseling.

The defendant shall register with the state sex offender registration agency in any state where the defendant resides, is employed, carries a vocation, or is a student, as directed by the supervising probation officer. The probation officer will provide state officials with any and all information required by the state sex offender registration agency and may direct the defendant to report to that agency personally for additional processing such as photographing and fingerprinting.

* * *

The defendant shall not be in the presence of minors, nor have any contact in any form, direct or indirect, including but not limited to, personally, by computer, telephone, letter or through another person, with children under the age of eighteen, without the approval of the probation officer. Any contact must be reported immediately to the probation officer.

13. Respondent reported his plea, as required, to the Board of Medicine. The letter written by Dr. Carter is lengthy and need not be repeated in its entirety. However, Dr. Carter's remarks include the following:

I downloaded these horrendous images thinking that my viewing them was invisible and innocuous. However, I now appreciate a larger perspective: that after these

perverse images are produced, they circulate in hyperspace indefinitely, so that the victimization is twofold. Following their original exploitation, the victims of child pornography are haunted by the knowledge that these pictures will persist on the internet, to be downloaded and seen by anyone, indefinitely. While our ability to remove the images is limited, we do have the ability to condemn them, to reject viewing them, and to refuse to possess them. This I failed to do. With an appreciation of the coercion involved in producing these horrible images, and the emotional injury of both the production and of having the images circulating indefinitely, I regret having viewed child pornography and I more deeply affirm my decision to avoid this revolting material.

14. Respondent asserted, both in his letter and in his hearing, that he should be able to continue practicing medicine for three reasons: 1) that no activity associated with child pornography occurred at work or was associated in any way with medical practice; 2) that the offense was limited to viewing internet images in his home, and no "hands-on" offense or production or distribution of material was alleged or occurred; and 3) his crime does not endanger patient safety because he does not treat children. The undersigned notes that Respondent indicates in his letter that "some time before a search warrant was served at my residence, I had independently discontinued my use of child pornography and had deleted all such files from my computer." The last activity involving Dr. Carter's IP address was one week before the issuance of the search warrant.

15. However, as stated by the Department's expert witness, Dr. Francisco Calimano, the qualities essential to the practice of medicine include sound judgment and respect for the welfare of others. Respondent's behavior in possessing and viewing child pornography shows total disregard for one of the most vulnerable segments of our population, and represents the antithesis of what a physician should be.

16. Dr. Calimano's view of the level of poor judgment exhibited did not change with the knowledge that Dr. Carter had decided to delete the pornographic files of his own accord. The undersigned shares his view.

17. In addition to the serious judgment lapse and breach of public trust involved in Respondent's behavior, the practical ramifications of the terms of Respondent's supervised release make the practice of medicine problematic if not impossible. One of those limitations is that Respondent have no contact with children under 18 without a probation officer's approval. While Dr. Carter indicates that his practice is limited to adults, that factor does not erase the presence of children from the practice setting. As stated by Dr. Calimano, children are brought into hospitals, waiting rooms, intensive care units, and similar practice settings, as patients, visitors, or dependants of patients or visitors. The same can be said of convicted

felons. Likewise, the ability to practice without contact with controlled substances is virtually non-existent.

18. In addition, upon his release from prison, Respondent is required to register as a sex offender wherever he lives or works. This status undermines the trust a member of the general public would have in the judgment and integrity of the care giver.

19. Respondent's conviction has effectively imposed serious practical impediments related to his continued ability to continue practicing medicine, without risking a violation of the terms of his lifetime supervised release.

20. It is found that the crime of possession of child pornography is related to the practice or the ability to practice medicine.

21. Respondent testified that prior to his arrest, he had made the conscious decision to stop viewing child pornography and had deleted the files from his computer. He also testified that he sought treatment and continues to do so. These factors, however, do not go to the actual commission of the offensive acts.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction of the subject matter and the parties to this

action pursuant to sections 120.569 and 120.57(1), Florida Statutes.

23. This is a proceeding whereby the Department seeks to impose discipline against Respondent's license to practice medicine. The Department has the burden to prove the allegations in the Second Amended Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 595 So. 2d 292 (Fla. 1987). As stated by the Supreme Court of Florida,

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and lacking in confusion as to the facts at issue. The evidence must be of such a weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)). This burden of proof may be met where the evidence is in conflict; however, "it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

24. The Second Amended Administrative Complaint charges Respondent with violating section 456.072(1)(c). Section 456.072 provides in pertinent part:

456.072 Grounds for discipline; penalties; enforcement.--

(1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:

* * *

(c) Being convicted or found guilty of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, a crime in any jurisdiction which related to the practice of, or the ability to practice, a licensee's profession.

