DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Decided: Jul. 31, 2019
Issued: Aug. 1, 2019

In the Matter of:	:	
	:	
JUSTIN ALAN TORRES,	:	
	:	D.C. App. No. 19-BG-276
Respondent.	:	Board Docket No. 19-BD-027
	:	Disc. Docket No. 2019-D037
A Suspended Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 1003136)	:	

REPORT AND RECOMMENDATION
OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

This matter is before the Board on Professional Responsibility (the "Board") as a result of Respondent's plea of guilty, in the Court of Common Pleas of Cuyahoga County, Ohio, to multiple felony counts of gross sexual imposition in violation of Ohio Revised Code § 2907.05(A)(4)).

On April 9, 2019, the District of Columbia Court of Appeals (the "Court") directed the Board to institute a formal proceeding to determine the nature of Respondent's offense and whether the crime involves moral turpitude within the meaning of D.C. Code § 11-2503(a) (2001). For the reasons that follow, the Board recommends that the Court disbar Respondent pursuant to D.C. Code § 11-2503(a) based on his conviction of a crime involving moral turpitude *per se*.

BACKGROUND

Respondent was admitted to the District of Columbia Bar on September 9, 2011. On November 29, 2018, he pleaded guilty to three counts of "gross sexual imposition" in violation Ohio Revised Code § 2907.05(A)(4) (the "Ohio Statute"), which provides that:

> (A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:
>
> (4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.

"Sexual contact" is defined as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." ORC § 2907.01(B). On January 10, 2019, Respondent was sentenced to serve 36 months in prison on each count, to be served concurrently.

On May 10, 2019, Disciplinary Counsel filed a statement with the Board recommending Respondent's disbarment based on his conviction of a crime involving moral turpitude *per se*.[1] Respondent did not file a response to

[1] Disciplinary Counsel's motion to late-file its statement on moral turpitude is granted.

Disciplinary Counsel's statement. On May 24, 2019, the Board *sua sponte* ordered the parties to address "the fact that the offense of conviction did not require proof that Respondent knew or should have known that the victim was under thirteen years of age."

In response, Disciplinary Counsel argues that a sex crime involving children aged twelve and under inherently involves moral turpitude because it is not reasonable to confuse such a young child with a consenting adult. Respondent argues that under *In re Lovendusky*, D.C. App. No. 84-1672 (D.C. Apr. 4, 1986), the Ohio Statute is not a crime of moral turpitude *per se* because conviction does not require proof that a defendant knew that the victim was under the age of consent.

ANALYSIS

D.C. Code § 11-2503(a) provides for the mandatory disbarment of a member of the District of Columbia Bar convicted of a crime of moral turpitude. Once the Court determines that a particular crime involves moral turpitude *per se*, disbarment is the mandated sanction. *See In re Colson*, 412 A.2d 1160, 1164 (D.C. 1979) (*en banc*). If the Board determines that the offense does not involve moral turpitude *per se*, it refers the matter to a Hearing Committee to determine whether the facts underlying the respondent's crime involve moral turpitude. *Shorter*, 570 A.2d 760, 765 (D.C. 1990) (per curiam).

Because the Court has not previously addressed the crime at issue here, we must review its elements to determine whether it is a crime of moral turpitude *per se*. Our assessment is based solely on an examination of the statute, not on the respondent's conduct. *See In re Shorter*, 570 A.2d at 765 (citing *Colson*, 412 A.2d at 1164-67). That is, we focus "on the type of crime committed rather than on the factual context surrounding the actual commission of the offense." *Colson*, 412 A.2d at 1164. We are therefore obliged to consider whether the least culpable offender convicted under the statute necessarily engages in a crime of moral turpitude. *See Shorter*, 570 A.2d at 765.

