

December 23, 2014

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

John M. Gayden, Jr., M.D.
REDACTED

Michael A. Hiser, Deputy Counsel
NYS Department of Health
ESP-Corning Tower-Room 2512
Albany, New York 12237

RE: In the Matter of John Matthew Gayden, Jr., M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 14-316) of the Hearing Committee in the above referenced matter. This Determination and Order shall be deemed effective upon the receipt or seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), (McKinney Supp. 2013) and §230-c subdivisions 1 through 5, (McKinney Supp. 2013), "the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the Respondent or the Department may seek a review of a committee determination.

All notices of review must be served, by certified mail, upon the Administrative Review Board and the adverse party within fourteen (14) days of service and receipt of the enclosed Determination and Order.

The notice of review served on the Administrative Review Board should be forwarded to:

James F. Horan, Esq., Chief Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Riverview Center
150 Broadway – Suite 510
Albany, New York 12204

The parties shall have 30 days from the notice of appeal in which to file their briefs to the Administrative Review Board. Six copies of all papers must also be sent to the attention of Mr. Horan at the above address and one copy to the other party. The stipulated record in this matter shall consist of the official hearing transcript(s) and all documents in evidence.

Parties will be notified by mail of the Administrative Review Board's Determination and Order.

Sincerely,

REDACTED

James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH:cah

Enclosure

**STATE OF NEW YORK : DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT**

GOPY

**IN THE MATTER
OF
JOHN MATTHEW GAYDEN, JR., M.D.**

**DETERMINATION
AND
ORDER**
BPMC #14-316

A hearing was held on November 20, 2014, at the offices of the New York State Department of Health (“the Department”), Bureau of Adjudication, 150 Broadway, Suite 510, Albany, New York 12204. A Notice of Referral Proceeding and a Statement of Charges, both dated September 15, 2014, were served upon the Respondent, John M. Gayden, Jr., M.D., by personal service on September 24, 2014. Steven I. Sherman, D.O., Chair, Mohammad-Reza Ghazi-Moghadam, M.D., and William W. Walence, Ph.D., members of the State Board for Professional Medical Conduct, served as the hearing committee in this matter. Denise Lepicier, Administrative Law Judge, served as the administrative officer. The Department appeared by Joel E. Abelove, Associate Counsel, Bureau of Professional Medical Conduct. The Respondent, John M. Gayden, Jr., M.D., represented himself at the proceeding. Evidence was received and transcripts of these proceedings were made. After consideration of the entire record, the Hearing Committee issues this Determination and Order.

STATEMENT OF CASE

This case was brought pursuant to Public Health Law Section 230(10)(p). This statute provides for a hearing on limited issues when a licensee is charged based upon a violation of New York Education Law Section 6530(9). In such cases, a licensee is charged with misconduct based upon a criminal conviction regarding conduct which is a crime under federal law or in New York State or upon an administrative adjudication in another state regarding conduct that would amount to professional misconduct if committed in New York.

In the instant case, the Respondent is charged with professional misconduct pursuant to Education Law §6530(9)(a)(iii), by having been convicted of committing an act constituting a crime under the law of another jurisdiction and which, if committed in this state, would have constituted a crime under New York state law.

A copy of the Statement of Charges (Exhibit 1) is attached to this Determination and Order as Appendix 1. The Respondent submitted an answer to the charges (Exhibit A) which is attached to this Determination and Order as Appendix 2.

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. Exhibits will be referred to in parentheses by an "Ex." Transcript citations will be referred to in parentheses by a "T." These citations refer to evidence found persuasive by the hearing committee in arriving at a particular finding. All hearing committee findings were unanimous.

1. John M. Gayden, Jr., M.D., the Respondent, was served with the notice of hearing and

statement of charges on September 24, 2014. (T. 14; Ex. 2)

2. The Respondent was authorized to practice medicine in New York State on November 14, 1983, by the issuance of license number 156717 by the New York State Education Department. (Ex. 3)
3. On or about June 16, 2014, the Circuit Court of the Eighteenth Judicial Circuit for Brevard County Florida accepted a plea of guilty from Respondent for the crime of "Possession With Intent to Sell or Deliver a Controlled Substance," in this case cannabis, in violation of Florida Statute § 893.13(1)(a)(2). (T. 11-14; Ex. 4)
4. Respondent was sentenced by the court to five years of probation and the court ordered that the "adjudication of guilt be withheld." (Ex. 4)

CONCLUSIONS OF LAW

The first and only specification in the Statement of Charges alleges that the Respondent violated New York Education Law § 6530(9)(a)(iii) by having been convicted of committing an act constituting a crime under the law of another jurisdiction which, if committed within this state, would have constituted a crime under New York state law. (Ex. 1) The committee was provided with very little information concerning the underlying act and, therefore, was limited to considering only the facts which must have been true for the Respondent to be convicted of the crime of which he was convicted, i.e., he was in possession of cannabis with the intention of selling or delivering the cannabis. Accepting these facts as the facts of the case, the committee was confronted with two questions: whether the Respondent was convicted in Florida and whether the act would be a crime in New York State if committed here.

Respondent in both his answer to the charges and in his testimony at hearing, argued that a “withheld adjudication” plea is not a “conviction” for purposes of Education Law § 6530. (Ex. A; T. 9, 17, 41-45, 57) Respondent’s answer also cites to certain Florida cases where the “withheld adjudication” plea has limited the use of the conviction for certain purposes in Florida. However, Respondent pled guilty to a felony in the third degree. (Ex. 4) Florida Statutes §§ 891.13(1)(a)(2) and 893.03(1)(c)(7). Florida Statute § 921.0021(2) defines a conviction for any felony offense (other than a capital felony) and states: “‘Conviction’ means a determination of guilt that is the result of a plea or a trial regardless of whether adjudication is withheld.” (Underlining supplied) Indeed the highest court of the state in Florida, citing the above definition, has found that, even when a person enters a no-contest plea, with “adjudication withheld,” the plea is a conviction. Montgomery v. State, 821 So. 2d 464 (Fla. 2005). At least one New York court has also determined that a Florida plea with “adjudication withheld” is a conviction for purposes of New York law. (T. 17-18) People v. Cassarino, 179 Misc. 2d 47, 649 N.Y.S.2d 323 (Sup. Ct., Kings Cty. 1996).

The committee concluded that Respondent’s Florida plea was a conviction under Florida statutes, whether it would be treated as a “conviction” for all purposes under Florida law or not, and that Respondent’s plea constituted a conviction for purposes of New York law.

The second question to be considered was whether Respondent’s conviction would constitute a crime in New York State. The committee did not have the charging instrument or the plea allocution before it. Therefore, all the committee knows about the act in this case is that Respondent was in possession of cannabis with the intent to sell or deliver it. (Ex. 4) The

Department argued that this act would constitute the crime of Criminal Sale of Marijuana in the Fourth Degree, an A misdemeanor, in New York State. (T. 14-15) Penal Law § 221.40.

The Department further cited to the definition, applicable to Criminal Sale of Marijuana in the Fourth Degree, of “sell” in the Penal Law. (T. 15) “Sell” means “to sell, exchange, give or dispose of to another, or to offer or agree to do the same.” Penal Law § 220.00. The Department argued that because this definition must include an intent to “sell or deliver” that all the elements of the Florida statute are included in Penal Law § 221.40. (T. 15-16, 33-35)

Even if what the Department argued is true however, the Department’s analysis is backward. It is not that all the elements of the Florida crime need to be within the New York State crime; it is that the New York State crime does not include any elements that were not necessary to the Florida conviction. In this instance, the New York State crime requires an element not necessary to the Florida conviction. Penal Law § 221.40 requires a sale, exchange, giving or disposing to another or an offer or agreement to do the same. Respondent may have had the intent to do so in Florida, but based upon what is before this committee, it cannot be said that Respondent took the next step.

Marijuana offenses in New York are largely structured around the quantity possessed or sold. Penal Law §§ 221.00 through 221.55. Since the hearing committee knows little about the act involved in the Florida conviction, the only offense which would match with the Florida elements of the crime would be “Unlawful Possession of Marihuana,” a violation. Penal Law § 221.00. A violation is not a crime under the Penal Law as a “crime” is defined as “a misdemeanor or a felony.” Penal Law § 10.00(6).

The First Specification is Not Sustained.

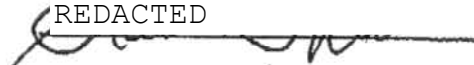
ORDER

IT IS HEREBY ORDERED THAT:

1. The specification of professional misconduct, as set forth in the Statement of Charges, is **NOT SUSTAINED**.
2. This Order shall be effective upon service on the Respondent in accordance with the requirements of Public Health Law Section 230(10)(h).

DATED: Woodmere, New York
December 19, 2014

REDACTED


Steven I. Sherman, D.O., Chair

Mohammad-Reza Ghazi-Moghadam, M.D.
William W. Walence, Ph.D.

To:

John M. Gayden, Jr., M.D.

REDACTED

Michael A. Hiser, Deputy Counsel
Bureau of Professional Medical Conduct
Corning Tower, Room 2512
Empire State Plaza
Albany, N.Y. 12237

APPENDIX 1

STATE OF NEW YORK : DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

IN THE MATTER
OF
JOHN GAYDEN, JR., M.D.
CO-11-10-5821A

STATEMENT
OF
CHARGES

JOHN GAYDEN, JR., M.D., Respondent, was authorized to practice medicine in New York state on November 14, 1983, by the issuance of license number 156717 by the New York State Education Department.

FACTUAL ALLEGATIONS

A. On or about June 16, 2014, in the County Court of the Eighteenth Judicial Circuit In And For Brevard County, Florida, (hereinafter "Florida Court"), Respondent was convicted by plea to Possession of Cannabis with Intent to Sell or Deliver, in violation of F.S. 893.13(1a2), a felony, and sentenced to probation for a period of five (5) years and shall be required to submit DNA samples as required by Florida law.

SPECIFICATIONS

FIRST SPECIFICATION

Respondent violated New York State Education Law §6530 (9)(a)(iii), Being convicted of committing an act constituting a crime under the law of another jurisdiction and which, if committed within this state, would have constituted a crime under New York state law, in that Petitioner charges:

1. The facts in Paragraph A.

DATED: *Sept. 15*, 2014
Albany, New York

REDACTED

MICHAEL A. RISER
Deputy Counsel
Bureau of Professional Medical Conduct

APPENDIX 2

STATE OF NEW YORK : DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

IN THE MATTER
OF
JOHN GAYDEN, JR., M.D.
CO-11-10-5821A

ANSWER TO
NOTICE OF REFERRAL

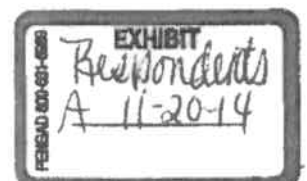
TO: State Board for Professional Medical Conduct
c/o Joel E. Abelove, Esq.
Corning Tower – Room 2512
Empire State Plaza
Albany, NY 12237

Pursuant to the provisions of New York Public Health Law §230(10)(p), I give the following Answer to each of the charges and allegations in the Statement of Charge as follows:

I specifically deny the allegation that I was “convicted upon plea”. For the benefit of the Board’s General Counsel, Florida judges have a special authority vested upon them to “withhold adjudication” in a criminal matter pursuant to F.S. §948.01. The statute provides the court with the ability to withhold adjudication after the imposition of a probation sentence without imposing upon the defendant a conviction and the collateral consequences that accompany a conviction¹.

For those who regularly practice criminal law, such as my lawyer who represented me in the Florida case, the disposition in my case is traditionally viewed that a withhold of adjudication is as a logical compromise for the amicable resolution of criminal cases. In those cases, the defendant consents to the payment of fines and a term of probation in exchange for the state’s acquiescence of a withhold of adjudication. Once

¹ Fla. R. Crim. P. 3.670



the term of probation is successfully completed, the court is divested of jurisdiction and there is no adjudication of guilt.² F.S. §948.04 (2) provides that upon the termination of the period of probation, the probationer shall be released from probation and cannot be sentenced for the offense which probation was allowed. In these cases, withholds of adjudication have promoted judicial economy and leniency for uncharacteristic behavior by removing the conviction from the adjudicatory process. In the case of qualifying felonies, defendants escape the forfeiture of civil rights such as the right to vote, hold public office, and serve on a jury.³ The effect of a withhold of adjudication has also had far reaching effect in practical application. For example, a person who has had the benefit of a withhold of adjudication could traditionally deny having a conviction, even when subject to deposition or while testifying in court.⁴ In addition, defendants could safely check the "no" box on job applications when asked if they had ever been convicted of a criminal offense.

Therefore, contrary to the allegations contained in the Statement, I was not convicted, nor can New York consider me to be convicted since I was not convicted of any crime.

Respectfully Submitted,

Date: 10-5-2014

By: REDACTED
John M. Gayden, Jr.M.D.

² See *Thomas v. State*, 356 So. 2d 846, 847 (Fla. 4th D.C.A. 1978), cert. denied, 361 So. 2d 835 (Fla. 1978) ("If the defendant successfully completes his probation he is not a convicted person but if the probation is violated the court may then adjudicate and sentence."); *United States v. Thompson*, 756 F. Supp. 1492, 1495 (N.D. Fla. 1991); *Davis v. State*, 623 So. 2d 579, 580 (Fla. 3d D.C.A. 1993) (However, once the "probationary period expires, the court is divested of jurisdiction over the probationer unless, prior to that time, the appropriate steps were taken to revoke or modify the probation."); *Purvis v. Lindsey*, 587 So. 2d 638, 639 (Fla. 4th D.C.A. 1991); see also Fla. Stat. § 948.04.

³ *Snyder v. State*, 673 So. 2d 9 (Fla. 1996).

⁴ *Brown v. State*, 787 So. 2d 136 (Fla. 4th D.C.A. 2001) (Court held it was improper impeachment to allude to felony cocaine possession case where adjudication had been withheld).