IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Appellant,

v.

REGAN BURKE,

Appellee.
_____/

CASE NO.: 2009-AP-05
CONSOLIDATED CASE NO.: 2009-AP-07
Lower Court Case Nos.: 2007-MM-8725
2007-MM-8726

Appeal from the County Court,
for Orange County, Florida,
Wayne J. Shoemaker, County Court Judge

Lawson Lamar, State Attorney and
David H. Margolis, Assistant State Attorney,
for Appellant

F. Wesley Blankner, Jr., Esq.
for Appellee

Before POWELL, THORPE, and BLACKWELL, J.J.

**PER CURIAM**.

**FINAL ORDER AFFIRMING TRIAL COURT**

The State appeals the order granting Appellee Burke's motions to withdraw his nolo contendre pleas in these consolidated appeals. The grounds of the motions are that his trial counsel had misadvised him on the collateral consequences of his pleas. We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320, and affirm.

Appellee's two motions alleged and the evidence[1] established that prior to Appellee entering his pleas, his trial counsel affirmatively advised him that the trial judge could not and

[1] Since Appellee and his trial counsel were the only two witnesses, and their testimony was consistent, not controverted, discredited, impeached or physically impossible, the trial judge had to accept it as true for the purposes of deciding the motion. *See State v. G.H.*., 549 So.2d 1148 (Fla. 3d DCA 1989); *State v. Jones*, 849 So.2d 438 (Fla. 3d DCA 2003).

would not take any action with regards to his ability to practice medicine. However, in each order of probation the judge required as a special condition that Appellee not practice medicine for one year, and that the two conditions would run consecutive for a total of two years.

Affirmative misadvice by counsel about a collateral consequence of a plea provides a basis upon which to withdraw the plea. *Gunn v. State*, 841 So.2d 629 (Fla. 2d DCA 2003); *Walkup v. State*, 822 So.2d 524 (Fla. 2d DCA 2002); *Roberti v. State*, 782 So.2d 919 (Fla. 2d DCA 2001). The license to practice medicine is a valuable property right when acquired, the suspension of which in this case was a collateral consequence of the pleas. *State Bd. of Med. Exam'r of Fla. v. Rogers*, 387 So.2d 937 (Fla. 1980). The law has always favored the policy of permitting the withdrawal of a guilty or nolo contendre plea where, as here, a motion was duly made in good faith sustained by the proofs, and a proper offer was made to go to trial on the merits. *Banks v. State*, 136 So.2d 25 (Fla. 1st DCA 1962); *Eckles v. State*, 180 So. 764 (Fla. 1938). Discretion to allow the withdrawal of such a plea must be exercised liberally where good grounds are shown, as they were in this case, since the policy of the law is partial to trial on the merits. *State v. Braverman*, 348 So.2d 1183 (Fla. 3d DCA 1977).

We reject the State's argument that Appellee's written plea form and Appellee's answers to the judge's questions during the plea colloquy refute Appellee's argument. The written plea form did not contain the traditional question of whether anyone had promised or threatened him in order to get him to enter his plea. It was entirely silent on this matter. There was mention of suspension of his medical license during the preceding colloquy when the prosecutor told the judge she did speak with the Board (of Osteopathic Medicine) and "it was fine with us revoking his license". The judge asked "And I have the authority to do this?", and she responded "Yes, you do. The Medical Board said they – all they need is – if you want to revoke it. If I fax them the order, it's done." The judge said "Okay, anything else?" When nothing further was said by

counsel, he proceeded to pronounce sentence. However, the judge never asked Appellee if anyone told him he was not going to suspend his license, nor did he give any indication that he was going to do so until he announced it as the last special condition and then quickly ended the hearing. Perhaps Appellee and counsel thought he was not going to do this and were so surprised and taken aback that they were unable to say anything. But the motions were quickly filed three days later.

We do not condone the conduct of Dr. Burke in these cases, and recognize that lasting emotional injuries were inflicted on the two victims. Although the issue is not before us here, we feel compelled to comment, as have other courts[2] before us, that we have grave doubts about the power of trial courts to impose the suspension or revocation of a professional license as a condition of probation where, like Florida[3], there is a board which disciplines licensees and has such power.

For the foregoing reasons, we conclude that the trial judge was correct in allowing Appellee to withdraw his pleas. Consequently the order appealed from is affirmed, and the cases remanded for further proceedings.

**AFFIRMED.**

**DONE AND ORDERED** at Orlando, Florida this 28th day of October, 2011.

/S/
**ROM W. POWELL**
**Senior Judge**

/S/
**JANET C. THORPE**
**Circuit Judge**

/S/
**ALICE L. BLACKWELL**
**Circuit Judge**

[2] *See e.g. Burns v. Huffstetler*, 433 So.2d 964 (Fla. 1983) (trial court had no jurisdiction to suspend attorney's license to practice law as an alternative punishment for being found in criminal contempt); *Gray v. Superior Court*, 125 Cal.App.4th 629 (2005) (order prohibiting doctor from practicing medicine as a condition of bail reversed as unreasonable).

[3] *See Ch. 457, Florida Statutes.*

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a copy of the foregoing order was furnished to **F. Wesley Blankner, Jr., Esquire,** 217 East Ivanhoe Blvd., North, Orlando, Florida 32804, and **David Margolis, Assistant State Attorney,** 415 N. Orange Ave., Orlando, Florida 32801; and **Honorable Wayne J. Shoemaker**, 425 N. Orange Avenue, Orlando, Florida 32801, by mail, this 28th day of October, 2011.

__/S/_____
Judicial Assistant