The legal standard for moral turpitude was established in *Colson*. A crime involves moral turpitude if "the act denounced by the statute offends the generally accepted moral code of mankind[,]" if it involves "baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man[,]" or if it is "contrary to justice, honesty, modesty, or good morals." *Id.* at 1168 (citations omitted). The "idea of moral turpitude incorporates a revulsion of society toward conduct deeply offending the general moral sense of right and wrong." *In re McBride*, 602 A.2d 626, 632-33 (D.C. 1992) (*McBride II*.) "Under the *Colson* and *McBride II* analysis . . . we examine whether the prohibited conduct is base, vile or depraved, or

whether society manifests a revulsion toward such conduct because it offends generally accepted morals." *In re Sims*, 844 A.2d 353, 361-362 (D.C. 2004).

Offenses that involve the touching, with lascivious intent, of the sexual organs of children under fifteen have been held to be crimes of moral turpitude *per se* when the offender knew the age of the victim, or was in a supervisory relationship with the victim such that knowledge of the victim's age was presumed. *See In re Haendel*, 199 A.3d 625 (D.C. 2019) (mem.); *In re Moore*, M–73 (81) (D.C. Nov. 18, 1981) (*en banc*).

The Ohio Statute, however, does not require the prosecution to prove that a defendant actually knew the victim's age. Thus, this case bears some resemblance to *In re Lovendusky*, where the Court agreed with the Board that the crime at issue, attempted carnal knowledge, was not one of moral turpitude *per se*. *See Lovendusky*, D.C. App. No. 84-1672 at 2 n.2; *see also In re Sharp*, 672 A.2d 899, 903-04 (D.C. 1996) (appended Board report). The Board recognized that, given that the age of consent in D.C. was sixteen, "it is possible for the offense to be committed without culpable intent by a man who *reasonably believes* his partner to be a consenting adult." *In re Lovendusky*, Bar Docket No. 416-84 at 7 (BPR Nov. 4, 1985) (emphasis added). The Court agreed with the Board, noting that the question "turned on whether [the] respondent *knew or should have known* that the girl involved was under sixteen." *In re Lovendusky*, D.C. App. No. 84-1672 at 2 n.2 (emphasis added).

In *Sharp*, the Court further clarified the "should have known" concept. The respondent was convicted of taking indecent liberties with a child by a person in custodial or supervisory relationship, in violation of Va.Code § 18.2–370.1. Even though a conviction under the statute did not require proof of *actual* knowledge of the victim's age, the Board held that proof of a custodial or supervisory relationship established *constructive* knowledge of the victim's age:

> The added requirement in Va. Code § 18.2–370.1 of a custodial or supervisory relationship *satisfies the missing element of knowledge, either actual or constructive*, of the victim's age. A person in a custodial or supervisory relationship by virtue of the relationship, *either will know or should know* the age of the minor.

Sharp, 674 A.2d at 904 (emphasis added). Thus in light of *Lovendusky* and *Sharp*, we must assess whether the Ohio Statute also "satisfies the missing element of knowledge, either actual or constructive, of the victim's age." *Id.* Phrased alternatively, we must determine whether the least culpable lawyer convicted of gross sexual imposition in Ohio could "reasonably have believed" that his victim was a consenting adult or, conversely, whether he "should have known" that his victim was not old enough to consent to his sexual advances. In doing so, we note the Court's recent observation in a criminal case that the phrase "should have known":

> is necessarily objective; when applying such a standard, we assume that the defendant *did not* know a particular thing, and we determine whether he *should have* known that thing by reference to whether someone else (a reasonable person) who is

> aware of the same facts and circumstances as the defendant *would have* known it.

Coleman v. United States, 202 A.3d 1127, 1143 (D.C. 2019) (emphasis in original).

