

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Jason E. Brake

Court of Appeals No. E-09-026

Appellant

Trial Court No. 2008-CV-0821

v.

Ohio Department of Insurance

DECISION AND JUDGMENT

Appellee

Decided: March 5, 2010

* * * * *

Loretta A. Riddle, for appellant.

Richard Cordray, Attorney General of Ohio, W. Scott Myers
and Elizabeth G. Hartnett, Assistant Attorneys General, for appellee.

* * * * *

HANDWORK, J.

{¶ 1} This case is before the court on appeal from the judgment of the Erie County Court of Common Pleas which decided the appeal filed by appellant, Jason E. Brake, against appellee, Ohio Department of Insurance. On August 12, 2008, appellant's application to be licensed as a surety bail bond agent in Ohio was denied by appellee.

Appellant appealed appellee's denial of his application to the Erie County Court of Common Pleas, which, on April 17, 2009,¹ affirmed appellee's decision denying appellant's application. Appellant timely appealed and raises the following assignments of error on appeal:

{¶ 2} 1. "A trial court errs, and abuses its discretion by determining that the department of insurance's order denying an applicant's license request is supported by reliable probative and substantial evidence when the department finds that the applicant violated R.C. 3905.14(B)(2) by having misdemeanors that are in no way connected to insurance laws."

{¶ 3} 2. "The trial court erred by finding that the department of insurance proved that the convictions of misdemeanors warrants a finding that a person is not of 'high character and integrity.'"

{¶ 4} In 2007, appellant applied with appellee to be licensed as a surety bond agent in Ohio. As part of the application process, appellant was required to disclose any criminal charges or convictions. Based upon appellant's disclosure, on January 31, 2008, appellee issued a notice of opportunity for hearing to appellant, advising him that the superintendent intended to deny his application due to his prior convictions of domestic violence in 2001, trespassing in 2005, and disorderly conduct in 2006, which demonstrated to appellee that appellant was not a person of high character and integrity, as required by R.C. 3905.85(B)(2) before a license will be issued. Appellant requested a

¹The trial court's judgment entry was journalized on April 29, 2009.

hearing, was notified of the hearing date of April 3, 2008, but failed to appear to present evidence on his behalf.²

{¶ 5} On April 3, 2008, appellee went forward with the hearing and received evidence concerning appellant's convictions. According to appellee's investigation, the 2001 domestic violence conviction concerned a physical altercation with appellant's wife, Maryanne, which occurred in front of seven children. Appellant was fined \$100 and served 15 days in jail for the 2001 conviction. In 2005, appellant was convicted of trespassing for entering the home of Alina Lockhart and standing over her bed while she slept. Appellant was convicted of disorderly conduct in 2006 for an incident involving his wife, Kateryna, who he was shoving into a car while she was trying to get away from him. Ultimately, she was successful in taking the car and driving away. Appellee additionally had evidence of a police investigation concerning an alleged breaking and entering in July 1989. According to the police investigation, appellant met an individual in a bar and went to an apartment with him where appellant and a group of others smoked crack cocaine. Appellant admitted to the police that during the evening, he drove to his workplace, for which he had keys, and took money and beer. He was placed in a diversion program for this alleged offense, which he successfully completed.

{¶ 6} As part of the application process, appellant provided a written explanation of the charges and convictions. With respect to the 1989 breaking and entering, appellant

²There is no evidence in the record that appellant requested a continuance of the hearing date.

stated the he was out at a bar, got drunk, went to a friend's house, and "the place I was working at got robbed because I had the keys and the night manager [sic]." He also stated that his "lawyer plead to the diversion program." Appellant described his actions in the 2001 domestic violence charge as follows, "me and my wife had been arguing, she had stabbed me in the back with a pair of scissors and I had grabbed her by the leg and pulled her leg." Concerning the 2005 incident, which appellant referred to as "Burglary 2005," appellant stated the following: "I was dating a Lithuanian girl and had a restraining order against her. She was here illegally. Her friend filed a complaint 30 days after the incident saying I broke into her house when her husband at the time said I didn't and my lawyer said it would be too expensive to go to court and I should plea to trespass." Finally, with respect to the 2006 charge, "attempted domestic violence," appellant stated, "I was shopping with my wife from Ukraine. She got upset because I wouldn't help her ask for the item she wanted to purchase. I didn't and she got upset and cried. I am still with her and we are getting along ok. We have a one year old daughter."

{¶ 7} Appellee found that, based upon his convictions, appellant failed to comply with R.C. 3905.85(B)(2) because he was not a person of high character and integrity. Having failed to comply with R.C. 3905.85(B)(2), appellee denied appellant's application because he failed to comply with an insurance rule or law,³ as set forth by R.C. 3905.14(B)(2).

³The insurance rule appellant failed to comply with was R.C. 3905.85(B)(2), i.e., that he could not receive a license because he was not "a person of high character and integrity."

{¶ 8} Appellant filed an appeal with the trial court. The trial court held that there was no evidence to support a finding that appellant violated R.C. 3905.14(B)(2)⁴ because the misdemeanors in question were not insurance related. The trial court then considered whether appellee would have been justified in denying appellant's application on the basis that appellant violated R.C. 3905.14(B)(7), because he was convicted of a misdemeanor that involved "moral turpitude." After analyzing appellant's misdemeanors, the trial court determined that they involved moral turpitude and, therefore, provided appellee with a sufficient basis to deny appellant's application for license. Ultimately, the trial court affirmed appellee's decision to deny appellant's application: "This court therefore concludes that there was reliable, probative and substantial evidence and that the decision of the DOI to refuse to issue Brake a Surety Bail Bond Agent license was in accordance with law. There was reliable, probative and substantial evidence to support the finding that Brake was not a person of high character and integrity."

{¶ 9} Because appellant's assignments of error are interrelated, we will consider them together. In appellant's first assignment of error, he argues that the trial court erred in affirming appellee's decision when there was no evidence that appellant was in violation of R.C. 3905.14(B)(2). In his second assignment of error, appellant argues that

⁴R.C. 3905.14(B)(2) states: "The superintendent may suspend, revoke, or refuse to issue or renew any license of an insurance agent, assess a civil penalty, or impose any other sanction or sanctions authorized under this chapter, for one or more of the following reasons: * * * (2) Violating or failing to comply with any insurance law, rule, subpoena, consent agreement, or order of the superintendent or of the insurance authority of another state; * * *."

the trial court erred in finding that, pursuant to R.C. 3905.14(B)(7), appellant's misdemeanor convictions warranted a finding that he was not a person of "high character and integrity." Appellant argues that, pursuant to Evid.R. 404 and 405, appellee could not rely on the evidence of his prior convictions to prove that his *character* was insufficient to permit him to receive a license. Appellant also argued that his pleas of no contest could not be considered in determining his fitness to obtain a license because, pursuant to Crim.R. 11(B)(2), a plea of no contest "shall not be used against the defendant in any subsequent civil or criminal proceeding."

{¶ 10} When reviewing an order of an administrative agency, the court of common pleas is limited to determining whether the order is supported by reliable, probative and substantial evidence, and is in accordance with the law. R.C. 119.12; and *Katz v. Ohio Dept. of Ins.*, 8th Dist. No. 80802, 2002-Ohio-3905, ¶ 11. R.C. 119.12 does not permit a trial de novo in the court of common pleas. *In re A-1 Natl. Agency Group LLC No. 1167*, 3d Dist. No. 15-04-01, 2004-Ohio-3553, ¶ 15. When reviewing the trial court's judgment, appellate review is limited to determining whether the trial court abused its discretion. *Id.* An abuse of discretion connotes more than a mere error of judgment, but an arbitrary, unreasonable or unconscionable attitude on the part of the trial court. *Katz* at ¶ 11.

{¶ 11} Initially, we note that application for a license is neither a criminal, nor civil proceeding; rather it is a special non-adversary statutory proceeding. See *McConnell v. Admr., Ohio Bur. of Emp. Serv.* (Sept. 3, 1996), 10th Dist. No.

96APE03-360; and *Sweetbriar Co. v. Liquor Control Comm.* (May 30, 1974), 8th Dist. No. 33089. As such, we find that Crim.R. 11(B)(2) is inapplicable to this matter. We also note that the rules of evidence are inapplicable to this proceeding. See Evid.R. 101(C)(7). Accordingly, we find that appellant's argument that appellee relied on inadmissible evidence in rendering its decision is not well-taken.

{¶ 12} We further find that the trial court incorrectly held that appellant was not in violation of R.C. 3905.14(B)(2). As noted above, the violation of R.C. 3905.14(B)(2) was appellant's failure to be a person of high character and integrity, as required by R.C. 3905.85(B)(2). Also, because the issue was never considered by appellee, we find that the trial court erroneously considered whether appellant's misdemeanors involved matters of moral turpitude. Nevertheless, having reviewed the record, we find that the trial court reached the correct conclusion, albeit for the wrong reasons.

{¶ 13} The convictions, appellant's admissions, and evidence of other police investigations, presented at the April 3, 2008 hearing, speak for themselves regarding appellant's lack of high character and integrity and, thus, his fitness to be licensed as a surety bail bond agent. Appellant had an opportunity to present evidence to refute the implication that he was not a person of high character and integrity because of the convictions, but appellant neglected to appear and present evidence that, despite his convictions, he was a person of high character and integrity. Accordingly, we find that appellee's finding that appellant was not a person of high character and integrity was supported by reliable, probative and substantial evidence. As such, we find that the trial

court did not abuse its discretion in affirming appellee's denial of appellant's application for license. Appellant's first and second assignments of error, therefore, are found not well-taken.

{¶ 14} On consideration whereof, the court finds substantial justice has been done the party complaining and the judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.