

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Vicki C. Dukes,	:	
Appellant-Appellant,	:	
v.	:	No. 09AP-515 (C.P.C. No. 08CVF-18175)
Director, Ohio Department of Job and Family Services,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on December 22, 2009

Joseph S. Tann, Jr., for appellant.

Richard Cordray, Attorney General, and *Todd K. Deboe*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Appellant, Vicki C. Dukes, appeals from a decision of the Franklin County Court of Common Pleas which affirmed an order of the Director of the Ohio Department of Job and Family Services ("ODJFS") that terminated a provider agreement between appellant and appellee, ODJFS. The provider agreement allows providers to be reimbursed for services under the Ohio Medicaid program. Appellant was an

independent provider in the Ohio Medicaid home and community-based waiver program.

{¶2} In 1993, pursuant to a guilty plea, appellant was convicted of the misdemeanor offenses of receiving stolen property of less than \$100 in value and attempted forgery, both offenses occurring on the same day. The Franklin County Court of Common Pleas found appellant to be a first offender and ordered the sealing of appellant's conviction record regarding the attempted forgery in an entry dated August 15, 2008.

{¶3} In 2004, appellant and appellee entered into a provider agreement for appellant to provide medical services to adults in their homes. Appellant disclosed the 1993 convictions in her application. Although R.C. 5111.034 prohibits persons convicted of a disqualifying offense from being awarded a contract, R.C. 5111.034(D) provides an exception if there is only one disqualifying offense; a provider may still be awarded a contract under certain circumstances. Prior to 2007, attempted forgery was not a disqualifying offense; therefore, appellant only had one disqualifying offense. However, in 2007, the law was changed and attempted forgery also became a disqualifying offense. The director of ODJFS terminated appellant's provider agreement prior to the August 15, 2008 sealing based upon her convictions of two disqualifying offenses.

{¶4} Appellant requested an R.C. Chapter 119 hearing. The hearing examiner recommended that the director terminate appellant's provider agreement. The director issued an Adjudication Order adopting the hearing examiner's recommendation to

terminate appellant's provider agreement. Appellant then appealed to the Franklin County Court of Common Pleas, which affirmed the director's Adjudication Order.

{¶5} Appellant filed a timely notice of appeal and raised the following assignments of error:

I. Contrary to law, the Franklin County Common Pleas Court affirmed the Appellee, Ohio Department of Job and Family Services ("Appellee"), retroactive application of a 2007 change in Section 5111.034 of the Ohio Revised Code ("ORC") to Appellant's 1993 misdemeanor offense to establish grounds for the 2008 termination of the contract between Appellant and Appellee.

II. Contrary to the Equal Protection Clause of the United States and State of Ohio Constitutions, the Franklin County Common Pleas Court affirmed the Appellee differentiation of Appellant from similarly situated others in providing terms and conditions for the continued provision of services by Appellant notwithstanding her criminal history.

III. Contrary to law, the Franklin County Common Pleas Court affirmed the Appellee[s] termination of the contract between Appellant and Appellee notwithstanding Appellant compliance with Sections 5111.034(D) and (G) of the Ohio Revised Code and 5101:3-45-08(D) of the Ohio Administrative Code.

{¶6} R.C. 119.12, provides the standard of review for the common pleas court, as follows:

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law.

{¶7} Reliable, probative, and substantial evidence has been defined in *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571, as follows: " 'Reliable' evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. 'Probative' evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. 'Substantial' evidence is evidence with some weight; it must have importance and value."

{¶8} The common pleas court's "review of the administrative record is neither a trial *de novo* nor an appeal on questions of law only, but a hybrid review in which the court 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.' " *Provisions Plus, Inc. v. Ohio Liquor Control Comm.*, 10th Dist. No. 03AP-670, 2004-Ohio-592, ¶7, quoting *Lies v. Ohio Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207.

{¶9} Within its review, the common pleas court must give deference to the agency's resolution of evidentiary conflicts. *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 213, 2008-Ohio-4826, citing *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 470-71, 1993-Ohio-182. An agency's findings of fact are presumed correct and "must be deferred to by a reviewing court unless that court determines that the agency's findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable." *Id.* at ¶37. However, " ' "the findings of the agency are by no means conclusive." * * * "Where the court, in its appraisal of the evidence, determines that there exist legally significant reasons for discrediting certain evidence relied upon by the administrative

body, and necessary to its determination, the court may reverse, vacate, or modify the administrative order." ' " Id. at ¶37, quoting *Ohio Historical Soc.* at 470-71, quoting *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d. 108, 111.

{¶10} On appeal, the standard of review is more limited than that of the common pleas court. "It is incumbent on the trial court to examine the evidence. Such is not the charge of the appellate court. The appellate court is to determine only if the trial court has abused its discretion." *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707. An abuse of discretion " 'implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency.' " *Bartchy* at ¶41, quoting *State ex rel. Commercial Lovelace Motor Freight, Inc. v. Lancaster* (1986), 22 Ohio St.3d 191, 193. Appellate courts must not substitute their judgment for those of an administrative agency or a common pleas court absent the approved criteria for doing so. *Bartchy* at ¶42, citing *Rossford*. An appellate court's scope of review on issues of law is plenary. *Bartchy* at ¶43, citing *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343.

{¶11} By her first assignment of error, appellant contends that the common pleas court acted contrary to law in affirming appellee's retroactive application of a 2007 change in R.C. 5111.034 to appellant's 1993 misdemeanor offense to establish grounds for the 2008 termination of the contract between appellant and appellee. Appellant argues that the Supreme Court of Ohio's holding in *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, is controlling in this case.

{¶12} *Hyle* involved an action seeking an injunction prohibiting Gerry R. Porter, Jr., from continuing to live within 1000 feet of a school because he had been found to be a sexually oriented offender based on convictions for sexual imposition in 1995, and sexual battery in 1999. Porter had owned and lived in the house since 1991. The issue was whether R.C. 2950.031, now 2950.034, could be applied retroactively to Porter, since the offenses for which he was designated a sexually oriented offender had been committed prior to the statute's effective date and Porter had been living in the house prior to that date.

{¶13} The Supreme Court first considered the application of R.C. 1.48 to the statute and determined that the statute was not made specifically retroactive for purposes of R.C. 1.48 and, thus, did not address the issue of whether the statute could constitutionally be applied retroactively. *Hyle* at ¶24.

{¶14} Statutes must be afforded a strong presumption of constitutionality. *In re James*, 113 Ohio St.3d 420, 2007-Ohio-2335, ¶13. Appellant is arguing that the application of law retroactively is prohibited by R.C. 1.48 and *Hyle*. In evaluating whether a statute applies prospectively or retroactively, courts in Ohio apply two rules. First is the rule of statutory construction adopted in R.C. 1.48, which establishes a presumption that statutes are prospective in operation unless the legislature expressly declares the statute to be retroactive. See *Hyle* at ¶7. "Absent a clear pronouncement by the General Assembly that a statute is to be applied retrospectively, a statute may be applied prospectively only." *State v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009, paragraph one of the syllabus. A prospective statute applies to claims that arise and

regulates conduct that occurs after its effective date. *Sorenson v. Tenuta* (1989), 62 Ohio App.3d 696, 702.

{¶15} The second rule is one of constitutional limitation contained in Section 28, Article II of the Ohio Constitution, used to determine whether a statute is substantive or remedial. Applying a substantive statute retroactively is unconstitutionally prohibited. *State v. Cook* (1998), 83 Ohio St.3d 404. "A purely remedial statute does not violate Section 28, Article II of the Ohio Constitution, even if applied retroactively." *Cosby v. Franklin Cty. Dept. of Job & Family Servs.*, 10th Dist. No. 07AP-41, 2007-Ohio-6641, ¶23, citing *Cook*. Remedial laws only affect the remedy provided, including substituting a new or more appropriate remedy for the enforcement of an existing right. *Cook*. A substantive statute, and therefore unconstitutionally retroactive, is one that "impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction." *Bielat v. Bielat*, 87 Ohio St.3d 350, 354, 2000-Ohio-451. A retroactive statute is one that is "made to affect acts or facts occurring, or rights accruing, before it came into force." *Bielat* at 353, citing *Black's Law Dictionary* (6 ed.1990). A statute is impermissibly retroactive in effect if either it impairs rights that vested or accrued before the statute came into force or it attaches a new disability in respect to past transactions or considerations. *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 281, citing *Soc. for the Propagation of the Gospel v. Wheeler* (C.C.D.N.H.1814), 22 F.Cas. 756, 767. A "disability" is a legal disqualification or incapacity in the eyes of the law to perform some function. See *Cline v. Hammond* (1931), 48 Ohio App. 228, 233. A statutory provision that attaches a new

disability to a past transaction or consideration is not invalid unless the past transaction or consideration created at least a "reasonable expectation of finality." *Matz* at 281.

{¶16} The language of R.C. 5111.034 must be examined first to determine whether the legislative intent expressly provides for retroactivity. R.C. 5111.034(D) provides, in pertinent part, that the department "shall terminate an existing provider agreement of, an independent provider if the person has been convicted of, has pleaded guilty to, or has been found eligible for intervention in lieu of conviction for any of the following." That statute section then lists the disqualifying offenses, but also lists offenses that existed before the statute's effective date. For example, it lists "felonious sexual penetration in violation of former section 2907.12 of the Revised Code, a violation of section 2905.04 of the Revised Code as it existed prior to July 1, 1996, a violation of section 2919.23 of the Revised Code that would have been a violation of section 2905.04 of the Revised Code as it existed prior to July 1, 1996, had the violation been committed prior to that date." R.C. 5111.034(D)(1). R.C. 5111.034(D)(2) also provides that a disqualifying offense is "[a]n existing or former law of this state, any other state, or the United States that is substantially equivalent to any of the offenses listed in division (D)(1) of this section."

{¶17} This language is similar to the language examined in *Cosby*. In *Cosby*, this court found the language "[n]o individual *who has been convicted of or pleaded guilty to* a violation of section * * * shall own or operate" expressed a clear legislative intent to apply retroactively. (Emphasis sic.) *Id.* at ¶19. Similarly, the language in R.C. 5111.034 applies to convictions or guilty pleas that occurred prior to the date the statutory amendment became effective, which would apply to appellant. The fact that

the legislature listed offenses that existed prior to the effective date as disqualifying offenses is evidence that it applies to convictions or guilty pleas that occurred prior to the effective date of the statute.

{¶18} Since we have found the language of R.C. 5111.034 expresses a clear intention of retroactivity, we must continue to step two of the analysis and determine whether the statutory restriction is substantive or remedial. *Hyle; Bielat* at 353. A statute that applies retroactively and is substantive is unconstitutional. *Id.* A statute is substantive if it "impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction." *Id.* at 354. "Conversely, remedial laws are those affecting only the remedy provided, and include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right." *Cook* at 411. Appellee argues that these rules regarding criminal background checks and terminations of Medicaid provider agreements serve an important public policy of protecting Medicaid home-health care consumers from potential abuse and, therefore, the statute is remedial in nature.

{¶19} This court held in *Cosby* that the day-care provider had no vested right in her day-care certification because it was similar to a license and licenses ordinarily do not confer an absolute or vested right. The court also recognized that the certification was revocable, which is similar to this case.

{¶20} A "vested right" is a right that " 'so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent.' " *Harden v. Ohio Atty. Gen.*, 101 Ohio St.3d 137, 2004-Ohio-382, ¶9, quoting Black's Law Dictionary (7th ed.1999). "A right is not regarded as vested in the constitutional sense

unless it amounts to something more than a mere expectation or interest based upon an anticipated continuance of existing law." *In re Emery* (1978), 59 Ohio App.2d 7, 11. "[W]here no vested right has been created, 'a later enactment will not burden or attach a new disability to a past transaction or consideration in the constitutional sense, unless the past transaction or consideration * * * created at least a reasonable expectation of finality.'" *Cook* at 412, quoting *Matz* at 281.

{¶21} Appellant's provider agreement is similar to the day-care certification in *Cosby*. The right to a provider agreement is not absolute. It has to be renewed annually and could be revoked by either party with 30 days notice. It is subject to regulations, and appellant was subject to an annual criminal background check and had to prove Ohio residency for the prior five years. From the date the provider agreement was entered into by the parties, until her provider agreement was terminated, appellant's agreement was expressly subject to ODJFS's revocation and the agency was prohibited from renewing the agreement if she did not comply with the laws and rules adopted under R.C. Chapter 5111.

{¶22} Based upon the foregoing, we conclude that the independent Medicaid provider agreement does not confer a vested or substantive right in the constitutional sense for the purposes of retroactivity analysis of a statute. Since a substantive right is not affected, retroactive application of R.C. 5111.034 is constitutionally permissible. Appellant's first assignment of error is overruled.

{¶23} By her second assignment of error, appellant contends that the trial court erred in affirming the director's order which was contrary to the Equal Protection Clause of the United States and Ohio Constitutions. As a general rule, legislative enactments

enjoy a presumption of constitutionality. *Conley v. Shearer*, 64 Ohio St.3d 284, 289. " 'The limitations placed upon governmental action by the federal and state Equal Protection Clauses are essentially the same.' " *Columbia Gas Transmission Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, ¶90, quoting *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, ¶17. Both require that similarly situated individuals be treated alike. *Id.*

{¶24} To begin an equal protection analysis, courts first examine the classifications created by the statute in question. *In re Estate of Barnett-Clardy*, 10th Dist. No. 08AP-386, 2008-Ohio-6126, ¶20, citing *Burnett v. Motorists Mut. Ins. Co.*, 118 Ohio St.3d 493, 2008-Ohio-2751, ¶31. The test to determine whether a statute is constitutional under the Equal Protection Clause depends upon whether a fundamental interest or suspect class is involved. *Conley*. " 'Under the equal protection clause, in the absence of state action impinging on a fundamental interest or involving a suspect class, a rational basis analysis is normally used. Where the traditional rational basis test is used great deference is paid to the state, the only requirement being to show that the differential treatment is rationally related to some legitimate state interest.' " *Id.* at 289, quoting *State ex rel. Heller v. Miller* (1980), 61 Ohio St.2d 6, 11.

{¶25} Where "a challenged statute does not actually create a classification that treats similarly situated individuals under like circumstances differently, there can be no discrimination to offend equal protection." *Burnett* at ¶43. See also *Conley* at 290, in which the court held "where there is no classification, there is no discrimination which would offend the Equal Protection Clauses of either the United States or Ohio Constitutions."

{¶26} Appellant's argument is that appellant, as an independent provider of Medicaid services to adults, is similarly situated to a type B day-care provider of services to children because both providers receive governmentally sponsored compensation to perform services under government supervision for a vulnerable population. Thus, providers under R.C. 5111.034 should be similarly treated to providers under R.C. 5104.01, and since the providers are not treated similarly, it is a violation of the Equal Protection Clauses.

{¶27} However, R.C. 5111.034 does not create different classifications. Appellant is comparing different statutory schemes and has not demonstrated that she is similarly situated to type B providers of services referred to in R.C. 5104.01. As stated above, where there is no classification, there is no equal protection discrimination. Moreover, R.C. 5111.034 does not create a suspect classification, classify individuals in a way that is not rationally related to a legitimate government interest, or violate a fundamental right. *Burnett* at 498-99. Appellant cannot maintain an equal protection claim and her second assignment of error is overruled.

{¶28} By her third assignment of error, appellant contends that the trial court erred in affirming the director's order which terminated the contract between appellant and appellee, notwithstanding that appellant complied with R.C. 5111.034(D) and (G) and Ohio Adm.Code 5101:3-45-08(D). Appellant's argument is that, in August 2008, her criminal record was sealed and, thus, she is entitled to the exception found in Ohio Adm.Code 5101:3-45-08(D) because her disqualifying offenses should be considered related offenses, as they were pursuant to R.C. 2953.31(A). Since the common pleas court considered the offenses related offenses, pursuant to R.C. 2953.31(A), and found

appellant to be a first offender in order to seal her record, she argues the director should consider them related offenses for Ohio Adm.Code 5101:3-45-08(D)(1) purposes.

{¶29} Ohio Adm.Code 5101:3-45-08(D)(1) provides that: "A consumer may choose to receive waiver services from a non-agency provider who has been convicted of, pleaded guilty to, or has been granted treatment in lieu of conviction of only one of the disqualifying offenses set forth in paragraph (B)(4) of this rule if all of the following conditions are met." Appellant argues her two convictions should be considered as one offense in order to fit within this exception. However, the director considered this argument and found that R.C. 2953.31(A) was not relevant to the issues at hand because the definition in R.C. 2953.31(A) applies "only as a means of defining who is a 'first offender' when an individual is applying to have a conviction sealed."

{¶30} R.C. 2953.31(A) provides, as follows: "As used in section 2953.31 to 2953.36 of the Revised Code: (A) 'First offender' means anyone who has been convicted of an offense in this state or any other jurisdiction and who previously or subsequently has not been convicted of the same or a different offense in this state or any other jurisdiction. When two or more convictions result from or are connected with the same act or result from offenses committed at the same time, they shall be counted as one conviction." Thus, since the common pleas court found that appellant's two convictions resulted from the same act or were committed at the same time, they counted as one conviction. Appellant argues that the director and the trial court should have also found that her two convictions should be considered one disqualifying offense for purposes of Ohio Adm.Code 5101:3-45-08(D), the continuation of services rule.

{¶31} R.C. 2953.31 specifies that it is to be used for R.C. 2953.31 to 2953.36. It defines a "first offender" for the purpose of having a record sealed only, not for other purposes. Appellant received the benefit of this definition when her record regarding one conviction was sealed in August 2008, but it does not correspond that her two disqualifying offenses that she had at the time her provider agreement was terminated in April 2008 should not be counted as two disqualifying offenses.

{¶32} At the time of the proposed adjudication order in April 2008, appellant had two disqualifying offenses: receiving stolen property and attempted forgery. R.C. 5111.034(D) provides that ODJFS "shall not issue a new provider agreement to, and shall terminate an existing provider agreement of, an independent provider if the person has been convicted of, has pleaded guilty to, * * * any of the following." Given the mandatory language in R.C. 5111.034, ODJFS was required to terminate appellant's provider agreement once she was no longer eligible for the exception provided in Ohio Adm.Code 5101:3-45-08(D), because she had two disqualifying offenses, rather than just one. We find the trial court did not err and appellant's third assignment of error is overruled.

{¶33} For the foregoing reasons, appellant's three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

McGRATH and CONNOR, JJ., concur.
