

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kwame S. Dwumaah, :
Petitioner :
v. : No. 2234 C.D. 2009
State Board of Nursing, : SUBMITTED: April 30, 2010
Respondent :

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: August 6, 2010

Kwame S. Dwumaah, *pro se*, petitions this court for review of the order of the State Board of Nursing (Board) which revoked Dwumaah's license to practice professional nursing in the Commonwealth of Pennsylvania. After review, we affirm.

Dwumaah holds a registered nurse license to practice nursing in the Commonwealth of Pennsylvania, issued on December 3, 2002, and active through April 30, 2010. On April 27, 2005, a Criminal Indictment was filed in the United States District Court for the Middle District of Pennsylvania charging Dwumaah with 15 counts of mail fraud in violation of 18 U.S.C. § 1343, and 13 counts of higher education resources fraud in violation of 20 U.S.C. § 1097(a). After

pleading not guilty to the Indictment, Dwumaah signed a plea agreement on July 25, 2005, in which he agreed to plead guilty to Count 17 of the original Indictment. Thereafter, a Criminal Information was filed in the United States District Court for the Middle District of Pennsylvania charging Dwumaah with one count of theft of public monies (less than \$1,000.00) in violation of 18 U.S.C. § 641. Pursuant to a substitute plea agreement,¹ on August 30, 2005, Dwumaah pleaded guilty to the charge in the Information and all counts of the original Indictment were dismissed. The court sentenced Dwumaah to 5 months incarceration and supervised release for one year and ordered restitution in the amount of \$75,192.00. Dwumaah appealed, citing ineffective assistance of counsel. On May 31, 2006, the United States Court of Appeals for the Third Circuit issued a judgment affirming the sentence and dismissing Dwumaah's claims without prejudice, finding that the ineffective assistance claim could not be heard on direct appeal because of the lack of a sufficient record of facts concerning the circumstances of the representation and advice.

On August 8, 2006, the Board notified Dwumaah that he was subject to disciplinary action pursuant to the Professional Nursing Law (Law),² and charged Dwumaah under Section 14(a)(5), Count I, based on his conviction of a crime of moral turpitude (theft of public monies); and under Section 14(a)(9), Count II, for immoral conduct.³ The Board issued an order for him to show cause

¹ The second plea agreement was signed on August 8, 2005, and superseded the first agreement. *See* Plea Agreement, Certified Record (C.R.), Item 1, Exhibit 5 at 12.

² Act of May 22, 1951, P.L. 317, *as amended*, 63 P.S. §§ 211-225.5.

³ 63 P.S. § 224(a)(5) and (9). These sections authorize the Board to “refuse, suspend or revoke any license in any case where the Board shall find that - -

(Footnote continued on next page...)

why he should not be sanctioned for these violations. A hearing was held on March 22, 2007, at which Dwumaah appeared and testified. Thereafter, the hearing examiner issued her Proposed Adjudication and Order recommending revocation of Dwumaah’s license to practice professional nursing in Pennsylvania.⁴ After Dwumaah filed exceptions to the hearing examiner’s proposed adjudication, the Board issued its Final Adjudication and Order in which it agreed with the hearing examiner’s recommendation and ordered that Dwumaah’s license be revoked. The Board denied Dwumaah’s motion for a stay, and he now petitions this court for review.⁵

In his *pro se* petition, Dwumaah raises several issues for our review. First, Dwumaah argues that the Board erroneously considered evidence that was not part of his plea agreement to establish the necessary elements of a crime of moral turpitude. Specifically, Dwumaah asserts that the Board considered the facts that he was ordered to pay \$75,192.00 in restitution and that he had filed for Chapter 7 bankruptcy to discharge certain loans he owed to the Pennsylvania Higher Education Assistance Agency (PHEAA) and to Villanova University, and used these facts to elevate his misdemeanor theft conviction to a crime of moral turpitude. Dwumaah also argues that the Board failed to consider his conviction as

(continued...)

(5) The licensee has been convicted, or has pleaded guilty, or entered a plea of nolo contendere, or has been found guilty by a judge or jury, of a felony *or a crime of moral turpitude*

. . . .

(9) The licensee has been guilty of immoral or unprofessional conduct

⁴ The Hearing Examiner dismissed Count II, concluding that “Respondent’s actions were not directly related to the practice of his profession” Proposed Adjudication and Order, filed June 2, 2009, C.R., Item 22, at 7.

⁵ Based on the issues presented, the scope of our review is limited to determining whether the Board committed any errors of law or abused its discretion.

a misdemeanor and that it occurred more than ten years ago and has nothing to do with his fitness to practice as a nurse. Dwumaah asserts that his past conviction cannot provide a basis for his license revocation where the conviction is too remote in time and does not in any way reflect on his ability to properly discharge the duties required by his profession, citing *Secretary of Revenue v. John's Vending Corp.*, 453 Pa. 488, 309 A.2d 358 (1973). We disagree.

The Board is authorized under Section 14(a)(5) the Law to suspend or revoke the license of any individual who has been convicted of or pled guilty to a felony or a crime of moral turpitude. We set forth the general rule in *Moretti v. State Board of Pharmacy*, 277 A.2d 516 (Pa. Cmwlth. 1971), that the element of fraud in a crime necessarily involves moral turpitude. We further noted that “‘moral turpitude’ has also been frequently defined as ‘anything done knowingly contrary to justice, *honesty* or good morals[.]’” *Id.* at 518 (citation omitted). Furthermore, “crimes involving dishonesty, such as fraud and theft by deception ... are crimes of moral turpitude.” *Bowalick v. Dep’t. of Educ.*, 840 A.2d 519, 524 (Pa. Cmwlth. 2004). Finally, a determination of whether a crime involves moral turpitude turns on the elements of the crime, and not on an examination of the details of the behavior underlying the crime. *Startzel v. Dep’t. of Educ.*, 562 A.2d 1005, 1007 (Pa. Cmwlth. 1989). Accordingly, we will examine the elements of the misdemeanor crime of theft of public monies at 18 U.S.C. § 641, in order to determine whether Dwumaah violated Section 14(a)(5) of the Law.

18 U.S.C. Section 641 provides that:

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property

made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with the intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted -

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Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case, does not exceed the sum of \$1,000, he shall be fined under this title or imprisoned not more than one year, or both.

A review of the plea agreement reveals that Dwumaah obtained a fraudulent Social Security card in 1990 under the name of “Simon Dwumaah” and a false date of birth, which he used to apply for admission to Community College of Philadelphia in 1996 and Villanova University in 1998, falsely representing that he was a United States Citizen. In 2000, Dwumaah submitted a false FAFSA (Free Application for Federal Student Aid) form to the U.S. Department of Education, fraudulently inducing the Department into awarding him a \$500 SEOG Grant (Supplemental Educational Opportunity Grant) while he was enrolled at Villanova University.⁶ The Board determined that by entering into this guilty plea, Dwumaah “admitted that he obtained a fraudulent Social Security card, used that card to obtain in excess of \$75,000 in education loans, and then attempted to declare bankruptcy to discharge those loans.” Board’s Final Adjudication and Order, C.R.,

⁶ Of the six fraudulent FAFSA forms that Dwumaah submitted between 1996 and 2001, he falsely represented either that he was a United States Citizen or that he was an Eligible Non-Citizen. *See* Criminal Indictment, attached as Exhibit 1 to the Notice and Order to Show Cause, C.R., Item 1 at 5.

Item 25 at 8 (footnote omitted). As a condition of his plea agreement, Dwumaah agreed that he would “clearly demonstrate a recognition and affirmative acceptance of responsibility as required by the sentencing guidelines,” and that he would be “responsible for making payment of . . . restitution in full” C.R. Item 1, Exhibit 5 at 4 and 8. The Board concluded that “[t]he elements of embezzling, stealing, purloining, or knowingly converting a thing of value belonging to the United States or any department or agency of the United States with intent to convert it to his use *certainly is a crime done knowingly contrary to justice, honesty or good morals.*” Final Adjudication and Order, C.R., Item 25 at 9 (emphasis added).

By pleading guilty to a crime of moral turpitude, Dwumaah subjected himself to the Board’s authority to sanction him under the statute. Moreover, the statute gives the Board authority to revoke his license for *either* a felony conviction *or* a conviction of a crime of moral turpitude, and nowhere does the statute preclude a finding that a misdemeanor crime can also be a crime of moral turpitude, as Dwumaah appears to argue. We also reject Dwumaah’s argument that the conduct that led to his conviction was not related in any way to the practice of his profession and that it was too remote in time to be considered. First, Section 14(a)(5) authorizes the Board to discipline a nurse who has been convicted of a crime of moral turpitude regardless of whether the conviction is related to the practice of nursing. Second, it is clear that the Board found that Dwumaah’s conduct did reflect on his ability to perform the duties and responsibilities of his profession, when it stated that:

Respondent obtained the education necessary to obtain his professional nurse license by defrauding the United States Government of in excess of \$75,000 in student

loans. Respondent's conduct involved dishonesty and fraud, which calls into question whether he possesses the good moral character needed to be a nurse. The citizens of this Commonwealth have a right to have only nurses of good moral character. Dishonest character traits exhibited by Respondent are contrary to that high standard the public expects of its nurse[s].

Id.

Finally, we believe that the facts in this case are not analogous to those in *John's Vending* and Dwumaah's reliance thereon is misplaced. That case involved the denial of a wholesale cigarette dealer's license based on a 20 year old conviction of one of the shareholders. The Supreme Court concluded that there was no relevance between the past conviction and the shareholder's current ability to perform his duties, having ascertained that he had held a position of responsibility for a number of years subsequently with no allegations of any wrongdoing. We recently noted in *Ake v. Bureau of Professional & Occupational Affairs, State Board of Accountancy*, 974 A.2d 514, 520 (Pa. Cmwlth.), *app. den.*, ___ Pa. ___, 987 A.2d 162 (2009), that, "*John's Vending* teaches that the nature of the offending conduct and its remoteness in time must be considered where an agency seeks to revoke a professional license on the basis of a conviction."⁷ Here, however, the Board moved to revoke Dwumaah's license less than three months after his conviction became final on appeal.

Next, Dwumaah asserts that the Board violated his right to due process by revoking his license based upon his ex-offender and immigrant status.

⁷ See also *Bethea-Tumani v. Bureau of Prof'l & Occupational Affairs, State Board of Nursing*, 993 A.2d 921, 930 (Pa. Cmwlth. 2010), wherein we noted that, "neither *John's Vending* nor *Ake* provide a *per se* rule that a conviction remote in time may not be considered in the licensing context. Instead, both of those cases appear to attempt to apply some 'perspective' as to the usefulness of consideration of the remote conviction given the circumstances presented."

While it is not entirely clear upon what Dwumaah bases his constitutional claims, a review of both Dwumaah's brief and the transcript of the hearing reveal that the focus of his argument is the legality of his marriage and his status as an immigrant. Dwumaah argues that he was legally married, and therefore, permitted as an Eligible Non-Citizen to apply for the loans and grants. Specifically, Dwumaah testified that:

I did obtain the money legally because my money I obtained was based upon my marriage.

....
I just went to school. I'm married. My marriage is genuine. That's why I'm sitting here. If my marriage is not genuine probably they will deport me.

Hearing of March 22, 2007, Notes of Testimony (N.T.), at 9, 20-21. Dwumaah also argues that he was targeted solely because he is an immigrant and that a crime of moral turpitude is one that shocks society and that no one would be shocked that he, as an immigrant, went to school.

Dwumaah's arguments are meritless. It is the conviction for theft of public monies that the Board examined in order to determine whether it was a crime of moral turpitude under Section 14(a)(5) of the Law. The conduct which led to Dwumaah's conviction for theft of public monies began well before his marriage on December 31, 1998, when he obtained a fraudulent Social Security card under a false date of birth and the name "Simon Dwumaah" in January 1990. From 1996 through 2001, according to the Indictment, Dwumaah submitted false applications to institutions of higher learning seeking admittance as a United States citizen and to the federal government seeking financial aid on the same basis.⁸

⁸ According to the Indictment, Dwumaah was born in Ghana, Africa on May 20, 1960, and entered the United States on December 9, 1989, on a 6 month non-immigration Visa, which (Footnote continued on next page...)

That conduct led to Dwumaah's guilty plea and it is for that conviction that the Board properly sanctioned Dwumaah by revoking his nursing license.

Dwumaah also contends that his due process rights were violated when the Board failed to send him a copy of the Certified Record. Dwumaah argues that without the necessary tools to litigate his case fully, he has been deprived of due process under the law. We disagree. A review of the record reveals that Dwumaah was provided with all the process he was due. Dwumaah was provided with notice of the charges against him filed by the Board, was given the opportunity to respond and filed an answer denying the charges, requested and received a full hearing at which time he had the opportunity to testify and present evidence in mitigation of the charges, and following the conclusion of the hearing, he was given the opportunity to file a brief with the hearing examiner. Finally, following the Board's final adjudication and order, Dwumaah was allowed to file exceptions and briefs with the Board. At the hearing, the hearing examiner specifically advised Dwumaah that:

If you want a copy - - your own copy of the transcript - - you'll have to make private arrangements with the court reporter. We have them. You can come in here and use them and look at them if you want, but we can't give you a copy, all right [sic].

