

FILED

December 24, 2003

**NEW JERSEY STATE BOARD
OF MEDICAL EXAMINERS
EFFECTIVE**

January 12, 2004

NEW JERSEY STATE BOARD
OF MEDICAL EXAMINERS

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF MEDICAL EXAMINERS

IN THE MATER OF THE
SUSPENSION OR REVOCATION OF :
THE LICENSE OF

Administrative Action

MARK S. DAVIS, D.P.M.

ORDER OF TEMPORARY

License No. 25MD002618 :

SUSPENSION

TO *PRACTICE PODIATRY IN THE :
STATE OF NEW JERSEY

This matter was initially opened before the New Jersey State Board of Medical Examiners ("the Board") on the application for a temporary suspension of respondent's license to practice medicine brought by Attorney General Peter C. Harvey, Swang 00, Deputy Attorney General appearing. An Order to Show Cause was signed by Board President David Wallace, M.D., on November 25, 2003 by which a hearing was scheduled before the Board on December 10, 2003.

The State's Verified Complaint (supported by a letter brief, certifications and appendix filed simultaneously with an Order to Show Cause) alleged in three counts actions by respondent inconsistent with those of a licensee entrusted by the State to provide health care to its citizens. The complaint alleges that respondent conceived a plan, utilizing the assistance of a member of his podiatric office staff, to lure a contractor (with whom he had an admitted long term financial dispute) to a construction site in order to threaten him with a stun gun and other weapon and cause him physical harm.

CERTIFIED TRUE COPY

Specifically, the state alleges in Count I that respondent, a podiatrist who maintains two podiatric practices named "Killer Feet" (one in Toms River, New Jersey and one in Staten Island, New York) instructed his office medical assistant, Helyse Araten, to arrange a meeting under false pretenses with a contractor, Joseph M. Vitale. The Verified Complaint alleges respondent told his medical assistant that he had a longstanding financial dispute concerning \$30,000 which the contractor owed him for unfinished work to respondent's home movie theater. While present in his office, he instructed Ms. Araten to telephone the contractor and falsely tell him that she wanted to surprise her husband with a home movie theater at 46 Orchard Lane, Colts Neck which is a vacant mansion under construction. While asking his employee to participate in the ruse, he showed her a long black object wrapped in a towel, which he told her he was going to use to "shock" the contractor. He also told her that if the shock device and threats were ineffective, he was going to kill him. The complaint also alleges that Ms. Araten actually met the contractor on May 13 and that she observed the contractor running with respondent chasing after him. Furthermore, the complaint alleged that respondent pointed a gun at the contractor, pulled the trigger twice and struggled with him, hitting the contractor with a stun gun before he was able to escape and call 911.

Count I further alleges that tools, nail guns and/or hoses were reported stolen from the Colts Neck premises the day before the incident and that the return of the search warrant for respondent's home revealed these tools, with the Colts Neck contractor's identification engraved on them, in respondent's garage.¹

The State charges that the conduct alleged in Count I, instruction to an employee to engage in illegal acts of subterfuge attendant to his attack on Mr. Vitale, constitutes professional misconduct in violation of N.J.S.A. 45:1-21(e). Furthermore, the complaint alleges that the conduct demonstrates that respondent engaged in acts constituting a crime or offense involving moral turpitude or relating adversely to the activity regulated by the Board in violation of N.J.S.A. 45:1-21(f) and that respondent is incapable of discharging the functions of a licensee in a manner

¹ The complaint recounts that respondent was arrested on May 15, 2003 by the Colts Neck Police Department on charges of attempting to commit murder, specifically pointing a hand gun at the victim and pulling the trigger twice in violation of N.J.S.A. 2C:5-1; aggravated assault, specifically pointing a hand gun at the victim, in violation of N.J.S.A. 2C:12-1b(9); unlawful possession of a weapon, in violation of N.J.S.A. 2C:39-4a and unlawful possession of a stun gun in connection with the attempted murder, in violation of N.J.S.A. 2C:39-3h; knowingly possessing a hand gun without first having obtained a permit to carry, specifically for an unlawful purpose, in violation of N.J.S.A. 2C:39-5b; committing burglary by entering a structure which was not opened to the public, in violation of N.J.S.A. 2C:18-2a(1); and theft by unlawfully taking or exercising control over construction tools and air hoses, in violation of N.J.S.A. 2C:20-3a (S-9 Colts Neck Police Department Criminal Complaint and Arrest Report).

consistent with the public's health, safety and welfare contrary to N.J.S.A. 45:1-21(1), respondent's lack of good moral character in violation of N.J.S.A. 45:9-6 and that he constitutes a clear and imminent danger to the public health, safety and welfare pursuant to N.J.S.A. 45:1-22.

Count II alleges that the search of respondent's residence found a clear plastic bag containing greenish vegetation and a smoked hand-rolled paper containing greenish vegetation and a Kleenex Cottonelle wipe box containing plastic bags with white powder. (The complaint reveals the lack of a forensic report analyzing either substance). The State alleges that this evidence demonstrates that respondent is presently engaged in drug use in violation of N.J.S.A. 45:1-21(i) which renders him incapable of discharging the functions of a licensee in a manner consistent with the public's health, safety and welfare contrary to N.J.S.A. 45:1-21(i).²

Count III alleges that the May 15, 2003 search by the criminal authorities of respondent's home revealed an "0-Mega 150,000 volts" stun gun and batteries, an empty blue hard plastic gun box labeled "Beretta USA" and a black plastic "Dorskocil" gun guard case. A search of the crime scene by the Monmouth County Police revealed a nine volt battery, pieces of rubber and a black

² Count II of the Complaint was not relied upon by the Board as a basis for the Board's findings herein.

plastic cap with nylon rape strap consistent with a stun gun implement. The complaint finally alleges that respondent is not licensed to possess or carry any firearms in New Jersey, that stun guns are illegal in New Jersey and that respondent's possession of same is an act constituting a crime or offense involving moral turpitude or relating adversely to the activity regulated by the Board in violation of N.J.S.A. 45:1-21(f) and poses a clear and imminent danger pursuant to N.J.S.A. 45:1-22.

On or about December 4, 2003 respondent filed a Verified Answer to the Complaint wherein he generally denied all the allegations. At the hearing on December 10, 2003, Deputy Attorneys General Swang Oo and Jeri L. Warhaftig appeared for complainant Attorney General of New Jersey, and Nathan L. Dembin, Esq., appeared for respondent.³ The Attorney General offered into evidence each of the exhibits attached to the Verified Complaint. The State's documentary evidence was marked as follows:⁴

S-1 Licensee Biennial Renewal dated September 10, 2001 and letter of Centralized Licensing indicating that respondent's license was not renewed for the current 2003 cycle.

³ Mr. Dembin presented documentation that his application to be admitted to the Bar in New Jersey Pro Hac Vice had been submitted and was pending.

⁴ Respondent's counsel made a standing objection to all of the State's "question and answer documents" in that he did not know the surrounding and underlying circumstances in which the statements contained in the documents were made.

- S-2a Sworn Statement of Assistant Prosecutor Susan Schroeder of Monmouth County Prosecutor's Office certifying that the documents provided to the Attorney General's office on September 22, 2003 are true and accurate copies of the discovery in this matter.
- S-2b Advertisements of respondent's office as "Killer Feet" dated May 2003.
- S-3 Sworn Certification of Helyse Araten, a medical assistant of respondent, dated May 14 and June 23, 2003 certifying as to respondent's enlisting her aid in a plan to meet the victim Mr. Vitale at a construction site and recounting respondent's statement that he would threaten and/or harm him with a weapon.
- S-4 Sworn Certification dated August 9, 2003 of Mark S. Davis, attesting to a June 29, 2001 incident involving Mr. Vitale and an ongoing dispute with respondent.
- S-5 Sworn Certification dated May 14, 2003 of the victim Joseph M. Vitale, certifying that he was lured to a construction site by respondent's employee and he indicated he was attacked and threatened by respondent.
- S-6 "911" transcript from Monmouth County, N.J. dated May 13, 2003 reporting an attack and struggle at a construction site between respondent and Joseph M. Vitale.
- S-7 Investigation Report of Monmouth County Police Department by Investigator Matthew Miyakawa, dated May 13, 2003, regarding tools stolen from a construction site on May 12, 2003.
- S-8 Affidavit dated May 21, 2003 of Detective Sergeant 'Joseph Whitehead of Monmouth County Prosecutor's Office and Return of Search Warrant of respondent's home itemizing the seizing of 38 items from respondent's home including a stun gun, two nine volt batteries and one box of six nine volt batteries, an empty gun box, a gun guard case, bullets and three nail guns, four air hoses and one sander.

- S-9** The Colts Neck Police Department Criminal Complaint and arrest report dated 5/12/03.
- S-10** Request for Examination of Evidence by the Monmouth County Prosecutor's Office to the State Police Forensic Science Bureau.
- S-11** Office of the Monmouth County Prosecutor Bureau of Forensics & Technical Services Initial Technical Report dated June 16, 2003
- S-12** Application for Firearms Identification Card and Application to Purchase a Handgun by respondent dated 12/27/01 and November 24, 2003 and letter from Colts Neck Chief of Police that they were not issued.
- S-13** Investigation Report of Monmouth County Police Department by Detective Paul Seitz dated July 2, 2003.
- S-14** Investigation Report of Monmouth County Police Department by Detective Paul Seitz, dated December 17, 2002.

Respondent marked into evidence the following:

- R-1** Verification and Affidavit dated December 9, 2003 of Mark S. Davis, D.P.M.⁵

⁵ The affidavit consists of the following seven statements;

1. I am the Respondent in the above entitled proceeding and I make this affidavit in opposition to the Application brought by Order to Show Cause to suspend or revoke my medical license.
2. I am fully familiar with the facts and circumstances of this matter from personal knowledge and I make this affidavit upon my personal knowledge of the facts stated.
3. I have plead not guilty to all charges alleged in the Verified Complaint. Since this matter is still pending under the advice of counsel I shall address only the salient issues.
4. I do not now, nor have I ever, since commencing my practice some 17 years ago used or consumed any illegal substance

R-2 Affidavit of Nathan L. Dembin, Esq. dated December 9, 2003.

R-3 Affidavit of Tammy Davis, wife of respondent, dated December 9, 2003.⁶

be it cocaine or marijuana or anything else.

5. I never attempted to kill Mr. Vitale nor did I ever point or possess or attempt to discharge a gun at him in May 2003.

6. I never unlawfully entered any facility in order to remove tools and/or equipment.

7. I am married and the father of three young children, I am committed to my profession and dedicated to my patients and practice.

⁶ The affidavit consists of the following six statements;

1. I am the wife of Dr. Mark Davis. We have been married for fourteen years. He is a wonderful and caring husband and a loving father to our three children.

2. We have three daughters, ages 12, 9, and 6. Dr. Davis loves and cares for them deeply. He is attentive to all aspects of their lives from school, education and their development.

3. I work with my husband on nearly a daily basis and can assure you he genuinely cares for his patients and provides excellent care to them.

4. In character, temperament, and demeanor, he is not aggressive, has never been violent, and is generous with his patients. Neither patient or staff has expressed concern about the allegations, rather they have supported him (*see* attached letters).

5. I should point out that we have had extensive construction in our house in May, 2003, including renovating our garage. We used a construction company who was using dumpsters for their work. They were using an assortment of tools and varied equipment.

6. We have lived in this community for six years, and

- R-4 Affidavit of Donna Rapuzzi, respondent's employee for more than one year, dated December 9, 2003, attesting that respondent is a "gentle non-aggressive man."
- R-5 Affidavit of Melissa Farley, LPN, a nurse working with respondent for seven months, dated December 9, 2003 attesting as to never having seen any "bizarre behavior and that he is kind and attentive."
- R-6 Affidavit of Faye Marie Habib dated December 9, 2003, an employee of respondent's for more than five years and the mother of a patient. She attests that he is a "kind, generous and compassionate man with a heart of gold" and "has never exhibited any bizarre or unusual behavior."
- R-7 Affidavit of Julia Stack, an office assistant of respondent and patient dated December 9, 2003 attesting to respondent's "concerns, attention and kindness and that he is not dangerous, irrational or bizarre."
- R-8 A packet of 69 letters generally supportive of respondent's character and competence and urging that no adverse action be taken against respondent.⁷

Respondent presented four witnesses -- Julia Stack, Melissa Farley, LPN, Faye Marie Habib and Ms. Florence Dreher -- who attested to his general good character, his competency as a physician, that they have never observed him acting violently or irrationally and neither they nor his patients feel threatened by

there have never been any altercations or difficulties.

⁷ The Board ordered that the name of patients be redacted in order to protect their privacy.

him. They all conceded that they had no first-hand knowledge of the events that form the basis for the complaint.

Upon careful review and analysis of all the evidence before us we unanimously conclude that the threshold showing necessary to support the temporary suspension of Dr. Davis' license has been made. N.J.S.A. 45:1-22 provides that a Board may temporarily suspend the license of a practitioner upon a verified application palpably demonstrating a clear and imminent danger to the public health, safety and welfare. The evidence before us includes most graphically, the certification of the victim, Mr. Vitale (S-5) and the corroborating certification of respondent's medical assistant, Ms. Araten (S-3) much of which is unrebutted at this juncture. Supporting the certifications is the evidence of the "911" transcript (S-6) placing the victim at the scene and the Affidavit of Detective Sergeant Joseph Whitehead of the Monmouth County Prosecutor's Office and return of search warrant of respondent's home recounting the finding of a stun gun in respondent's home and a black hat and other objects at the crime scene consistent with that stun gun (S-8). Taken collectively, the evidence paints a portrait of a licensee using his medical office and a member of his medical office staff to plot and carry out an intricate, violent and dangerous scheme involving weapons to cause harm to or threaten another person. Such activities are so inconsistent with the conduct the public expects and the

responsibilities that a medical professional owes to his patients and the public, that we find respondent's continued practice would, at this juncture, pose a clear and imminent danger to the public.

The evidence before us demonstrates sufficient indicia of reliability and corroboration to support the findings we make at this point of the proceedings, Most compelling are (S-3), the certification of Helyse R. Araten, and (S-5) the certification of Joseph M. Vitale which are strikingly similar in their detailed description of the May 13, 2003 incident. The date, address, time, and specific descriptions of the premises where the struggle took place are consistent. Both statements are identical as to the description of the assistant and victim together approaching more than one door at the house under construction. Further they both describe the repeated cell phone calls Ms. Araten reports receiving from respondent, and Mr. Vitale recounts that he saw a man walk into the woods at the scene with a phone to his ear. Importantly, both describe respondent in a black hat with red writing on the front beginning with the Letter "B" and the Jets duffle bag they state respondent carried concealing inside an instrument consistent with a stun gun. Ms. Araten relates that respondent told her he was going to use the long black object to "shock Joe Vitale" and if his threats against Vitale didn't work he was going to kill him. Mr. Vitale describes a violent struggle with the respondent using his stun gun including beating him with

it and respondent's attempts to shoot him with a hand gun which is consistent with Ms. Araten's report. Ms. Araten certifies she saw respondent chasing Mr. Vitale as she fled the scene pursuant to respondent's direction. Finally, both describe Ms. Araten driving a black SW, Mr. Vitale noted there was a dealer license plate and both state that a Nissan was also present at the scene.

Ample evidence in the record further bolsters these statements. The Investigation report of Monmouth County Police Department IS-7) reveals that on May 12, 2003 the night before the incident, tools were reported stolen from the construction site at issue; specifically, air hose compressors and nail guns. These very items, with the contractor's identification engraved on them, were later found in respondent's garage when the search warrant was executed on May 15, 2003 (S-8). These items found in respondent's home provide yet one more basis for connecting respondent to the scene, Further, a nine volt battery and pieces of rubber and a nylon strap material associated with a stun gun were found by the police where the struggle detailed in the victim and medical assistant's certifications were reported to have occurred (S-11). Further, the return of the Search Warrant (S-8) revealed at respondent's home an "Omega" 15,000 volt, Serial #200183 (a stun gun) containing two nine volt batteries and one box of six nine volt batteries, a blue hard plastic gun box "Beretta USA," four 380 PMC bullets and an empty black plastic "Dorskocil" gun guard case.

Although no guns other than the stun gun were found at respondent's home, gun cases and bullets consistent with the weapon the victim described were found there.'

We find it compelling that the Initial Technical Report of the Monmouth County Prosecutor's Office (S-11) dated June 16, 2003 revealed that a black baseball cap with red and white lettering design "Borla," an Energizer nine volt battery and a black plastic cap with nylon type rope strap were found at the scene. The hat found at the scene is consistent with both Ms. Araten's and Mr. Vitale's descriptions of the hat +respondent wore that evening.

There are multiple references to the automobiles utilized in commission of this plan. Ms. Araten swears that respondent had her get into his black S W and he used her Nissan Maxima. Mr. Vitale confirms in his certification that as he approached the scene, a man in a parked Nissan covered his face and a woman drove up in a black SW. Mr. Vitale reports that the SUV had dealer plates. S-11, an official record of the Monmouth County Prosecutor's Office, also recounts that a detective from the Monmouth County prosecutor's office presented at Pine Belt Automotive in Eatontown, New Jersey where a sales representative

^a 5-12 documents respondent's applications for a New Jersey Firearms Identification Card and Permit to Purchase a Handgun which were never granted, Well in advance of this incident respondent contemplated gun ownership.

reported that respondent, a repeat customer, had borrowed and returned a black Chevy Suburban on the night of the incident in question. The truck was returned to the dealer with "dried mud on mast of the exterior parts." The salesman reported that when respondent returned the car he asked that it be cleaned and he called several times the next day to ask if "anything unusual had occurred or if the police had stopped by." The report certifies that the truck in question is now in the custody of the Monmouth County prosecutors office and soil samples have been taken.'

Taken in aggregate, the unrebutted evidence shows that respondent used his podiatry office and personnel to plot and plan illegal activities including threatening and harming another with illegal weapons. In the face of the charges and the evidence presented, respondent's affidavit and that of his wife are absolutely silent as to the allegations involving the scheme with his medical assistant, the possession in his home and office and use of the stun gun and attachment, and his presence at the scene on the date and time which forms the basis for this complaint. Nowhere does he deny his presence at the scene, or the allegations of threats to Mr. Vitale, nor his use of the stun gun to beat, hit

9 The Board viewed S-11 as corroborative of the certifications but recognizes that it would not serve as an independent basis for the findings herein.

or threaten Mr. Vitale.¹⁰ Nor does he deny enlisting the aid of his medical office assistant in a violent plot. He does not offer any explanation for the empty gun boxes and bullets found in his home or the hat and parts associated with the stun gun found at the scene. He never addressed the issues involving the black SW and the Nissan or the cell phone calls alleged to have been made.

We were not reassured as to his safety and fitness to practice by testimony and affidavits of respondent's witnesses. Julia Stack is a personal friend, patient and employee of respondent who is financially indebted to him for sponsoring her local TV show. Her fierce loyalty to respondent was obvious. Faye Marie Habib testified she worked with Ms. Araten for five years. However, under Board questioning she could provide no motive for Ms. Araten to fabricate negative information and reluctantly acknowledged that she knew of no examples of Araten's ever being dishonest. Although respondent and his wife were both present at the hearing, on the advice of counsel both declined to testify.

We reject respondent's argument that temporary suspension of licensure cannot be supported because respondent has not been charged with any crime. We are fully cognizant that eight months have elapsed since respondent was arrested and that he has not been indicted or convicted. The Board in no way seeks to abrogate the

¹⁰ Respondent's affidavit never refers to a stun gun, and states the following - "I never attempted to kill Mr. Vitale nor did I ever point or attempt to discharge a gun at him in May 2003."

role of the criminal authorities. However, the Board is acutely aware of its responsibility to protect the public from Licensees with grossly tainted judgment. We move not based on the criminal charges but instead make an independent finding on the evidence presented that the certifications supporting the Verified Complaint and the evidence in the record are compelling and strikingly similar, containing multiple details collectively and independently supportive of each other. They lead us to conclude that respondent committed the dangerous acts alleged. Without rebuttal from respondent as to the core facts of this case, we find for purposes of this application a palpable demonstration that they were committed. We find that the violent plan and acts demonstrated are indicative of conduct of an individual with seriously impaired judgment such that he should not be entrusted by the State with the privilege of a license as a podiatric physician for the pendency of the plenary proceeding.

We also reject respondent's argument that the Board cannot base a finding against him without hearing oral testimony and permitting cross-examination. Clearly the statute providing for temporary suspension of license contemplates that such a suspension may be based on a verified application alone, without the requirement for live testimony (see N.J.S.A. 45:1-22).

Nor do we agree with respondent's argument that none of the charges relate to patient care and therefore, there is no clear and

imminent danger. We find the danger palpable in that there is substantial risk to the public and patients alike because respondent lacks the requisite level of judgment and good moral character necessary to maintain the position of trust reposed in him as a licensee. Additionally, we find the use of his office and staff to plot the scheme involved in this matter creates a dangerous work environment. By virtue of his license and position of authority, respondent could require his employees to again engage in inappropriate behavior. When viewed as a total picture, we find at this time that respondent's flawed judgment as demonstrated by his conduct renders him unfit to bear the responsibilities of licensure.

This conduct is so illustrative of flawed judgment that we can only conclude at this point in the proceedings that respondent is not now safe to practice. The license to practice podiatric medicine is a privilege and with that privilege comes a concomitant responsibility to behave in an honest, professional, trustworthy manner, and in a manner which will ensure the safety of patients. Respondent by his conduct has clearly abrogated that responsibility. The totality of the evidence illustrates a licensee with such poor judgment that the State licensing authority would be derelict in its responsibilities to protect the public if we did not assure that his practice rights be temporarily suspended pending resolution of a plenary hearing in this matter.

In making our decision we are cognizant that only respondent's conduct regarding his longstanding dispute with the victim, indicates

violent tendencies. However, the pattern of conduct which permeates respondent's home and work life evidenced here is so egregious, has the potential for creating such grave harm, and directly implicates the use of respondent's medical office and office staff, to harm another, that we feel nothing short of a suspension from practice will afford the public *the* protection to which it is entitled. No less restrictive means such as a practice monitor or the submission to a psychological evaluation could adequately protect against the unrebutted threatening and violent behavior which took place both in and out of the office.

Moreover, the Board is of the opinion that the poor judgment exhibited here is not limited to one aspect of an individual's life but infects all decisionmaking. We cannot now be assured that in the charged environment of a modern medical office if respondent has a financial or billing dispute with a patient or an insurance company he would not act inappropriately, as he did in this matter. No measures we could impose could adequately ensure that respondent henceforth will act in an professional manner.

Accordingly, we herein order that respondent's license to practice podiatric medicine and surgery in the State of New Jersey be temporarily suspended pending the conclusion of plenary proceedings. We make our order effective on January 2, 2004, in order to permit an orderly transition of patients.

WHEREFORE, IT IS ON THIS 24 December DAY OF 2003

ORDERED effective January 2, 2004,

1. The License of Mark S. Davis, D.P.M., to practice podiatric medicine and surgery in the State of New Jersey is hereby temporarily suspended, pending review by the Board of the plenary proceedings in this matter before the Office of Administrative Law.

STATE BOARD OF MEDICAL EXAMINERS

By: 
David M. Wallace, M.D.,
President