We think the answer here, as guided by the rule of reason, is clear. Respondent was convicted of violating a statute that prohibits sexual misconduct with a child aged twelve or under. Thus, as did the statute in *Sharp*, the Ohio Statute has an added requirement: a victim must be more than three years younger than the sixteen-year-old Ohio age of consent. *See State v. Mole,* 74 N.E.3d 368, 380 (Ohio 2016); ORC 2907.04(A). That wide age gap ensures that an offender "should have known" that the molested child was incapable of consent. This is so, according to Ohio law, because the "physical immaturity of a pre-puberty victim is not easily mistaken and engaging in sexual conduct with such a person indicates vicious behavior on the part of the offender." *State v. Schwarzman*, 2014 WL 2565975 at *4 (Ohio Ct. App. June 5, 2014); *State v. Crawl*, 2000 WL 968779 at *3 (Ohio Ct. App. July 14, 2000) (same).[2] Both of these cases quoted the Legislative Service Commission's comment on the statute, which Ohio courts consider in the effort to ascertain legislative intent. *See State v. Myles*, 1980 WL 352530 at *3 (Ohio Ct. App. 1980).

[2] These cases discuss the Ohio rape statute (ORC § 2907.02). Respondent's offense of conviction, "gross sexual imposition" (ORC § 2907.05(A)(4)) is a lesser included offense (*State v. Johnson*, 522 N.E.2d 1082, 1084 (Ohio 1988)), as it prohibits "sexual contact" with children aged twelve and under, while the rape statute prohibits "sexual conduct" with children aged twelve and under. For purpose of our moral turpitude analysis, there is no difference between "sexual contact" and "sexual conduct."

Because the statute at issue criminalizes sexual contact where the victim is more than three years younger than the age of consent, this case is distinguishable from *Lovendusky*, where the Board and the Court recognized that someone under sixteen could be reasonably mistaken for someone who was sixteen. A reasonable person would know that a child aged twelve or younger cannot consent to sexual contact.

The dissent would refer this matter to a Hearing Committee for a moral turpitude determination, presumably because some child victims of sex abuse might look older than their years. "Based on [its] experience, [the dissent] cannot find that everyone under the age of 13 today is pre-pubescent." *Id*. at 4.

It is not clear what the dissent means by the term "pre-pubescent." Nor is it clear what relevance that notion has to this case, since puberty is a multi-year, multi-faceted physiological process, and the evolving physical characteristics of a young child are only part of the picture. The changes in a child's bodily appearance that begin with the onset of puberty say nothing about that child's emotional, intellectual or psychosocial vulnerabilities. A twelve-year-old may look older than his or her chronological age, but will not think, talk or act like an adult. Victimizing such a child constitutes moral turpitude *per se*.

Moreover, the reasoning of the dissent would presumably charge a Hearing Committee with determining, sometime in 2020 or thereafter, whether the child victim in this case was "pre-pubescent" in November 2016, December

2016, and November 2017 when the crimes occurred. Resolving that issue would be inherently speculative, invite reliance on stereotypes, and seem to be unworkable.[3]

We do not agree with the dissent's observations, nor do we think that the dissent's – or the Board's – expertise in matters of childhood maturation is superior to that of the Ohio legislature. The Ohio Statute draws a line that reasonably meets the standard set out in *Sharp*: because of the more-than-three-year gap between the age of the victim and the age of consent, the least culpable violator of that statute "should know the age of the minor" is younger than the age of consent. *Sharp*, 674 A.2d at 904

Finally, we do not believe it appropriate in the assessment of the "least culpable offender" issue to conjure up fanciful or extraordinary circumstances in order to mitigate a hypothetical convicted felon's degree of depravity. Thus we should not undertake to imagine victims with uncommon personal characteristics, as the dissent's analysis seems to require. Nor should we dream up extreme, exculpatory factual scenarios to that end. Rather, we should assess the implications of the statutory elements as a reasonable person would.

The Ohio Statute and the courts of that State have concluded that the touching of an erogenous zone of a child aged twelve or under "for the purpose

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[3] In *Lovendusky*, the Board pinned its determination on just such a stereotype. Despite the fact that the Hearing Committee found that the victim "at the hearing looked and acted like a girl of fifteen," the Board concluded – without citation to authority – "that a young girl faced with persons in authority might well look into act younger than she would to someone meeting her in a purely social situation." *Lovendusky*, Bar Docket No. 416-84 at 8.

of sexually arousing or gratifying either person" is criminal. The fact that victims protected by the statute are more than three years younger than the age of consent satisfies the criterion of *Sharp* and *Lovendusky* that every person convicted under the statute should know the inability of the victim to consent. Those who violate the Ohio Statute necessarily engage in behavior that constitutes moral turpitude *per se.*

There is no basis upon which to order a moral turpitude hearing into the facts of this case, where, as in *Lovendusky*, an infant victim of sexual abuse could be summoned to testify.

CONCLUSION

For the reasons set forth above, the Board finds that Respondent's conviction under ORC § 2907.05(A)(4) involved moral turpitude *per se*. Accordingly, the Board recommends that Respondent be disbarred pursuant to D.C. Code § 11- 2503(a).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: 

Robert C. Bernius, Chair

All members of the Board concur in this report and recommendation, except Ms. Soller, Mr. Kaiser, Mr. Bernstein and Mr. Hora, who dissent for the reasons set forth in their dissenting statement.

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(Bar Registration No. 1993136)	:	

DISSENT FROM THE RECOMMENDATION OF
THE BOARD ON PROFESSIONAL RESPONSIBILITY

The majority of the Board has concluded Respondent's crime involves moral turpitude *per se* and recommends that the Court disbar him pursuant to D.C. Code § 11-2503(a). Because we believe the Majority misapplies the law, we dissent and recommend that this case be referred to a Hearing Committee for a determination of moral turpitude on the facts.

The standard is clear: the Board must determine whether "the least culpable offender" who violates the Ohio statute necessarily commits a crime of moral turpitude. *In re Rohde*, Bar Docket No. 347-05 (BPR July 27, 2006) at 2 (citing *In re Shorter*, 570 A.2d 760, 766-67 n.11 (D.C. 1990). If so, then it is a crime of moral turpitude *per se*. If not, then a Hearing

Committee must determine if the Respondent's conduct in his particular case is a crime of moral turpitude.

The Court of Appeals has held that if the *mens rea* of an offense is negligence, it is not a crime of moral turpitude. *See e.g., In re Rohde,* 191 A.3d 1124, 1134 n.22 (D.C. 2018) (rejecting "negligence theory of moral turpitude").

Here, Respondent pled guilty in the Court of Common Pleas, Cuyahoga County, Ohio, to "felony gross sexual imposition," in violation of Ohio Revised Code § 2907.05(A)(4), which provides:

> No person shall have sexual contact with another . . . when any of the following applies . . . [T]he other person, or one of the other persons, is less than thirteen years of age, *whether or not the offender knows the age of that person.*

(Emphasis added.) There is no knowledge requirement in this Ohio statute; indeed it specifically rejects it.

Thus, the question we must decide is whether the least serious offender who has violated § 2907.05(A)(4) must have knowledge – actual or constructive – that the victim is under the age of consent, which, in Ohio, is 16. *See In re Haendel*, 199 A.3d 625 (D.C. 2019) (approving *In re Haendel*, Disc. Docket No. 2018-D067 (Nov. 2, 2018) (finding that crimes involving touching sexual parts of the bodies of people under the age of 15 are crimes

of moral turpitude *per se* when the statute required the prosecution to prove the respondent knew the actual age of the child).

The majority concludes that a person who violates § 2907.05(A)(4) knew or should have known that his victim is under the age of 16, because it concludes, as a matter of law, that no person under the age of 13 could be "easily mistaken" for someone who is over the age of 16. We read the majority opinion to conclude that no one could ever reasonably be mistaken about the child's age. We are unable to reach that conclusion.

Because we are required to consider the offense from the perspective of the least culpable offender, and because we do not agree that a person under the age of 13 can never reasonably be mistaken for a person over the age of 16, we cannot conclude that a violation of § 2907.05(A)(4) is a crime of moral turpitude *per se*.

The majority relies on the Ohio legislature's determination setting the age cutoff of 12 years old for coverage of this statute in 1974 that "the physical immaturity of a pre-puberty victim is not easily mistaken." *State v. Schwarzman,* 2014 WL 2565975 at *4 (Ohio Ct. App. June 5, 2014).[1] We do not find the Ohio legislature's determination dispositive, for two reasons.

[1] Disciplinary Counsel goes further than the Ohio legislature, asserting unconditionally that "[i]t is not reasonable to confuse a child under thirteen years old for a consenting adult." ODC Supp. Statement at 2. As discussed above, we cannot in good conscious reach this conclusion.

First, the legislature does not use the standard we are required to apply here. If a respondent could have been reasonably mistaken in some cases, even if not "easily mistaken" in most cases, that is sufficient to take this outside of the range of moral turpitude *per se* crimes.

Second, § 2907.05(A)(4) does not criminalize conduct involving a "pre-puberty" person; it criminalizes conduct involving someone under the age of 13. Based on our experience, we cannot find that everyone under the age of 13 today is pre-pubescent, thus clearly distinguishing them from older adolescents. Of particular importance to us in reaching this conclusion are the Board's and the Court's decision in *In re Lovendusky,* Bar Docket No. 416-84 (BPR Nov. 4, 1985) and No. 84-1672 (D.C. April 4, 1986) at 2 n.2. In *Lovendusky*, the respondent had pled guilty to violating the District of Columbia's attempted carnal knowledge statute, which did not require proof that the respondent knew or should have known that the victim was under sixteen, the age of consent. The Board found, and the Court agreed, that the lack of knowledge required by the statute prevented the offense from being a crime of moral turpitude *per se.* Bar Docket No. 416-84 at 7; No. 84-1672 at 2 n.2. As the Board explained its decision, since the statutory offense was "one of 'strict liability' in which the knowledge and intent of the offender is immaterial, moral wrongdoing contrary to the standards of society may not be involved where the defendant could reasonably have believed that the girl

involved was a consenting adult." Bar Docket No. 416-84 at 4. The Court agreed.

When a statute included the "added requirement" that a respondent be in a "custodial or supervisory relationship," the Board found that this satisfied the "missing element of knowledge, either actual or constructive, of the victim's age." *In re Sharp,* 674 A.2d 899, 904 (D.C. 1996) (appended the Board Report). Because of the extended contact and interactions between the custodian/perpetrator and the victim, the Court agreed with the Board that the statutory offense qualified as a crime of moral turpitude *per se* because a respondent in such a relationship "either will know or should know the age of the minor." *Id.* But the element of knowledge is not present in the law at issue here. We do not believe that the Ohio legislature's simply setting the age of the victim at under 13 is a substitute for the "missing element of knowledge."

The record does not contain any facts about Respondent's case because whether an offense is *per se* a crime of moral turpitude does not turn on the facts of an individual case. Instead, the determination of whether Ohio Revised Code § 2907.05(A)(4) is a crime of moral turpitude *per se* must be based *only* on the elements of the offense of conviction. *See In re Shorter*, 570 A.2d 760, 765 (D.C. 1990) (per curiam) (citing *Colson*, 412 A.2d at 1164-67). Applying the law as defined by the Court of Appeals –

and looking at the elements of § 2907.05(A)(4) – we cannot conclude that the least culpable offender necessarily committed a crime of moral turpitude.

Crimes such as those encompassed in § 2907.05(A)(4) spark strong emotions, and Ohio is justified in establishing its criminal law as it sees fit to protect its citizens. In reaching our conclusion, we emphasize that we do not minimize in any way the seriousness of protecting children from sexual assault. To be sure, reading the statute, it is not difficult to imagine many fact patterns that would surely be crimes of moral turpitude. But that is not what our analysis must be here. Because we cannot conclude that every person under the age of 13 could never reasonably be mistaken for a person over the age of 16, under the controlling standard, Respondent should have a hearing to determine whether his crime constituted a crime of moral turpitude.

Accordingly, we respectfully dissent.

By: Matt Kaiser
Matthew G. Kaiser, Vice Chair

Joined by Ms. Soller, Mr. Bernstein and Mr. Hora.