

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

In Re: Woodie Kevin Dean

No. 11-0660

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

The petitioner, Woodie Kevin Dean, passed the West Virginia Bar Examination in February 2009 and seeks admission to the practice of law in this State. However, upon a lengthy administrative process culminating in an evidentiary hearing, the West Virginia Board of Law Examiners on February 2, 2011, rejected prior determinations to conditionally admit Dean and, instead, recommends to this Court that his application for admission be denied without prejudice to reapply after one year. This matter is now before this Court upon Dean's exceptions to the February 2, 2011, recommendation.

On examination of the record, and applying the standards of review set forth in *In the Matter of Dortch*, 199 W.Va. 571, 486 S.E.2d 311 (1997), this Court is of the opinion that the exceptions filed by Dean are without merit and that the recommendation not to admit him to the practice of law should be adopted.

We note, however, that the Board's recommendation constitutes an affirmation of a prior recommendation dated May 18, 2010, not to admit Dean. The Board determined that the one year waiting period from that decision began on May 18, 2010. That time is now expired, and Dean has filed a new application for admission to the practice of law in this State. Inasmuch as the new application is not before this Court, and the Board's recommendation thereon is not expected until the latter part of this year, this Court's consideration in the current proceeding of matters pertaining to Dean's original and updated applications for admission to practice is not moot.

Factual Background

In June 2002, Dean, a resident of Mingo County, West Virginia, received a law degree from the Appalachian School of Law in Virginia. However, after filing an application for admission with the West Virginia Board of Law Examiners, he failed to pass the bar examination in July 2002, February 2003 and February 2004.

On October 30, 2006, Dean filed an updated application with the Board and disclosed the following:

(1) In 2004, Dean entered a guilty plea in the Magistrate Court of Cabell County, West Virginia, criminal case no. 04-M-2130, to misdemeanor possession of cocaine. He paid a \$100 fine, plus court costs;

(2) In 2005, Dean was charged in the Magistrate Court of Mingo County, West Virginia, criminal case no. 05-M-0000879, with battery. The charge was dismissed without prejudice. (The record indicates that the investigating officer, the witnesses and the alleged victim failed to appear at the scheduled hearing);

(3) In 2006, Dean was charged in Buchanan County, Virginia, criminal case no. A-6814-01, with assault and battery of his then wife, Tracy E. Dean (later Tracy E. Deel). Dean entered a plea of not guilty. However, the Judge entered a finding of “facts sufficient for finding of guilt.” Dean paid court costs and was ordered to take anger management classes. Disposition was deferred for one year. The case was subsequently dismissed because no additional charges were filed against Dean during the one year period.

(4) Dean disclosed that he was involved in a child support matter in Buchanan County, Virginia. (Dean’s two children currently live with their maternal grandparents.)

On October 27, 2008, Dean again updated his application and disclosed the following:

In 2008, Dean was charged in the Magistrate Court of Mingo County, West Virginia, case no. 08-M-444, with brandishing a deadly weapon (a firearm). The case was dismissed without prejudice because the alleged victim failed to appear at the scheduled hearing.

Subsequently, the Board of Law Examiners received a letter dated April 10, 2008, from the West Virginia Department of Education indicating that Dean had applied for a substitute teacher’s permit. The Department of Education’s letter stated that Dean:

did not disclose that he had been arrested for assault on a family member, Tracy Elaine Dean, in Buchanan County, Virginia on August 13, 2006. WVDE learned of this arrest from an FBI fingerprint check.

Dean passed the bar examination in February 2009 and was given a qualified, but favorable, recommendation by the District Character Committee for Mingo County. On November 11, 2009, Dean was interviewed by the Board of Law Examiners. During the interview, he stated that the first time he used cocaine was in December 2003 and that the second time was in March 2004. In addition, he purchased the drug in April 2004 but was arrested before using it. Referring to the arrest, Dean stated, “That was it. I guess it was kind of a hard lesson learned.” The Board interpreted that comment to mean that Dean did not possess or use cocaine after his April 2004 arrest. Moreover, Dean denied possessing a firearm with regard to the 2008 brandishing charge and stated, with regard to the Board of Education, that the teacher’s permit was eventually granted.

Soon after, Dean underwent a psychiatric evaluation by Dr. Bobby L. Miller at the Board’s request. As reflected in his report dated December 8, 2009, Dr. Miller diagnosed Dean with Adult Attention Deficit Disorder and predicted that treatment for that condition would reduce Dean’s “risk of stimulant abuse relapse.” Moreover, Dr. Miller indicated that Dean possesses the intellectual and psychological capacities to practice law. In addition, attached to the report was an affidavit from Dean’s former wife, Tracy, stating that she falsely accused him of assault and battery in Virginia. Significantly, Dr. Miller’s report states as follows concerning Dean’s prior use of cocaine:

Despite the legal and social consequences of his arrest, he again bought cocaine and used a near-gram quantity in only 5 hours.

Two weeks later he used cocaine again and at that time he “realized” that this behavior was self-destructive. He claimed he made a simple decision to never use the drug again (2004).

