STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0990

Tonia Nicole Williams,
Relator,

vs.

Commissioner of Minnesota Department of Health,
Respondent.

Filed May 27, 2008
Affirmed
Poritsky, Judge[*]

Minnesota Department of Health
Study Nos. 21130761 & 21327051

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Considered and decided by Shumaker, Presiding Judge; Willis, Judge; and Poritsky, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

PORITSKY, Judge

Relator Tonia Williams appeals from an order of respondent Commissioner of the Minnesota Department of Health (MDH) disqualifying her from working in a position allowing direct contact with, or direct access to, persons receiving services from facilities licensed by MDH or the Minnesota Department of Human Services (DHS). Because the commissioner correctly applied the current statute, we affirm.

FACTS

In 1992, Williams shot and killed a burglar who broke into her home in Philadelphia, Pennsylvania. Williams was charged with, and convicted of, involuntary manslaughter in violation of 18 Pa. Cons. Stat. § 2504. Williams was also convicted of possessing and carrying a firearm. Williams served two-and-one-half years in prison.

After her incarceration, Williams moved to Minnesota and became a registered nurse. In 2002, Williams began working as a registered nurse at Abbott Northwestern Hospital. Williams claims she disclosed her involuntary-manslaughter conviction on her Abbott Northwestern job application. [1]

At the time of her Abbott Northwestern application, all facilities licensed by MDH or DHS were required to submit background studies for prospective employees and, depending on what the background study revealed, DHS could disqualify the prospective

[1] The commissioner does not seem to dispute Williams's contention that she disclosed her conviction in 2002 when she first applied at Abbott Northwestern.

employee from providing direct-contact services at the licensed facility. *See* Minn. Stat. §§ 144.057 (stating background studies for MDH shall be conducted by DHS), 245A.04, subds. 3 (describing DHS background studies and stating employees providing direct-contact services in personal-care-provider organizations shall be studied), and 3d (2002) (stating that after background study, individual may be disqualified from holding a direct-contact position at licensed facility). An individual who was disqualified had the right to petition the commissioner of MDH to reconsider and set-aside the disqualification. Minn. Stat. § 245A.04, subd. 3b (a)(1)-(2) (2002). A set-aside would be granted if the individual could establish (1) that the commissioner relied on incorrect information in determining that the underlying conduct giving rise to the disqualification occurred; or (2) that the individual does not pose a risk of harm to any person served by the licensed facility.[2] *Id.*

After Williams submitted her job application, Abbott Northwestern apparently did not request a background study. The commissioner notes that "there is no evidence . . . of a previous background study by Abbott-Northwestern Hospital or any other employer"

[2] In determining that an individual does not pose a risk of harm, the commissioner was required to consider the nature, severity, and consequences of the event or events that led to disqualification, whether there was more than one disqualifying event, the age and vulnerability of the victim at the time of the event, the harm suffered by the victim, the similarity between the victim and persons served by the program, the time elapsed without a repeat of the same or similar event, documentation of successful completion by the individual studied of training or rehabilitation pertinent to the event, and any other information relevant to reconsideration. Minn. Stat. § 245A.04, subd. 3b(b) (2002).

and that "[t]he record does not reveal why [Williams's] employers did not request a background study on her until 2006."

In 2006, Williams inquired with Regency Hospital about possible employment options. Regency submitted a background study form to DHS. DHS obtained a Federal Bureau of Investigation report, which contained Williams's Pennsylvania conviction of involuntary manslaughter. By this time the laws relating to disqualification had changed. The commissioner was now required to permanently disqualify an individual "where the elements of the offense [from another state] are substantially similar to any of the offenses listed in [Minn. Stat. § 245C.15, subd. 1], as each of these offenses is defined in Minnesota Statutes . . . ." Minn. Stat. § 245C.15, subd. 1(c) (2006). After reviewing the elements of involuntary manslaughter in Pennsylvania, DHS concluded that they are substantially similar to the elements of second-degree manslaughter in Minnesota, an offense that is listed in the disqualification statute as a permanently disqualifying crime. *See* Minn. Stat. § 245C.15, subd. 1(a)(2)[3] (second-degree manslaughter used as a permanently disqualifying crime); Minn. Stat. § 609.205 (2006) (elements of second-degree manslaughter). Accordingly, DHS concluded that Williams must be permanently disqualified from any position allowing direct contact with persons in MDH- or DHS-licensed facilities.

[3] The commissioner must disqualify an individual when a background study shows "a conviction of or admission to one or more of the crimes listed in section 245C.15, regardless of whether the conviction or admission is a felony, gross misdemeanor, or misdemeanor level crime." Minn. Stat. § 245C.14, subd. 1(a)(1) (2006).

By letter dated October 6, 2006, DHS notified Williams that she was disqualified. An order calling for Williams's immediate removal was sent to Abbott Northwestern. Williams filed a request for reconsideration. The review was done by the commissioner of MDH, who affirmed the initial disqualification, explaining that Williams's conviction was a disqualifying crime that mandated permanent disqualification. The commissioner also stated, "You have a disqualifying crime or conduct listed in Minnesota Statutes, section 245C.15, subd. 1 [permanently disqualifying crimes]. Effective July 1, 2005, Minnesota Statutes, section 245C.24, subd. 2, prohibits the Commissioner from setting aside your disqualification, regardless of how much time has passed." Prior to 2005, an individual with a permanently disqualifying crime could petition the commissioner for a set-aside of the disqualification, based on a showing that he or she did not pose a risk of harm. Minn. Stat. §§ 245A.04, subd. 3b (a)(1)-(2) (petition for set-aside), subd. 3b (2002); (risk-of-harm factors). In this certiorari appeal, Williams seeks rescission of the disqualification.

D E C I S I O N

"We presume the agency's decision . . . is correct, but the court may reverse an agency decision if the decision was affected by an error of law." *N. States Power Co. v. Minn. Pub. Utils. Comm'n*, 344 N.W.2d 374, 377 (Minn. 1984).

Williams's first argument is that the commissioner "erroneously translated" the Pennsylvania involuntary-manslaughter conviction, a misdemeanor, "to equate to a charge of felony [] manslaughter in the second degree in Minnesota." It is somewhat unclear what Williams is arguing. She may be challenging DHS's statement in the initial

disqualification letter that Williams was "arrested and subsequently convicted of felony involuntary manslaughter on November 2, 1992, in Philadelphia, PA." Or, she may be arguing that the Pennsylvania involuntary-manslaughter conviction, a misdemeanor, is not substantially similar to a Minnesota second-degree manslaughter conviction, a felony.

If Williams is merely arguing that DHS erred in stating that she was convicted of "felony involuntary manslaughter," Williams's contention is without merit. First, in the request-for-reconsideration decision, the commissioner acknowledged the error, stating, "The October 6, 2006, letter incorrectly stated that your conviction was a felony. According to the information submitted by your attorney, your conviction was actually for a misdemeanor involuntary manslaughter." Second, as the commissioner points out, the level of conviction is not determinative in the categorization of permanently disqualifying crimes under Minn. Stat. § 245C.15, subd. 1. Instead, the focus is on comparing the elements of the out-of-state crime with the elements of the disqualifying Minnesota crime. *See* Minn. Stat. § 245C.15, subd. 1(c). Thus, the initial error by DHS, labeling the involuntary manslaughter crime as a felony, is inconsequential.

If Williams is challenging the conclusion that the elements of involuntary manslaughter in Pennsylvania are substantially similar to the elements of second-degree manslaughter in Minnesota, Williams's argument fails. In determining that Williams had committed a disqualifying crime, DHS compared the elements of the two offenses as required by Minn. Stat. § 245C.15, subd. 1(c). Under Pennsylvania law, involuntary-manslaughter is defined as "when as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless or grossly

negligent manner, he causes the death of another person." 18 Pa. Cons. Stat. § 2504(a). Under Minnesota law, second-degree manslaughter is defined as "caus[ing] the death of another . . . by the person's culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another." Minn. Stat. § 609.205(1) (2006). DHS concluded that "both statutes, while using different words, require that the person act in a risky way which causes the death of another person." Williams does not present any evidence that DHS erred in its analysis of the two statutes. Thus, it appears the commissioner correctly determined that the elements of the two statutes are substantially similar, and, as a result, Williams committed a permanently disqualifying crime.

Williams's second argument is that the application of the law as it existed at the time the commissioner made the review is "unjust as an ex post facto law." She argues that if Abbott Northwestern had submitted a request for a background study to DHS in 2002 and DHS had permanently disqualified her at that point, she would have been able to petition for a set-aside based on the risk-of-harm factors. But because the DHS background study was not conducted until 2006 and the law changed in 2005 so as to prohibit set-asides for permanently disqualified individuals, Williams contends she was stripped of the opportunity to petition for a set-aside through no fault of her own. *See* 2005 Minn. Laws ch. 136, art. 6, § 7.

Williams cites *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960 (1981), and *Hankerson v. State*, 723 N.W.2d 232 (Minn. 2006), in support of her argument. In our view, neither of these cases has any persuasive effect here. Both cases concern prison

sentences and thus clearly involve punishment. The disqualification and set-aside statutes involved here are part of a statutory scheme that is clearly civil in nature.

In determining whether a civil statute is so punitive in either purpose or effect as to subject it to the ex-post-facto prohibition, the court looks at seven factors, as articulated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 567-68 (1963).[4] *Smith v. Doe*, 538 U.S. 84, 97, 123 S. Ct. 1140, 1149 (2003). As the Court in *Kennedy* noted, these factors may often point in different directions. 372 U.S. at 169, 83 S. Ct. at 568. The factors that are most relevant to this case are: whether the disqualification and set-aside provisions have a non-punitive and "alternative" purpose to which the provisions are rationally connected; whether the statutory penalty has been traditionally regarded as punitive; whether the operation of the statutory penalty in this case will promote the traditional aims of punishment—retribution and deterrence; whether the behavior to which they apply is already a crime; and whether their combined operation is excessive. *See id.* at 169, 83 S. Ct. at 568.

First, the purpose of the disqualification laws is the protection of the public, particularly vulnerable adults and children who are receiving services from health care programs. *See, e.g.*, Minn. Stat. § 245C.22, subd. 3 (2006) (stating that in reviewing a reconsideration request "the commissioner shall give preeminent weight to the safety of

[4] The seven factors are: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable to it; and (7) whether it appears excessive in relation to the alternative purpose assigned. *Kennedy*, 372 U.S. at 168-69, 83 S. Ct. at 567-68.

each person served by the license holder . . . over the interests of the disqualified individual"). As the commissioner has pointed out, the legislature has apparently determined that individuals who have committed certain offenses should not be allowed to have direct contact with certain vulnerable patients for varying periods of time, depending on the seriousness of the offense. The Supreme Court in *Smith v. Doe*, in upholding Alaska's sex offender registration laws, stated:

> The *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences . . . Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application.

538 U.S. at 103-04, 123 S. Ct. at 1153 (quotation omitted).

Second, Williams has made no showing that the disqualification statutes have traditionally been regarded as punitive. The Supreme Court has noted that occupational debarment has not been historically regarded as punitive. *Hudson v. United States*, 522 U.S. 93, 103-04, 118 S. Ct. 488, 495-96 (1997) ("We have long recognized that revocation of a privilege voluntarily granted, such as debarment, is characteristically free of the punitive criminal element.").

Third, while employment disqualification may have some deterrent effect on an individual who is considering committing a crime, the Court has noted, "[t]o hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation . . . ." *Id.*

at 105, 118 S. Ct. at 496. Fourth, the behavior to which Williams's disqualification applies— second-degree manslaughter—was already a crime when she committed it.

Finally, Williams argues that the disqualification is excessive, given the facts of her case. ("[T]he determination to disqualify [Williams] is devastating to the welfare and financial stability of her family.") But the issue that governs our decision is whether or not the legislature has the authority to create a disqualification scheme that prevents any person who has committed second-degree manslaughter, regardless of the facts of the case, from giving care to vulnerable patients. In both Pennsylvania and Minnesota, the crime committed by Williams requires proof of extremely negligent behavior (Pennsylvania: acting in a "reckless or grossly negligent manner"; Minnesota: "culpable negligence" coupled with "consciously tak[ing] chances") causing the death of another. 18 Pa. Cons. Stat. § 250A; Minn. Stat. § 609.205. It is not irrational for the legislature to have taken note of those elements and determined that all persons who have committed such an offense should be permanently disqualified from providing direct care to vulnerable patients in licensed facilities. The Supreme Court in *Smith* ruled that the legislature has the power to make reasonable categorical judgments without violating the prohibition against ex-post-facto laws. The Court in *Smith* concluded, "The State's determination to legislate with respect to [a particular] class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the *Ex Post Facto* Clause." 538 U.S. at 104, 123 S. Ct. at 1153.

We conclude that in 2005, when the legislature withdrew the commissioner's authority to set aside a permanent disqualification in cases involving an individual

convicted of second-degree manslaughter, the legislature did not violate the prohibition against ex-post-facto laws. The commissioner properly applied the disqualification statute in effect in 2006 and determined that Williams is permanently disqualified from direct-contact positions in licensed facilities. Accordingly, we affirm.

Affirmed.