

RESPONDENT SUSPENDED DURING TERM OF DEFERRED ADJUDICATION

Opinion and Judgment Signed and Delivered Aug. 21, 2008.



**BEFORE THE BOARD OF DISCIPLINARY APPEALS
APPOINTED BY
THE SUPREME COURT OF TEXAS**

No. 41472

IN THE MATTER OF EDDIE MICHAEL POPE

(State Bar Card No. 16135500)

Petition for Compulsory Discipline

Opinion and Judgment

Heard En Banc April 4, 2008

COUNSEL:

For Petitioner, Commission for Lawyer Discipline of the State Bar of Texas, Sylvia Delgado, Assistant Disciplinary Counsel, and Laura Poppo, Regional Counsel for the Austin Region, Austin

For Respondent, Eddie Michael Pope, Charles Herring, Jr., Austin

OPINION:

In this compulsory attorney discipline case, we are asked to decide whether the felony crime of possessing with intent to promote obscene material depicting children engaging in sexual acts is a crime involving moral turpitude as a matter of law, and therefore an “Intentional Crime” under the Texas Rules of Disciplinary Procedure. TEX. R. OF DISCIPLINARY PROC. (“TRDP” or “Rule”) 1.06T, 8.01, *reprinted in* TEX. GOV’T CODE, tit. 2, subtit. G, app. A-1 (Vernon 2005). An attorney convicted of an Intentional Crime is subject to mandatory discipline, as opposed to discipline through the standard process where a grievance committee may investigate the underlying facts and conduct. *In re Lock*, 54 S.W.3d 305, 306 (Tex. 2001). Because the felony crime of possessing with intent to promote obscene material depicting children engaging in sexual acts necessarily involves the sexual exploitation and victimization of children—“a most serious crime and an act repugnant to the moral instincts of a decent people”¹—we hold that the felony of knowingly possessing with intent to promote images of minors engaging in obscene conduct involves moral turpitude regardless of the specific facts and circumstances. We suspend Eddie Michael Pope’s law license for the remainder of the term of his criminal sentence.²

Whether a particular crime involves moral turpitude is a question of law. *In re Lock*, 54 S.W.3d at 307; *In re Humphreys* 880 S.W.2d 402, 407 (Tex. 1994), *cert. denied* 513 U.S. 964 (1994); *State Bar of Tex. v. Heard*, 603 S.W.2d 829, 835 (Tex. 1980) (orig. proceeding). “The concept of ‘moral turpitude’ is not unique to Texas and did not originate in our disciplinary rules. It

¹ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002) (referring to possession of child pornography). “Pornographic material which is obscene forms a sub-group of all ‘obscene’ expression. . . .” *Miller v. California*, 413 U.S. 15, 18 n.2 (1973) (citing *Roth v. United States*, 354 U.S. 476, 487 (1957)).

² The Order of the Court Deferring Further Proceedings in the criminal case placed Pope on Community Supervision for a term of four (4) years beginning April 24, 2006, on certain terms and conditions.

has appeared in laws and rules across the country for many years.” *In re Lock*, 54 S.W.3d at 313 (Owen, J., dissenting). Tribunals have considered whether certain crimes involve moral turpitude in various contexts.³ The prevailing view is that, because knowingly possessing images of minors engaging in obscene conduct necessarily entails and encourages sexual abuse of society’s most vulnerable members, it is always a crime of moral turpitude without regard to the specific facts or circumstances.⁴ We agree.

Intentional Crime

We must determine whether Pope’s crime involves moral turpitude as a threshold requirement for compulsory discipline which is reserved for when an attorney has been convicted⁵ of an “Intentional Crime.” An “Intentional Crime” is “(1) any Serious Crime that requires proof of knowledge or intent as an essential element or (2) any crime involving misapplication of money or other property held as a fiduciary.” TRDP 1.06T.⁶ “Serious Crimes” include “barratry, any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes.” TRDP 1.06Z.

³ In immigration law, for example, citizenship may be denied or deportation sought following a conviction for a crime involving moral turpitude. *See, e.g., United States of America v. Santacruz*, No. CV 05-07633, 2007 U.S. Dist. LEXIS 61949, at *8, *10 (C.D. Cal. February 5, 2007) (Government’s summary judgment revoking defendant’s certificate of naturalization granted on showing defendant pled guilty within five years of his application to possession of child pornography (computer images), a crime of moral turpitude *per se*. “Our society has determined that child pornography is, by its very existence, an affront to the rights of children and that possessing it encourages further exploitation.”).

⁴ The State’s interest in protecting child victims from sexual exploitation justifies criminalizing the mere possession of sexually explicit material involving children, *Osborne v. Ohio*, 495 U.S. 103, 110 (1990), as well as offers to provide or requests to obtain such material, *United States v. Williams*, 2008 U.S. LEXIS 4314, at *24 (May 19, 2008).

⁵ For purposes of compulsory discipline, criminal sentences which are fully probated, defer adjudication of guilt, or impose community supervision are procedurally equivalent. TRDP 8.01.

⁶ Pope does not dispute that the crime to which he pled guilty requires knowledge or intent.

Because possession of obscene material depicting minors is not one of the expressly articulated Serious Crimes, to qualify as the basis for compulsory discipline, it must be a felony involving moral turpitude. Additionally, it must be a *per se* crime; that is, factual inquiry into the circumstances of the offense must not be required to determine whether the offense involved moral turpitude. *In re Humphreys*, 880 S.W.2d at 408 n. 7; *Turton v. State Bar of Texas*, 775 S.W.2d 712, 716-717 (Tex. App.—San Antonio 1989, writ denied). Some crimes, including those which are “universally morally reprehensible,” have been characterized as necessarily involving moral turpitude. *Turton* 775 S.W.2d at 717.

Pope argues that he pled guilty to a general obscenity statute, under which a person can be convicted for private conduct not involving moral turpitude and which is, therefore, neither a Serious nor an Intentional Crime. Pope urges that, if he is subject to discipline at all for this conviction, it must be through the standard disciplinary process where a grievance committee can evaluate the facts and circumstances of the underlying conduct and not by compulsory discipline.

The Record of Conviction

In compulsory discipline, BODA looks to the statutory elements of the crime to determine whether the attorney has been convicted of an Intentional Crime without otherwise considering the individual facts of the underlying conduct. TRDP 8.04; *In re Lock*, 54 S.W.3d at 307. In this case, the Order of the Court Deferring Further Proceedings and the State’s indictment articulate the statute and the elements of the offense to which Pope pled guilty. A guilty plea is an admission by the accused of all the elements of a formal criminal charge. *Aguirre-Mata v. State*, 992 S.W.2d 495, 499 (Tex. Crim. App. 1999).

The Order of the Court Deferring Further Proceedings⁷ states that Pope pled “GUILTY to the indictment herein . . . to “POSSESSION OF OBSCENE MATERIAL, A STATE JAIL FELONY.” (emphasis in the original). There is no Texas Penal Code section entitled “Possession of Obscene Material.” The Commission for Lawyer Discipline offered, with Pope’s concurrence, the State’s criminal indictment to clarify the actual charge to which Pope pled: “Possession with intent to promote obscene material 43.23(c).” However, a conviction under § 43.23(c) alone is a Class A misdemeanor. TEX. PENAL CODE ANN. § 43.23(d) (Vernon Supp. 2007). Pope does not argue that he pled guilty to a misdemeanor, nor could such an argument be made in good faith, because the Order of the Court Deferring Further Proceedings proves conclusively otherwise.

Pope argues that we must ignore the fact that his criminal judgment makes clear, on its face and as a matter of law, that he was convicted of a State Jail Felony and not a misdemeanor (which would not support an action for compulsory discipline⁸). We find no basis to restrict our examination of the indictment to the caption on the indictment and ignore the actual criminal charge. Incorporated by reference into the Order of the Court Deferring Further Proceedings, the indictment is a proper part of the “record of conviction.” TRDP 8.04 (“Nothing in these rules prohibits proof of the necessary elements in such Disciplinary Action by competent evidence in any other manner permitted by law.”); *In re Birdwell*, 20 S.W.3d 685, 686 (Tex. 2000) (the court considered specific charge in the indictment to which attorney pled guilty to determine nature of underlying crime in conspiracy conviction); *In re Duncan*, 898 S.W.2d 759, 763 (Owen, J., concurring) (“In every case, the indictment or information may be used as a source of the factual

⁷ *The State of Texas vs. Eddie Michael Pope*, Cause No. 9040440 in the 147th Judicial District Court of Travis County, Texas.

⁸ The only misdemeanor convictions supporting compulsory discipline are for theft, embezzlement, or fraudulent or reckless misappropriation of money or other property, or misapplication of money or other property

basis for a determination of moral turpitude.”).

The indictment to which Pope pled guilty charges that he

did then and there knowingly and intentionally possess with intent to promote obscene material visually depicting a child younger than eighteen years of age at the time the image of the child was made who is engaging in sexual conduct including deviate sexual intercourse and lewd exhibition of the genitals. Defendant knew that the obscene material depicted the child as described.

The indictment, read with the Order of the Court Deferring Further Proceedings, confirms that Pope pled guilty to a violation of Texas Penal Code §43.23(c)(1) enhanced to a state jail felony under §43.23(h)(1).⁹ Pope wants us to ignore that part of the statute which says that the violation is a felony if the obscene material visually depicts a child younger than 18 at the time the image was made.

Statutory Elements of the Crime

Tex. Penal Code § 43.23(c)(1) provides: “A person commits an offense if, knowing its content and character, he: (1) promotes or possesses with intent to promote any obscene material or obscene device.”¹⁰ Section 43.23(h)(1) increases the punishment for that offense from a Class A misdemeanor to a state jail felony if “that obscene material that is the subject of the offense visually depicts activities described by Section 43.21(a)(1)(B) engaged in by: (1) a child younger than 18 years of age at the time the image of the child was made.” Those “activities” include:

- (i) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or
- (ii) patently offensive representations or descriptions of masturbation, excretory

held as a fiduciary. TRDP 1.06T, 1.06Z.

⁹ Pope’s guilty plea offered into evidence by the Commission and admitted without objection by Pope, as well as Pope’s own testimony, further confirmed that he pled to Tex. Penal Code § 43.23(c)(1).

¹⁰ Section 43.23(c)(1) requires that the defendant know of the material’s sexually explicit character and content. *Burden v. State of Texas*, 55 S.W.3d 608, 613 (Tex. Crim. App. 2001).

functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful for stimulation of the human genital organs. . . .

Tex. Penal Code § 43.21(a)(1)(B). Intent to promote is presumed where a person “possesses six or more obscene devices or identical or similar obscene articles.” Tex. Penal Code § 43.23(f). “‘Promote’ means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.” Tex. Penal Code § 43.21(a)(5). Therefore, the statutory elements of the crime to which Pope pled guilty are: (1) a person (2) knowingly (3) promotes or possesses six or more identical or similar items of (4) any obscene material (5) visually depicting certain patently offensive sexual conduct (6) engaged in by a child younger than 18 years of age (7) knowing its character and content.

Pope claims that his compulsory discipline may only be determined from the least offense for which a person can be convicted under Tex. Penal Code § 43.23(c). Pope argues that, because the least offense could potentially involve private possession and expression of free speech protected material, his conviction cannot involve moral turpitude as a matter of law. His argument fails for two reasons. First, Section 43.23(c)(1) does not criminalize mere possession of protected material, but requires that the person promote or possess obscene material with intent to promote. Second, the least offense for which a person can be convicted under § 43.23(c) is irrelevant to a determination of Intentional Crime, because the least offense is a misdemeanor, and Pope confessed guilt to a state jail felony. We must consider whether the least felony offense under the specific subsection of the statute to which Pope pled guilty is an Intentional Crime. There is only one specific subsection to the statute to which Pope pled guilty, and it requires that the obscene material depict minors.

Pope also attempts to argue that he was not convicted of a felony involving moral turpitude as a matter of law because Tex. Penal Code § 43.23(h)(2) and (3) concerning virtual images may be unconstitutionally vague. He did not challenge the constitutionality of the criminal statute to which he pled guilty during his criminal trial, however, and we treat the record of conviction in a compulsory discipline matter as “conclusive evidence” of guilt. TRDP 8.02; *In re Humphreys*, 880 S.W.2d at 405.

Moral Turpitude

The Texas Supreme Court has noted that, “Generally, moral turpitude is implicated by crimes that involve dishonesty, fraud, deceit, misrepresentation, deliberate violence, or that reflect adversely on a lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.” *In re Humphreys*, 880 S.W.2d at 408; *In re Lock*, 54 S.W.3d at 308. Texas courts also have found, however, that crimes of “far-reaching public interest” involve moral turpitude *per se* for purposes of attorney compulsory discipline. *In re Thacker*, 881 S.W.2d 307, 310 (Tex. 1994) (sale of a child); *see also, Hernandez v. State Bar of Texas*, 812 S.W.2d 75 (Tex. App.—Corpus Christi 1991, no writ) (indecent with a child); *Muniz v. State*, 757 S.W.2d 408 (Tex. Civ. App.—Corpus Christi 1979, writ ref’d n.r.e.) (possession with intent to distribute marijuana). We also have held that unlawful delivery of a controlled substance is a felony involving moral turpitude *per se*. *In re Filippov*, BODA Case No. 30611 (January 22, 2004)¹¹ *aff’d*, Supreme Court of Texas No. 04-0151 (June 18, 2004). We note that at least two other jurisdictions have held in mandatory disciplinary proceedings that a criminal conviction for possession of child pornography renders an attorney categorically unfit to continue in the practice of law. *Iowa Supreme Court Attorney Disciplinary Board v. Blazek*, 739 N.W.2d 67, 69 (Iowa 2007) (attorney’s crimes, including possession of child

pornography, involved moral turpitude); *In re Boudreau*, 815 So.2d 76, 78 (La. 2002) (attorney's participation in the sexual exploitation of and support of an industry that capitalizes on the degradation of children reflected adversely on his honesty, trustworthiness, and fitness as a lawyer).

Because the possession with intent to promote obscene images of minors is "intrinsically related to the sexual abuse of children," *Ashcroft v. Free Speech Coalition*, 535 U.S. at 249, citing *New York v. Ferber*, 458 U.S. 747, 759-760 (1982), and given the importance of the State's interest in protecting the child victims, we find that the crime to which Pope pled guilty is, as a matter of law, a felony involving moral turpitude and therefore a Serious and an Intentional Crime.

Sanction

Having decided that Pope was convicted of a Serious and Intentional Crime, we now turn to the question of the appropriate sanction. We cannot examine the facts to assess anew Pope's guilt or innocence of the underlying conviction. Nor did we examine the facts of the underlying conviction to determine that the crime qualified as one involving moral turpitude *per se*. Nevertheless, when both suspension and disbarment are available as sanctions, we may consider evidence of the underlying facts in mitigation or aggravation of the sanction to be imposed. To this end, we also may consider such factors as whether the crime was directly related to the lawyer's practice of law; the conduct of the attorney during the compulsory proceeding; whether the attorney has complied with the terms and conditions of his probation; the attorney's efforts at rehabilitation; the attorney's credibility under oath; whether the attorney accepts responsibility for his past conduct; and any prior discipline imposed on the attorney. *In Re Filippov*, BODA Case No. 30611 (January 22, 2004 *aff'd*, Supreme Court of Texas No. 04-0151 (June 18, 2004)).

¹¹ BODA opinion available at www.txboda.org.

At the sanctions portion of the compulsory hearing, Pope presented unrefuted evidence relating to the underlying circumstances of the offense. The evidence showed that Pope's roommate, not Pope, was responsible for child pornography found on a home computer that was seized pursuant to a search warrant. Given the weak connection between Pope and the child pornography, the state prosecutor agreed to reduce the child pornography charge against Pope to "Possession of Obscene Material, A State Jail Felony," and to recommend that Pope be sentenced to 4 years deferred adjudication probation.

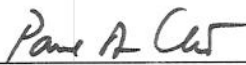
Pope pled guilty pursuant to the plea agreement described above, and was sentenced to four (4) years of deferred adjudication probation. We presume that the judge who accepted the plea bargain, as well as the state prosecutor who entered into it, were aware that sentencing Pope to probation would make disbarment a discretionary, rather than a mandatory, sanction. *See, Sanchez v. Board of Disciplinary Appeals*, 877 S.W.2d 751, 752 (Tex. 1994) (court presumed to consider potential impact of sentence upon future right to practice law). Of additional significance, the conviction for the lesser obscenity charge was not for an offense listed in Chapter 62 of the Texas Code of Criminal Procedure for which an offender must register as a sex offender. *See*, TEX. CODE CRIM. PROC. ANN. art. 62.01 (Vernon 2005). Presumably, neither the prosecutor nor the judge viewed Pope as a typical sex offender worthy of the government interest in public protection.

Pope's criminal conviction was not related, in any way, to Pope's law practice. Pope's conduct during the compulsory proceeding was very credible. Pope has complied, to date, with the conditions of the deferred adjudication, completing 200 hours of community service in less than seven months, fully paying all fines and fees, and passing all drug tests. Pope, who is 57,

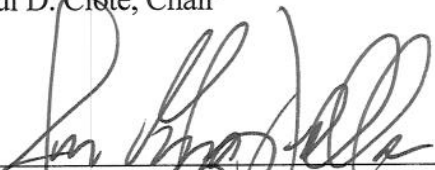
has practiced law for 33 years without any previous disciplinary history. Evidence presented during the compulsory hearing from employers, clients, and friends, characterized Pope as ethical, talented, honest, and trustworthy. These third parties rated Pope an exceptional lawyer whose disbarment would be to the public's detriment. After balancing the relevant considerations set forth above, and in the exercise of our discretion, we conclude that suspension for the length of Pope's criminal probation, not disbarment, is the appropriate sanction in this case.

We therefore order Pope's license to practice law in Texas be suspended immediately as of the date of this opinion and judgment. The active suspension of Pope's license shall be for the term remaining on his deferred adjudication. Pope is prohibited from practicing law or holding himself out as an attorney during such period. An early termination of the deferred adjudication by the criminal trial court will not terminate this disciplinary suspension. This Board retains jurisdiction during the term of Pope's criminal sentence pursuant to TRDP 8.06.


IT IS SO ORDERED.



Paul D. Clote, Chair



Jose I. Gonzalez-Falla, Vice Chairman



Clement H. Osimetha




Carol E. Prater



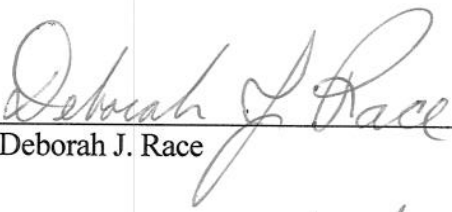
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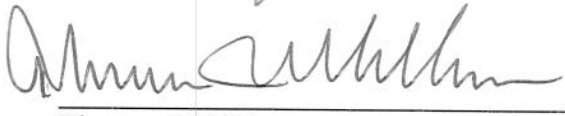
Charles L. Smith



W. Clark Lea



Deborah J. Race



Thomas J. Williams

Member Thomas E. Pitts, Vice Chairman, filed an opinion concurring in part and dissenting in part.

Members Ben Selman and Yolanda De Leon not participating.



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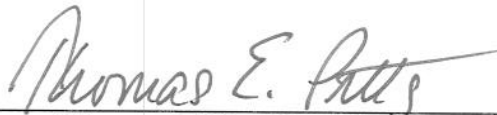
Member Thomas E. Pitts, Vice Chairman, concurring in part and dissenting in part.

I agree with the majority that felony possession with intent to promote obscene material depicting children engaging in sexual acts is a felony involving moral turpitude as a matter of law. The logic, reasoning, and precedent cited by the majority are correct and compelling in analysis of the issue whether compulsory discipline applies to Mr. Pope's conviction.

However, I cannot agree with the majority on the issue of sanction. Our society has entrusted the attorney with a "place of special responsibility," *In re Lock*, 54 S.W.3d 305, 315 (Tex. 2001) (Owen, J., dissenting). Without regard to the criminal sanction

imposed, certain offenses involve behavior so reprehensible and repugnant to society¹ that conviction for those offenses represents proof of a violation of the special responsibility and core values that the practice of law represents. Accordingly, such convictions mandate disbarment as the only appropriate sanction. Based on the record of conviction in this case, this offense is among that class of offenses.

Accordingly, I would vote to disbar.

A handwritten signature in cursive script that reads "Thomas E. Pitts". The signature is written in black ink and is positioned above a horizontal line.

Thomas E. Pitts, Vice Chairman

¹ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002), *Osborne v. Ohio*, 495 U.S. 103, 111 (1990); *United States v. Williams*, 2008 U.S. LEXIS 4314 (May 19, 2008).