At the time of the evaluation, Mr. Dean agreed to an unannounced urine drug screen. He then refused to submit to the test claiming it was an “invasion of his physical privacy” and not a legitimate part of the evaluation.

After discussing the matter with his Counsel, Mr. Dean returned to the office 24 hours later and offered a urine specimen that was negative for substances of abuse. Given the rapid metabolism of some substances this negative result is a relevant data point but does not conclusively prove that Mr. Dean is free from all forms of substance abuse.

Procedural Background

In January 2010, the Board of Law Examiners issued a letter to Dean recommending his admission to the practice of law with conditions. *See*, Rule 7.0.(c) of the *West Virginia Rules for Admission to the Practice of Law* providing for conditional admission. The conditions concerning Dean included: (1) two years of supervised practice, (2) continuous treatment for his Adult Attention Deficit Disorder, (3) random drug screens and (4) continuous participation in AA or NA meetings.

Upon review, this Court deferred its ruling on Dean's admission and remanded the proceedings to the Board for more information about Dean's 2005 battery charge and the 2008 brandishing charge, both in Mingo County. Thereafter, in a letter addressed to the Board and this Court, Dean denied committing those offenses and emphasized that the charges were dismissed. With regard to the 2005 battery charge, the letter explained that the sister of Dean's girlfriend had been beaten by an individual named Roger Urban, and when Dean attempted to back from a parking spot with his girlfriend and her sister in his car, Urban suddenly jumped into the vehicle's path. Although Urban was struck, he was not injured. As to the 2008 brandishing charge, the letter explained that, after calling 911, Dean and his girlfriend drove to the residence of the girlfriend's former husband to rescue her 17 year-old daughter from a potentially violent situation. Upon arrival, Dean and his girlfriend were threatened by several adult men, including the former husband. All of the men appeared to be intoxicated. Dean and his girlfriend immediately drove from the scene and reported the circumstances to the police. Dean insisted that at no time did he have a firearm.

On May 4, 2010, Dean was interviewed by the Board for the second time. The interview focused on the discrepancies in the chronology of Dean's cocaine use. Dean indicated that, shortly after his arrest for cocaine, he again used cocaine. Additionally, he used cocaine two weeks later. As the interview concluded, the Board noted that Dean had responded to the concerns of this Court with respect to the 2005 battery charge and the 2008 brandishing charge. On May 18, 2010, the Board of Law Examiners recommended that Dean's application to practice law be denied. The primary basis for the recommendation was Dean's initial lack of candor during the first interview concerning his cocaine use following his arrest for cocaine in 2004.

On June 15 and August 18, 2010, evidentiary hearings were conducted upon Dean's application. *See*, Rule 6.0. of the *West Virginia Rules for Admission to the Practice of Law*. Dean testified that, during questioning by the Board at his first interview, his post-arrest use of cocaine slipped his mind, or he misstated it, and that his incidents of cocaine use as later related to Dr. Miller were more accurate. Similarly, Dean testified that his failure to disclose the charge of assault and battery in Virginia to the West Virginia Department of Education was an oversight and that he promptly submitted the information and received the teacher's permit. Finally, Dean testified that he has been receiving treatment from a psychiatrist and

a counselor for his Adult Attention Deficit Disorder. Following the submission of evidence, the hearing officer, on November 30, 2010, recommended Dean's admission to the practice of law, subject to the conditions originally set forth by the Board. The hearing officer concluded: "The issues for which the Board now criticizes Mr. Dean were all discovered through his own voluntary statements made either to them, the Hearing Examiner or Dr. Bobby Miller, who was acting on behalf of the Board."

Nevertheless, the Board of Law Examiners by letter dated February 2, 2011, informed Dean that it recommended that his admission to the practice of law in this State be denied, without prejudice, and that he could reapply after one year. The letter stated: "The Board bases its decision on your lack of candor during your November 2009 interview regarding your use of cocaine after your April 2004 arrest for cocaine possession."

On March 4, 2011, Dean filed exceptions in this Court to the recommendation of the Board of Law Examiners.

Standard of Review

Syllabus points 2 and 5 of *In the Matter of Dortch, supra*, hold:

2. This Court reviews *de novo* the adjudicatory record made before the West Virginia Board of Law Examiners with regard to questions of law, questions of application of the law to the facts, and questions of whether an applicant should or should not be admitted to the practice of law. Although this Court gives respectful consideration to the Board of Law Examiners' recommendations, it ultimately exercises its own independent judgment. On the other hand, this Court gives substantial deference to the Board of Law Examiners' findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record.

5. Even though, pursuant to Rule 7.0 of the Rules for Admission to the Practice of Law, the West Virginia Board of Law Examiners issues a certificate of eligibility, and files it along with a character report, with this Court, for an applicant for admission to the practice of law, this Court is not required to admit that applicant. If this Court determines that the applicant possesses the necessary qualifications for admission, it will, pursuant to its inherent power to define, regulate and control the practice of law in this State, admit the applicant to the practice of law. However, if this Court determines that the applicant does not possess the necessary qualifications for admission,

it will, pursuant to its inherent power to define, regulate and control the practice of law in this State, deny the applicant's admission to the practice of law.

See, George L. Blum, Annotation, Criminal Record as Affecting Applicant's Moral Character for Purposes of Admission to the Bar, 3 A.L.R.6th 49, §§ 14, 17 (2005) (discussing Dortch).

Discussion

This Court's inherent power and independent judgment concerning the practice of law can be traced to the organic judicial authority of this State expressed in art. VIII, § 1, *et seq.*, of the Constitution of West Virginia. Syl. pt. 1, *In re McMillian*, 210 W.Va. 265, 557 S.E.2d 319 (2001). Derivative of that authority are the *West Virginia Rules for Admission to the Practice of Law*, throughout which can be found the requirement of good moral character. Rule 5.0. states in part: "No person shall be admitted to the practice of law in the State of West Virginia, either by examination or on motion without examination, unless such person demonstrates to the Board, either directly or through the applicable District Character Committee, that he or she is possessed of good moral character[.]" Moreover, as made clear in Rule 5.2.(b): "The applicant shall at all times have the burden of proving his or her good moral character before the District Character Committee, the Board, and the Court." As a result, to borrow a phrase from Oliver Wendell Holmes, one "must turn square corners" when establishing good moral character for admission to the practice of law in this State. *Rock Island, Arkansas & Louisiana R. R. v. United States*, 254 U.S. 141, 143, 41 S.Ct. 55, 56, 65 L.Ed. 188, 189 (1920).

In light of Dean's misdemeanor conviction of cocaine possession, further assistance in this matter is provided by *Dortch* in syllabus point 4 which states:

4. When assessing the moral character of an applicant whose background includes a criminal conviction, the following factors should be considered: (1) The nature and character of the offenses committed; (2) The number and duration of offenses; (3) The age and maturity of the applicant when the offenses were committed; (4) The social and historical context in which the offenses were committed; (5) The sufficiency of the punishment undergone and restitution made in connection with the offenses; (6) The grant or denial of a pardon for offenses committed; (7) The number of years that have elapsed since the last offense was committed, and the presence or absence of misconduct during that period; (8) The applicant's current attitude

about the prior offenses (e.g., acceptance of responsibility for and renunciation of past wrongdoing, and remorse); (9) The applicant's candor, sincerity and full disclosure in the filings and proceedings on character and fitness; (10) The applicant's constructive activities and accomplishments subsequent to the criminal convictions; and (11) The opinions of character witnesses about the applicant's moral fitness. These factors are intended to be illustrative rather than exhaustive.

See also, syl. pt. 4, *McMillian*, *supra*.

Urging this Court to reject the conclusions of the Board and adopt the recommendation of the hearing officer in favor of conditional admission, Dean emphasizes that both the 2005 battery charge and the 2008 brandishing charge originated from a call by an individual in distress to Dean's female companion. Neither charge resulted in a conviction, and the alleged victims in those cases could, themselves, have been charged with an offense. Moreover, Dean's former wife has stated that she falsely accused him of assault and battery in Virginia. With regard to his incidents of cocaine use, Dean asserts that, although he may have been mistaken or confused when questioned by the Board during the first interview of November 2009, no reason exists to conclude that he tried to mislead the Board since he later spoke candidly to the Board's designated psychiatrist, Dr. Miller.

On the other hand, the Board contends that Dean's criminal history was enough to warrant deeper inquiry and that he was not candid during his first interview regarding his post-arrest use of cocaine. Contrary to that interview, Dean told Dr. Miller that he used cocaine on two occasions after his arrest for possession. Moreover, the Board states that Dean's failure to disclose the 2006 charge in Virginia for domestic assault and battery to the West Virginia Department of Education exacerbated the Board's concern that Dean was not candid about his past conduct.

Looking then to the record and the standards set forth in *Dortch*, this Court finds the concerns of the Board justified. Of the numerous factors to be considered under *Dortch*, the age and maturity of an applicant when the offenses were committed and the responsibility of full disclosure are especially problematic in this matter. Dean graduated from law school in 2002 and, after that, used cocaine twice before his April 2004 arrest and twice after his arrest. As stated by Dr. Miller, the latter incidents were "despite the legal and social consequences of his arrest." Moreover, although Dean was convicted of misdemeanor possession, any transgression involving controlled substances should not be discounted. As Dean informed the hearing officer, a factor in his ultimate decision to stay away from cocaine was that, about three weeks after his cocaine arrest, the police informant "was found dead on the streets of Huntington."

The Board asserts that Dean's inconsistent account of his past cocaine use "may not be as flagrant or deceptive as misrepresentations presented to the Board in other cases, but it cannot be ignored or explained as mere memory lapse or confusion in chronology." That assertion finds support in the record which reveals that Dean was not completely candid in his communications with the Board or with the Department of Education until discrepancies were brought to light.

Conclusion

For the reasons expressed above, Dean's exceptions to the February 2, 2011, decision of the West Virginia Board of Law Examiners are without merit, and the Board's recommendation to deny his application for admission to the practice of law in West Virginia is adopted. As noted, the denial of Dean's application was without prejudice, and he may pursue the new application pending before the Board.

ISSUED: June 14, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh