

IN THE MATTER OF

* BEFORE THE

JAY SHERR, P.D.

* MARYLAND STATE

* BOARD OF PHARMACY

LICENSE NO. 11168

*

Respondent

* Case No. 08-039

* * * * *

FINAL DECISION AND ORDER

Background

On August 31, 2009, the Maryland Board of Pharmacy (the "Board") issued a Notice of Intent to Revoke the pharmacist's license held by Jay Sherr (the "Respondent"), License No. 11168. The Board's action was based on its investigation indicating that on October 26, 2007, Mr. Sherr pled guilty in the U.S. District Court for the District of Maryland to one count of possession of material shipped and transported in interstate and foreign commerce depicting minors engaged in sexually explicit conduct.

A contested case hearing was held under the Administrative Procedure Act, Md. Code Ann., State Gov't §10-201 *et seq.*, and COMAR 10.34.01, before a quorum of the Board on November 18, 2009, for purposes of adjudicating the charges. After the conclusion of the hearing on the same date, November 18, 2009, the same quorum of the Board convened to deliberate and voted unanimously to sanction the license held by Mr. Sherr as set forth in this Final Decision and Order.

SUMMARY OF THE EVIDENCE

The parties submitted a joint stipulation of facts and conclusions of law for consideration by the Board. The Board accepted the parties' joint stipulation and has incorporated the findings and conclusions as set forth below.¹ The Respondent was also given an opportunity for allocution.

FINDINGS OF FACT

Based upon the Joint Stipulation presented at the evidentiary hearing, the Board finds that the following facts are true:

1. At all times relevant hereto, the Respondent was licensed to practice pharmacy in Maryland. The Respondent was first licensed on July 30, 1987. The Respondent's license will expire on March 30, 2010.
2. On October 23, 2003, the Respondent was indicted in the United States District Court for the District of Maryland for possession of material shipped and transported in interstate and foreign commerce depicting minors engaged in sexually explicit conduct in violation of Federal law.
3. The facts are that, in December 2002, the United States Customs Office in San Jose, California notified the Customs Office in Yuma, Arizona that its agents had information that a resident in Lake Havasu City, Arizona had been trafficking in child pornography. Acting on this information, Arizona Customs agents served a Federal search and seizure warrant at the resident's residence on his AOL account. In the

¹ The joint stipulation contained a typographical error in the citation under the Conclusions of Law, referencing § 12-313(b)(21) instead of § 12-313(b)(22).

course of the search of the AOL account, agents noticed that the resident had transmitted images of child pornography to someone using the screen name "Carols459@aol.com." Thereafter, the agents used an administrative subpoena to obtain records from AOL for the subscriber information to the above, which indicated that it belonged to the Respondent. Consequently, Arizona agents notified the Customs Office in Baltimore regarding the information about the Respondent. Subsequently, a Baltimore-based U.S. Postal Inspection Service Inspector conducted an undercover on-line conversation with the Respondent and later executed a Federal search warrant at his residence. Among the items the agents seized from the Respondent's address was his computer, which subsequently showed that the Respondent had a substantial number of images of minors engaged in sexually explicit conduct, including 147 still images and eight videos, all of which the Respondent had downloaded to his computer from the internet. The Respondent's collection included series of images from the United Kingdom, the United States, Germany, Brazil and Paraguay.² On the day that customs agents executed the Federal search warrant at the Respondent's residence, they interviewed him and the Respondent stated that he knew that the agents were at his house because "of the pictures on [his] computer."

4. When the Respondent renewed his license for the 2006 renewal period, on an application dated 3/28/06, the Respondent answered "yes" to Question #4, which asks: "Have you pled guilty, nolo contemre (*sic*), or been convicted of, or received

² The persons who produced the child pornography received and possessed by the Respondent did not limit themselves to taking single photographs of the minors they sexually molested, but created "series" of images of each child being sexually violated.

probation before judgment of any criminal act (excluding traffic violations)?" As an explanation, the Respondent wrote the following:

Please be advised that on Friday, January 27, 2006, I entered a Conditional Plea under Rule 11(a)(2) of the Federal Rules of Criminal Procedure to a charge in violation of 18 U.S.C. §225(a) Conditional Plea was entered here with the consent of Federal Judge and the Assistant United States Attorney prosecuting me. The Condition Plea allows me to appeal to the Fourth Circuit Court of Appeals numerous issued (*sic*) raised prior to the plea. If successful in the Court of Appeals, the guilty plea will be withdrawn and all charges will be dismissed. Thus, my attorney has advised me that the Conditional Plea is provisional and should have no effect until the underlying issues are adjudicated by the Fourth Circuit Court of Appeals.

5. On October 19, 2007, the Board was notified via email regarding the Respondent's indictment, and on October 29, 2007, the Board was further notified that the Respondent had been sentenced.
6. On October 26, 2007, the Respondent pled guilty to the indictment and was found guilty. The Respondent was placed on Probation for three years; received standard conditions of supervision; was *inter alia*, placed on home detention for a period of 12 months; had to do 200 hours of community service, as directed by the Probation Officer; had to participate in a mental health treatment program, including sex offender treatment; was not to use computer systems; had to register with a sex offender registration agency where he resides, is employed, carries on a vocation, is a student, as directed by the Probation Officer; and, had to pay a \$10,000 fine and other assessments. The Respondent's sentencing order is attached here to and made a part hereof as Exhibit 1.
7. On the Respondent's 2008 renewal application, the Respondent again answered "yes" to Question #5, and responded as follows:

On August 12, 2003, I was charged with violating 18 U.S.C. 2252(a)(4)(B) regulating the possession of child pornography obtained over the internet. On January 27, 2006, I pled guilty to that charge and on October 26, 2007 I was sentenced to 3 years probation. The offense did NOT involve any physical contact, manufacture, sale or distribution or predatory conduct. I have been compliant with all conditions of probation and continue with therapy.

OPINION AND SANCTION

The Respondent concedes that his egregious misconduct subjects him to disciplinary action by the Board and asks this Board for mercy in determining its sanction. The Board is mindful, however, that the child victims who were molested in the 147 images and 8 videos possessed by the Respondent will probably be scarred for life. The Respondent attempts to distance himself from the abhorrent behavior associated with child pornography by distinguishing his acts as non-predatory and explaining that he did not participate in any physical contact with these children. The Board nonetheless finds the Respondent's actions equally horrifying. It is individuals like the Respondent who create the market for child pornography.

The Board must not only fulfill its mandate to protect the public, including children, who may come across the Respondent in a professional setting, but it must also protect the standards of the profession in order to instill public trust and confidence in Maryland pharmacists. While the Board acknowledges that the Respondent has been engaged in and compliant with his sex offender treatment, the Board also realizes that this was ordered by the court as part of his criminal probation. The Respondent would risk a violation of probation and probable incarceration should he not cooperate and comply with his treatment provider.

Lastly, the Board did not feel that the Respondent was significantly remorseful for his actions. The Respondent focused on his own personal and professional difficulties since he was

indicted, and emphasized that his misconduct did not affect his clinical ability as a pharmacist.³ The Respondent never mentioned nor empathized with the minor victims who were portrayed in his image and video collections except to say that he had no personal knowledge about them.

Based on the egregiousness of the Respondent's misconduct, the Board finds that the most significant sanction is necessary to address the violations committed by the Respondent as well as to provide a catharsis for the profession.

CONCLUSIONS OF LAW

Based upon the foregoing joint stipulation and Findings of Fact, the Board concludes the Respondent is subject to disciplinary action based on Md. Code Ann., Health Occ. §§ 12-313(b)(22) ("Is convicted of or pleads guilty or nolo contendere (*sic*) to a felony or to a crime of moral turpitude, whether or not any appeal or other proceeding is pending to have the conviction or plea set aside.")

ORDER

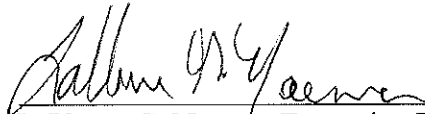
Based on the foregoing Findings of Fact, Opinion, and Conclusion of Law, by a unanimous decision of a quorum of the Board it is hereby:

ORDERED that the pharmacist's license held by Jay Sherr is REVOKED for a minimum of THREE (3) YEARS, beginning on November 18, 2009; and be it further,

ORDERED that this is a formal order of the Maryland Board of Pharmacy and as such is a **PUBLIC DOCUMENT** pursuant to Md. Code Ann., State Gov't Art., §§10-611, *et seq.*

³ The Respondent has not practiced pharmacy for approximately ten years. (T. 53) He is currently employed as the Director of Legal Services at Alternative Solutions. (T. 26) Irrespective of his moral deficiencies, the Board would have serious concerns regarding the Respondent's professional competency as well.

January 13, 2010
Date



LaVerne G. Naesea, Executive Director
for
Donald Taylor, P.D., President

NOTICE OF RIGHT TO APPEAL

Pursuant to Md. Code Ann., Health Occ. Art., §12-316, you have the right to take a direct judicial appeal. A petition for appeal shall be filed within thirty days of this Final Decision and Order and shall be made as provided for judicial review of a final decision in the Maryland Administrative Act, Md. Code Ann., State Gov't Art., §§10-201, *et seq.*, and Title 7, Chapter 200 of the Maryland Rules.