N.T. at 36.

Moreover, the Rules of Appellate Procedure require only that the government unit or agency, in this case the State Board of Nursing, file the record with the prothonotary within 40 days of receiving service of the petition for

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expired on June 8, 1990. Thereafter, Dwumaah became an illegal alien subject to deportation by the United States Immigration and Naturalization Services. C.R., Item 1, Exhibit 1 at 1.

review. *See* Pa. R.A.P. 1952(a). The Board complied with this requirement. There is nothing in the rule requiring the Board to send a copy of the certified record to Dwumaah. As the Board points out in its brief, Dwumaah was provided with a table of contents of the certified record and had ample opportunity to review the original or purchase a copy of the record from this court. Furthermore, the Board also noted that we granted Dwumaah's motion to proceed on the original record and excused him from having to file a reproduced record. We therefore conclude that this argument is without merit.

Finally, Dwumaah argues that the Board abused its discretion by imposing the maximum penalty under the Law when it revoked his nursing license. Dwumaah contends that because he was convicted of a misdemeanor crime, he should have received a lesser sanction, such as a temporary suspension. In support of his argument, Dwumaah cites the following cases: *Moretti v. State Board of Pharmacy*, 277 A.2d 516 (Pa. Cmwlth. 1971) (Moretti pled guilty to income tax evasion and his pharmacist's license was suspended for 15 days); *Flickinger v. Department of State*, 439 A.2d 235 (Pa. Cmwlth. 1982) (Flickinger pled guilty to several counts of theft by deception and tampering with public records and received only a 60 day suspension of his chiropractor's license); *State Dental Council & Examining Board v. Friedman*, 367 A.2d 363 (Pa. Cmwlth. 1976) (Friedman entered a plea of nolo contendere to charges of mail fraud and had his license to practice dentistry suspended for 3 months).

Unless the occupational licensing board acts with bad faith or fraud, allegations not made by Dwumaah, our review of the board's disciplinary sanction is "limited to the determination of whether there has been a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or

functions.” *Goldberger v. State Bd. of Accountancy*, 833 A.2d 815, 817 n.1 (Pa. Cmwlth. 2003) [quoting *Slawek v. State Bd. of Medical Edu. and Licensure*, 526 Pa. 316, 322, 586 A.2d 362, 365 (1991)]. We believe this court’s statement in *Friedman*, regarding the State Dental Board and its responsibility to protect the citizens of this Commonwealth by regulating the conduct of its licensees, is equally applicable to the State Board of Nursing and Dwumaah, as its licensee, in the matter *sub judice*; to wit:

the Board is essentially a watchdog of the [nursing] profession, empowered to maintain the high standards which the people of this Commonwealth have a right to expect from their [nurses]. These standards are not ethereal but are substantial and practical, dealing as they do with all aspects of professional conduct. Therefore, the Board is entrusted with the power to suspend [or revoke] the privilege of any licensee who has been guilty, *inter alia*, of a crime or misdemeanor involving moral turpitude.

367 A.2d at 366.

The Board herein made the following determination with respect to the appropriateness of the hearing examiner’s recommendation to revoke Dwumaah’s nursing license:

The Board views Respondent’s conviction as egregious and gives his arguments little weight. Respondent’s actions go against the high standards of the nursing profession. Nurses are entrusted with the care of the sick and elderly when they are at their most vulnerable. Nurses must be trustworthy. Nurses are also required to have good moral character. Respondent’s conduct demonstrates a complete lack of morals. The Board has determined that Respondent’s conduct warrants the revocation of his license to practice professional nursing.

Board's Final Adjudication and Order, C.R., Item 25 at 10. We cannot say as a matter of law that the Board's disciplinary sanction was an abuse of its discretion, and, accordingly, we affirm the decision of the Board.

BONNIE BRIGANCE LEADBETTER,
President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kwame S. Dwumaah,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2234 C.D. 2009
	:	
State Board of Nursing,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 6th day of August, 2010, the order of the State Board of Nursing in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge