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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001060-MR

ARTURO PORTALES, D.O. APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 05-CI-009215

KENTUCKY BOARD OF MEDICAL LICENSURE APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND THOMPSON, JUDGES, HENRY,[1] SENIOR JUDGE.

MOORE, JUDGE: Arturo Portales appeals from the Jefferson Circuit Court's Opinion and Order affirming the Kentucky Board of Medical Licensure's (KBML) revocation of Portales's medical license. Having fully reviewed the matter, we affirm.

[1] Senior Judge Michael L. Henry, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Portales is a physician who was licensed to practice medicine in the Commonwealth of Kentucky. A formal complaint was issued in May 2001 by the KBML arising out of actions taken by the Arizona Board of Osteopathic Examiners of Medicine and Surgery due to Portales's involvement in prescribing medications over the internet without prior consultations with patients. Approximately one year later, Portales and the KBML entered into an "Agreed Order of Indefinite Restriction and Fine" regarding Portales's involvement with prescribing medications over the internet.

In the Agreed Order, Portales and the KBML entered into Stipulations of Fact. We summarize the relevant facts in the 2002 administrative action as follows:

> On April 10, 2000, the Arizona Board of Osteopathic Examiners in Medicine and Surgery contacted Portales regarding his internet prescribing practices.
>
> Portales responded to the Arizona Board that once he received this inquiry, he stopped internet prescribing.
>
> On April 19, 2000, the Arizona Board entered a "Stipulation and Consent Order for Restriction of License," providing that Portales would cease all internet prescribing "pending further investigation and an Investigative Hearing."
>
> On October 21, 2000, the Arizona Board issued a "Stipulation and Consent Order for Surrender of License" in Case No. 2766. Portales and the Arizona Board mutually agreed that Portales would surrender his Arizona osteopathic license and that he would no longer engage in the practice of medicine in Arizona.

On February 22, 2001, the Kentucky Board received information from the Federation of State Medical Boards' Internet Clearinghouse that one of its representatives purchased and obtained medications from three separate internet prescription websites by completing a medical questionnaire. Portales was the prescribing doctor for these medications.

The Kentucky Board's Inquiry Panel began a review of Portales and on May 8, 2001, it filed a Complaint and Emergency Order of Restriction, prohibiting him from prescribing medications over the internet until the matter was resolved.

During the inquiry, the Board learned that from September 30, 2000 through October 6 2000, Portales prescribed medication over the internet from his residence in Lexington, Kentucky. He authorized prescriptions for at least 406 individuals residing in Florida, California, Massachusetts, Delaware, New Jersey, Mississippi, Tennessee, Virginia, Ohio, Minnesota, Texas, New York, Alabama, Pennsylvania, Iowa, Nevada, Illinois, Missouri, Georgia, Colorado, Maryland, Wyoming, Oregon, West Virginia, Utah, Louisiana, North Carolina, Oklahoma, Connecticut, Hawaii, Idaho, South Carolina, Puerto Rico, Kansas, New Mexico, Indiana, Washington, D.C., New Hampshire, South Dakota and Wisconsin.

These prescriptions were for medications which included Viagra, Zyban, Xenical, Propecia, Phentermine (Adipex-P), Meridia, Ionamin, and Bontril.

On January 11, 2001, Portales prescribed medications, including controlled substances, to at least 208 individuals over the internet. These prescriptions were for Viagra, Zyban, Xenical, Valtrex, Celebrex and Phenntermine (Adipex-P), Meridia, Ionamin, and Bontril.

Portales admitted in his answers to the Board's interrogatories[2] that:

[2] These answers were excluded in the Agreed Order.

> he "was involved in an Internet prescribing practice from approximately March 1, 2000 to approximately April 10, 2000 while [he] lived in Arizona[;]"
>
> he "was again involved in an Internet prescribing practice from approximately November 2000 to May 8, 2001;"
>
> the Internet Service Providers that [Portales] used and/or that were used per his instructions in the Internet prescribing practice in which he was involved, before and after April 10, 2000, include the following: Mindspring.com; AT&T Worldnet.com; and Insight@Home.com;
>
> the home website addresses [Portales] used in the Internet prescribing practice[s] in which he participated were: SafeWeb.com; Medprescribe.com and USAPrescriptions.com; [and]
>
> he authorized Mock's Pharmacy, Inc., which is located at 711 Arkansas Road in West Monroe, Louisiana 71291, to dispense prescriptions that he authorized from a location(s) within the Commonwealth of Kentucky[.]

Beyond his answers to interrogatories, Portales stipulated that he also authorized Access Pharmacy in Florida to dispense medications that he prescribed over the internet.

In addition to the stipulated facts in the Agreed Order, Portales and the KBML entered into Stipulated Conclusions of Law, including:

> [Portales's] conduct . . . constitutes a violation of KRS 311.595(9), as illustrated by KRS 311.597(3) and (4); KRS 311.595(10); and KRS 311.595(17). Accordingly, there is a legal basis for discipline against [Portales's] Kentucky osteopathic license.
>
> Pursuant to KRS 311.591(6) and 201 KAR 9:082, the parties may fully and finally resolve this pending investigation, without formal disciplinary proceedings,

> by entering into an informal resolution such as this AGREED ORDER OF INDEFINITE RESTRICTION AND FINE.
>
> "While [Portales] refutes an ultimate conclusion that he has violated the Act by engaging in the conduct described in the Stipulations of Fact, he agrees that there is a legal basis for resolving this case pursuant to the terms of an AGREED ORDER OF INDEFINITE RESTRICTION AND FINE, such as this.

The KBML and Portales thereafter agreed to a number of terms restricting Portales from prescribing, authorizing, or dispensing any medications over the internet, until the KBML gave its approval. Additional restrictions were placed on Portales in the event he was approved in the future to prescribe medication over the internet. Portales agreed to pay a fine in the amount of $50,000, $20,000 of which was due within thirty days of the filing of the "Agreed Order of Indefinite Restriction and Fine." Portales was thereafter to pay $6,000 per year until the fine was paid; the full amount was due before January 1, 2007.

Under the Agreed Order, Portales was to comply with the provisions of the Kentucky Medical Practice Act, KRS 311.530, *et seq.* and corresponding regulations. The parties to the instant appeal agree that at the time the Agreed Order was executed, there were no criminal investigations nor charges pending against Portales in any jurisdiction. According to counsel for the KBML at oral argument before a panel of this Court, the Agreed Order only went to standards of practice issues.

On October 30, 2003, Portales was indicted in the United States District Court for the Eastern District of Virginia for several charges of criminal conspiracy to distribute and dispense controlled substances. Portales pleaded guilty to Count I of the criminal conspiracy charges on July 8, 2004, and was thereafter sentenced to prison for one year and one day. The KBML does not dispute that Portales did not personally prescribe any medications via the internet after the entry of the 2002 Agreed Order.

Upon learning of the Virginia felony conviction, the KBML issued a formal complaint in 2005 against Portales charging his felony conviction violated KRS 311.595(4). The hearing officer set the original date for a revocation hearing for October 4 and 5, 2005. However, the date was moved forward to June 21 and 22, 2005, while Portales was still serving his prison sentence. Portales requested that the hearing be set for the original date so that he could be present to testify. The hearing officer denied this request and held the hearing in June, while Portales was still in prison.

At the revocation hearing, Portales was represented by counsel. Neither Portales's counsel nor the KBML's counsel called witnesses. The KBML's counsel submitted six exhibits, including Portales's affidavit, submitted in reference to his inability to pay the fines levied against him while he was in prison.[3] Portales's counsel requested that the hearing officer leave the record open

[3] Originally, there was an issue regarding whether Portales's failure to timely pay his fines was additional grounds for revocation under KRS 311.595(13). Counsel for the KBML conceded at oral argument that it was not. Thus, we decline to review this issue.

after the hearing to allow another affidavit to be submitted by Portales. The hearing officer granted this request, and later entered an Amended Order, granting additional time for the submission of Portales's affidavit. Portales submitted a document entitled "affidavit"[4] on July 20, 2005. After the hearing and review of the evidence and law, the hearing officer recommended that Portales's medical license be revoked. The Board accepted this recommendation.

Portales challenged the Board's revocation of his license in Jefferson Circuit Court. Before the circuit court, Portales argued that the conduct for which his revocation was based was already adjudicated in the 2001 complaint and proceedings. He also argued that the hearing officer failed to consider all evidence presented and should have delayed the hearing until he could be present. The circuit court reviewed each issue and agreed with the hearing officer's recommendation of revocation.

On appeal, Portales argues, as he did before the circuit court, that the element of claim preclusion under the doctrine of *res judicata* bars the Board's 2005 complaint. Portales maintains the 2005 complaint is based on the same internet prescribing practices as the 2001 complaint. He urges this Court to rule that the 2002 Agreed Order fully and finally decided all violations from Portales's internet prescription activities, barring the 2005 complaint.