25. Among the penalties authorized for a violation of section 456.072(1)(c) are suspension and permanent revocation of a license. § 456.072(2)(b), Fla. Stat.

26. Whether or not a particular crime is related to a profession is not limited to its connection to the technical ability to practice the profession. As stated by the First District:

Several cases demonstrate that, although the statutory definition of a particular profession does not specifically refer to acts involved in the crime committed, the crime may nevertheless relate to the profession. In Greenwald v. Department of Professional Regulation, the court affirmed the revocation of a medical doctor's license after the doctor was convicted of solicitation to commit first-degree murder. 501 So. 2d 740 (Fla. 3d DCA 1987). The

Fifth District Court of Appeal has held that although an accountant's fraudulent acts involving gambling did not relate to his technical ability to practice public accounting, the acts did justify revocation of the accountant's license for being convicted of a crime that directly relates to the practice of public accounting. Ashe v. Dep't of Prof'l Regulation, Bd. of Accountancy, 467 So. 2d 814 (Fla. 5th DCA 1985). We held in Rush v. Department of Professional Regulation, Board of Podiatry, that a conviction for conspiracy to import marijuana is directly related to the practice or ability to practice podiatry. 448 So. 2d 26 (Fla. 1st DCA 1984). These cases demonstrate, in our view, that appellee did not err by concluding Doll's conviction was "related to" the practice of chiropractic medicine or the ability to practice chiropractic medicine.

Doll v. Dep't of Health, 969 So. 2d 1103, 1006 (Fla. 1st DCA 2007).

27. The same can be said with respect to the crime for which Respondent was convicted. Greenwald also highlights the fallacy of Respondent's argument that his crime of viewing child pornography is not likely to transition into a "contact" crime. Greenwald was convicted of solicitation to commit first-degree murder: the intended victim being his ex-wife. One could say that because his actions stemmed from a domestic situation (as does Respondent's in part), that once the ex-wife was removed from the equation, the threat was gone. Both Greenwald and Respondent missed the point. It is the lack of respect for human life and the exploitation of others for personal

gain -- whether it be for financial gain, personal pleasure, revenge, or something else entirely -- that demonstrates the impaired judgment of the licensee and reflects the antithesis of what is required as a licensee to practice medicine.

28. Given the lack of judgment and the practical limitations on the practice of medicine required for Respondent to be in compliance with his supervised release upon the completion of his prison term, the Department has proven a violation of section 456.072(1)(c) by clear convincing evidence.

29. In accordance with the requirements of section 456.079, the Board of Medicine has adopted disciplinary guidelines for the purpose of notifying the public of the range of penalties typically imposed for violations of sections 458.331 and 456.072, and the rules adopted related to these provisions. With respect to a violation of sections 456.072(1)(c) and 458.331(1)(c), the penalty for a first-time offense is the same: from probation to revocation or denial of the license, an administrative fine of \$1,000 to \$10,000, and 50 to 100 hours of community service. Fla. Admin. Code R. 64B8-8.001(2)(c). The rule also provides aggravating and mitigating penalties to consider should a penalty outside the disciplinary guidelines be recommended. Resort to these factors is unnecessary in this case, because the recommended penalty is within the guidelines of rule 64B8-8.001(2)(c). However, in the

event that resort to aggravating and mitigating circumstances was required, rule 64B8-8.001(3)(a) would be applicable, due to the exploitation and both physical and emotional trauma imposed on the victims of child pornography viewed by Respondent on multiple occasions. Imposition of a fine and community service is impractical in this case, given Respondent's incarceration and the previously discussed conditions of release.

30. The undersigned is mindful of the sacrifices any physician makes to attain the education to become licensed as a medical doctor. However, the undersigned is also mindful of the trust that the Board of Medicine, and by extension, the people of the State of Florida, place in those who attain licensure status. Respondent's actions show a grave violation of this trust.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Medicine enter a Final Order finding that Respondent has violated section 456.072(1)(c), Florida Statutes, and revoking his license to practice medicine.

DONE AND ENTERED this 26th day of November, 2012, in
Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
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Filed with the Clerk of the
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this 26th day of November, 2012.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.