[4] There are two separate affidavits from Portales in the administrative record. The first affidavit was entered as Exhibit Six at the hearing. The other "affidavit" is not notarized nor listed as an "exhibit" on the "Index of Documents" in the administrative record.

For claim preclusion to apply in the present case, Portales must show the following elements are met: (1) identity of the parties; (2) identity of the causes of action; (3) the case must have been resolved on the merits. *Yeoman v. Commonwealth Health Policy Board*, 983 S.W.2d 459, 464 (Ky. 1998) (citation omitted).

We disagree with Portales that claim preclusion barred the Board's 2005 complaint. Prior to the 2002 Agreed Order, Portales had not been criminally charged and the 2002 Agreed Order did not cover any criminal charges. In fact, at oral argument in this matter both parties agreed that there were no criminal investigations pending in any jurisdictions regarding Portales's internet prescription activity.

The 2005 complaint was based on Portales's alleged violations of KRS 311.595(4) and (13).[5] Relevant to the matter before this Court is KRS 311.595(4), which provides that a doctor's medical license may be revoked if he has "[e]ntered a guilty or nolo contendere plea, or been convicted, by any court within or without the Commonwealth of Kentucky, of committing an act which is, or would be a felony under the laws of the Commonwealth of Kentucky, or of the United States, or of any crime involving moral turpitude which is a misdemeanor under the laws[.]" Accordingly, the 2005 complaint was based on Portales's guilty

[5] As mentioned *supra*, the 2005 complaint was also based on KRS 311.595(13) for Portales's failure to timely pay fines in violation of the Agreed Order. As conceded by the KBML's counsel at oral argument, this provision did not serve as a basis for the revocation of Portales's medical license due to his inability to pay while he was incarcerated. Accordingly, we decline to review this issue.

plea to the federal indictment in Virginia for criminal conspiracy for internet prescribing, including prescriptions for controlled substances, over a five-year period. Portales pleaded guilty to Count I of the federal indictment returned in October 2003, which charged specifically that

> [b]eginning in or before December, 1998, the exact date being unknown, and continuing until the date of the Indictment, in the Eastern District of Virginia and elsewhere . . . [Portales] . . . knowingly and intentionally conspired and agreed together, and with others known and unknown to the Grand Jury, to commit the following offenses against the United States:
>
> (a) to distribute and disperse Schedule III and IV controlled substances, including but not limited to, quantities of the following controlled substances: (1) Phendimetrazine (brand name Bontril), a Schedule III controlled substance; (2) Phentermine (including brand names Ionamin, Adipex-P, Teramine, and Fastin), a Schedule IV controlled substance; and (3) sibutramine hydrochloride (brand name Meridia), a Schedule IV controlled substance, other than for a legitimate medical purpose and not in the usual course of professional practice, in violation of Title 21, United States Code, Sections 841(a)(1), 841 (1)(D), and 841(b)(2), and Title 21, Code of Federal Regulations, Section 1306.04; and
>
> (b) to use a communication facility in committing and in causing and facilitating the distribution and dispensing of Schedule III and IV controlled substances, including but not limited to, quantities of the following controlled substances: (1) Phendimetrazine (brand name Bontril), a Schedule III controlled substance; (2) Phentermine (including brand names Ionamin, Adipex-P, Teramine, and Fastin), a Schedule IV controlled substance; and (3) sibutramine hydrochloride (brand name Meridia), a Schedule IV controlled substance, other than for a legitimate medical purpose and not in the usual course of professional practice, in violation of Title 21, United States Code, Sections 841 (a)(1), 841 (b)(1)(b)(2), and 843 (b), and Title 21, Code of Federal Regulations, Section 1306.04.

Portales's arguments that the 2001 complaint and the 2005 complaint are based on the same conduct and the same violations of KRS Chapter 311 lack merit. The Arizona conduct, forming much of the basis of the 2001 complaint, covered approximately a forty-day period when Portales wrote internet prescriptions without having examined patients personally. Additionally, the 2001 complaint was based on misrepresentations Portales made regarding his internet activity. It did not cover any criminal activity or criminal investigations, and none, in fact, were pending at that time.

Contrary to Portales's arguments, the federal felony conviction as cited *supra*, which Portales pleaded guilty to, specifically covered a federal felony conspiracy over a five-year period. The only rebuttal to Portales's guilty plea to Count I of the conspiracy charges was the reference of Portales's counsel, at oral argument, to a written statement by Portales, which was incorporated by reference to his plea agreement. According to Portales's counsel, this statement included Portales's representations that were inconsistent with his plea agreement that he was involved in a five-year criminal conspiracy as charged in the federal indictment.

The plea agreement does provide that "[t]he statement of facts, which is hereby incorporated into this plea agreement, constitutes a stipulation of facts for purposes of Section 1B1.2(a) of the Sentencing Guidelines." The parties have not cited to the record where this statement can be found. Upon our independent

review of the record, Portales's statement of facts referenced in the plea agreement and by his counsel at oral argument was not included as part of the administrative record. Accordingly, it was not before the hearing officer nor the KBML; and, it is not before this Court for review.

In an affidavit signed by Portales, but not notarized, which was received by the Board on July 20, 2005,[6] Portales stated that he did not prescribe any medications via the internet since May 2001. Pursuant to KRS 13B.090(2), all testimony shall be made under oath or affirmation. Despite Portales's affidavit not having been made under oath, the hearing officer referenced it in paragraph 21 of his Findings of Fact in the Recommended Order.[7] While Portales's statement styled as an affidavit failed to meet the requirements of KRS 13B.090(2), this really is of no significance to the question at hand for several reasons. First, while the hearing officer relied on one paragraph of the statement, that paragraph is not in controversy before this Court. Second, nothing in the Recommended Order leads this Court to conclude that the hearing officer accepted the remainder of Portales's affidavit as true or relied upon it.

Even if we were to accept Portales's unsworn statement as evidence under KRS Chapter 13B, it was well within the hearing officer's scope of his prerogative to accept evidence which he found credible or persuasive, draw

[6] The hearing officer left the record open for a period of time to allow Portales's affidavit to be submitted.

[7] The referenced section of Portales's unsworn statement relates to his failure to timely pay fines levied on him in the earlier Agreed Order and does not go to the question of claim preclusion.

reasonable inferences, and weigh conflicting evidence. *Magic Coal Company v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). This Court is prohibited from reweighing the evidence on appeal. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). Given that the record contains Portales's plea agreement to Count I in the federal indictment for a criminal conspiracy taking place over a five-year span with only an unsworn statement by Portales to contradict it, the hearing officer's decision must stand as reasonable, and it is immaterial that the record contains statements that may have permitted a different decision. *Whittaker v. Rowland*, 998 S.W.2d 479 (Ky. 1999). Portales has failed to show that the hearing officer relied on evidence so lacking in probative value that the hearing officer's decision on *res judicata* must be reversed as a matter of law.

We agree with the hearing officer's analysis of KRS 311.595(4) that Portales's felony conviction on the criminal charge of violating the Controlled Substances Act was a sufficient basis, in and of itself, for the revocation of his license to practice medicine. Additionally, the Virginia felony conviction was a separate and distinct cause of action from the basis of the 2001 complaint. The issue of conspiracy and/or other criminal activity was not previously adjudicated on the merits, so claim preclusion does not apply in this matter.

The administrative record and statutory provisions provide an ample basis for our Court to affirm.[8] Nonetheless, we are compelled to note that

[8] "[W]e, as an appellate court, may affirm the trial court for any reason sustainable by the record." *Kentucky Farm Bureau Mut. Ins. Co. v. Gray*, 814 S.W.2d 928, 930 (Ky. App. 1991).

Portales's counsel accurately noted that the trial court's opinion contained a few inaccuracies. First, on page three of the trial court's opinion, it stated that "[a]fter notification of Portales'[s] possible federal charges in Virginia, both parties entered into *Agreed Order of Indefinite Restriction and Fine* ("Agreed Order"). . . ." As noted *supra*, at the time the parties entered the Agreed Order, neither side was aware, much less had been notified, that Portales may have been subject to federal charges in Virginia. In fact, there is nothing in the record to suggest that Portales was even being criminally investigated at that time.

Next, on page four of the trial court's opinion, it stated that "Portales'[s] issues reviewed and determined by the Board were based on *pending charges and investigation* in Virginia." Later on page four, the trial court stated "[t]he Agreed Order never stipulated that the Board would not revoke Portales'[s] medical license if he was in fact found guilty of the felony charges in Virginia. The Agreed Order merely put . . . Portales's status in abeyance until the final determination in Arizona." Again, as earlier noted, both parties agree that the foundation of these statements is inaccurate. Despite these inaccuracies, substantial evidence exists in the administrative record to affirm the revocation of Portales's medical license under KRS 311.595(4).

Finally, we find no merit to Portales's argument that his constitutional due process rights were violated when the revocation hearing was held while he was incarcerated and could not attend. Portales was represented by counsel throughout the proceedings. At the hearing, counsel for KBML stated that it would

have agreed for Portales to have been deposed and the hearing officer concurred in this. Despite this, Portales's counsel had not arranged for his disposition to be taken. Moreover, neither side called witnesses to testify and only the KMBL submitted exhibits into the record. Consequently, Portales's presence was not necessary to facilitate examining witnesses, and based on the manner in which the hearing proceeded, *i.e.,* on the written record, there was nothing that Portales could offer by his mere presence. *See generally Sanders v. Commonwealth*, 89 S.W.3d 381, 388 (Ky. 2002). Accordingly, Portales's presence was not required to ensure fundamental fairness. *See id.*

Moreover, the hearing officer left the record open after the hearing so that Portales's affidavit could be submitted, and later amended the order to give additional time for the submission of Portales's affidavit. Further, although Portales's statement styled as an affidavit was not notarized under oath, it was filed in the administrative record, and the hearing officer referenced it in his recommended order. If either side has reason to complain regarding this, KBML is more likely to have a grievance, as the hearing officer allowed an unsworn affidavit into the record and referenced it in his recommended order. Accordingly, based on the method in which the underlying hearing proceeded, which was substantially on the written record, we find no merit to Portales's characterization of a constitutional due process violation.

For the reasons as stated, we affirm.

HENRY, SENIOR JUDGE CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. I believe that the agreement entered into between the Board and Dr. Portales must be analyzed in accordance with the basic principles governing contracts and, as a result, the Board was precluded from revoking Dr. Portales' medical license.

The Board and Dr. Portales entered into an agreement that resolved the controversy concerning precisely the same facts that served as the basis for the revocation of Dr. Portales' license. Thus, the question is whether the conspiracy charge was one encompassed within the agreement and resolved by its terms.

A settlement agreement is a contract and, therefore, is subject to contract law. *Ford v. Ratliff*, 183 S.W.3d 199, 202 (Ky.App. 2006). A basic tenet of that law requires the court to look first to the plain language of the agreement. If it is ambiguous, extrinsic evidence may be resorted to in order to determine the parties' intent. Absent an ambiguity, the court may not rely on extrinsic evidence and the intent of the parties is discerned only from the four corners of the instrument. *Id*. The agreement in question is unambiguous.

The intent of the Board and Dr. Portales is expressly stated in their agreement. It states:

> Come now the Kentucky Board of Medical Licensure (hereafter the Board), acting by and through its Hearing Panel B and Arturo Portales, C.O., and based upon their mutual desire to fully and finally resolve a pending grievance without an evidentiary hearing, hereby ENTER

INTO the following AGREED ORDER OF INDEFINITE RESTRICTION AND FINE: . . .

The stipulation of facts includes that Dr. Portales engaged in an internet drug prescription practice which included prescriptions to residents of Virginia as well as other states and that he "authorized" Mock's Pharmacy to dispense the prescriptions. Dr. Portales' affidavit, upon which the hearing officer relied upon as evidence, is not contradicted and, therefore, is conclusive that he did not engage in any additional conduct in violation of the parties' agreement. Yet, the majority's result is premised on the failure of the agreement, which was drafted by the Board, to reference any criminal charges including conspiracy.

The parties did not use legal terminology which, under our criminal law, charged a specific crime; however, the facts stipulated and the expressed intent of the parties was to resolve the allegations against Dr. Portales. The Board's power is civil in nature and it is not within its authority, nor is it within its enforcement powers, to "charge" a physician with a specific crime. Futhermore, if the Board intended to make any criminal conviction based on the identical facts as stipulated in the agreement a basis for the revocation of Dr. Portales' license, it could have included such a condition in the agreement. Although no such language appears, the majority suggests that because the agreement did not state that the facts admitted constituted "conspiracy" the Board can now renege on its agreement.

I conclude by analogizing this situation to where a criminal defendant enters a guilty plea, admits the underlying facts of his crime, and the court is aware that the defendant's course of conduct has caused additional criminal charges in other counties. No learned jurist could reasonably contend that the Commonwealth could utilize the same underlying facts to revoke a defendant's probation when the defendant was subsequently convicted of the additional charges in other counties.

Likewise, another analogy would be where a party is a defendant in civil litigation and a defendant in criminal litigation from the same underlying factual basis. Once the civil litigation was settled, it could not be reopened based upon the defendant's criminal conviction for the same conduct. The inherent unfairness in both hypotheticals is evident. The result reached by the majority is equally unjust.

I would reverse.

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