MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Dr. Duane Wilcox,
Appellant-Petitioner,

v.

Indiana Horse Racing Commission,
Appellee-Respondent.

March 25, 2021

Court of Appeals Case No. 20A-MI-2257

Appeal from the Marion Superior Court

The Honorable Kurt. M. Eisgruber, Judge

Trial Court Cause No. 49D06-2001-MI-742

Najam, Judge.

Statement of the Case

[1] Dr. Duane Wilcox appeals the trial court's dismissal of his petition for judicial review of a decision by the Indiana Horse Racing Commission ("the Commission"). Dr. Wilcox raises one issue for our review, namely, whether the trial court erred when it dismissed his petition.

[2] We affirm.

Facts and Procedural History

[3] Dr. Wilcox is a veterinarian who was licensed by the Commission to practice veterinary medicine at horse racetracks in Indiana. In 2018, the Commission filed a complaint against Dr. Wilcox in which the Commission alleged that Dr. Wilcox had violated "a number" of rules governing horse racing activities. Appellant's App. Vol. 2 at 31. Following a hearing, an administrative law judge ("ALJ") entered proposed findings and conclusions in which the ALJ determined that Dr. Wilcox had committed eight rule violations. Accordingly, the ALJ recommended that the Commission suspend Dr. Wilcox's license for a period of ten years. On December 13, 2019, the Commission adopted the ALJ's proposed findings and recommended order.

[4] On January 7, 2020, Dr. Wilcox filed a petition for judicial review of the Commission's order. Dr. Wilcox did not challenge any of the Commission's findings or its conclusion that he had violated the rules. Rather, he only challenged the Commission's ten-year suspension of his license. According to Dr. Wilcox, the suspension amounted to a "cruel and unusual penalty" in

violation of the Eighth Amendment and Article 1, Section 16 of the Indiana Constitution. *Id*. at 15. Specifically, Dr. Wilcox asserted that, because Indiana is a member of an interstate compact on horse racing, his suspension will be "reciprocally enforced" in other member states. *Id*. at 19. He maintains that, as a result, his suspension in Indiana is really a nationwide ban on his employment. Dr. Wilcox included with his petition the ALJ's recommended findings and order and the Commission's final order.

[5] On January 29, Dr. Wilcox filed a motion for extension of time to file the agency record. The trial court granted his motion and ordered Dr. Wilcox to file the record by March 6. On March 3, Dr. Wilcox filed a second motion for extension of time to file the record. The court again granted that motion and ordered Dr. Wilcox to file the record by April 6. But Dr. Wilcox did not meet that deadline, and, on April 27, Dr. Wilcox filed his third motion for extension of time. The court granted that motion and gave Dr. Wilcox until June 1 to file the record.

[6] Shortly thereafter, the Commission filed a motion to vacate the court's order granting Dr. Wilcox's third extension of time and to dismiss his petition for judicial review. The Commission asserted that, because Dr. Wilcox had not sought his third extension of time prior to April 6, the court lacked discretion to grant the motion. The Commission also argued that the court must dismiss Dr. Wilcox's petition because he had not timely filed the agency record as required by the Indiana Administrative Orders and Procedures Act ("AOPA").

[7] Dr. Wilcox responded to the Commission's motion to dismiss and asserted that the agency record was not "necessary" and that the supporting materials he had submitted with his petition were all the court needed to determine that his ten-year suspension was unconstitutional. *Id*. at 109. The Commission filed its reply and contended that the materials Dr. Wilcox had provided did not support his allegations regarding the unconstitutionality of his suspension. Dr. Wilcox then filed an "additional response" to the Commission's motion to dismiss and again asserted that dismissal was not necessary because the court could review the constitutionality of the suspension without the agency record. *Id*. at 119 (emphasis removed). Dr. Wilcox also provided the trial court with copies of various state and federal statutes along with Indiana administrative rules to demonstrate that other states would enforce his license suspension.

[8] Following a hearing at which the court heard oral argument, the trial court found that "there is no question that [Dr. Wilcox] failed to timely file the agency record as required" by AOPA. *Id*. at 12. The court further concluded that, "[w]ithout the agency record, and without any authority or other basis on which to verify [his] assertion[s]," it could not address the merits of Dr. Wilcox's claims. *Id*. at 13. Accordingly, the trial court granted the Commission's motion to dismiss Dr. Wilcox's petition for judicial review. This appeal ensued.

Discussion and Decision

[9] Dr. Wilcox contends that the trial court erred when it dismissed his petition for judicial review. Where, as here, the court ruled on a paper record, we review *de novo* the court's ruling on a motion to dismiss for failure to timely file the necessary agency records. *See Teaching Our Posterity Success, Inc. v. Ind. Dep't of Educ.*, 20 N.E.3d 149, 151 (Ind. 2014) (hereinafter, "*TOPS*").

[10] Pursuant to AOPA, a petitioner for judicial review "shall" transmit to the court the original or a certified copy of the agency record "[w]ithin thirty (30) days after the filing of the petition, or within further time allowed by the court[.]" Ind. Code §4-21.5-5-13(a) (2020). Further, the "[f]ailure to file the record within the time permitted by this subsection, including any extension period ordered by the trial court, is cause for dismissal of the petition for review by the court[.]" I.C. § 4-21.5-5-13(b). Our Supreme Court has stated that that statute creates a "bright-line" rule requiring a petitioner to file the agency record in order for judicial review to proceed. *TOPS*, 20 N.E.3d at 155.

[11] Dr. Wilcox acknowledges that he neither filed the agency record nor timely sought an additional extension of time. Nonetheless, he contends that the court erred when it dismissed his petition for judicial review because, according to him, the documents he submitted with his petition as well as the federal and state statutes he provided to the trial court were sufficient for the court to address his claims. He asserts that, based on those materials and without the agency record, the court could conclude that his ten-year suspension was in

essence "a nationwide bar to employment" that violates the Eighth Amendment of the United States Constitution and Article 1, Section 16 of the Indiana Constitution. Appellant's Br. at 33.

[12] Our Supreme Court previously addressed a similar issue in *First American Title Insurance Co. v. Robertson*, 19 N.E.3d 757 (Ind. 2014).[1] In that case, First American Title Insurance Company ("First American") sought judicial review of a decision by the Commissioner of the Indiana Department of Insurance ("IDOI"). *Id*. at 759. First American attached several documents to its petition, but it failed to timely file the agency record. *Id*. IDOI filed a motion to dismiss the petition for failure to file the record, which motion the trial court denied. *Id*.

[13] On appeal, First American asserted that the documents it had presented to the trial court with its petition were "sufficient" for the trial court to address its claims without the agency record. *Id*. at 762. However, our Supreme Court reiterated that AOPA creates a "bright line" rule and held that a "'petitioner for review cannot receive consideration of its petition where the statutorily-defined agency record had not been filed.'" *Id*. at 762-63 (quoting *TOPS*, 20 N.E.3d at 155). Accordingly, the Court held that, because First American had not filed

[1] We note that, while the trial court cited *Robertson* in its findings of fact and conclusions thereon, neither Dr. Wilcox nor the Commission cited it in their respective briefs on appeal.

the agency record with the trial court, "its petition for judicial review cannot be considered." *Id*. at 763.

[14] Similarly, here, while Dr. Wilcox provided other materials to the trial court in support of his claims, he failed to file the agency record with the court. Based on the bright line rule created by our Supreme Court in *TOPS* and *Robertson*, Dr. Wilcox's petition for judicial review could not be considered by the trial court.[2] *See id*.

[15] Still, Dr. Wilcox contends that, despite the "bright line" rule, our Supreme Court created an exception to the requirement that a petitioner file the agency record. Appellant's Br. at 16. To support that assertion, Dr. Wilcox directs us to the portion of the opinion in *TOPS* where the Court stated as follows:

> Two important facts distinguish *[Ind. Fam. & Soc. Servs. Admin v.] Meyer* from the case before us and from most AOPA appeals. First, the contested issue [in *Meyer*] was the existence of what was essentially an arithmetic error in the agency decision, albeit one that affected the outcome. Second, and most importantly, the State *conceded its error* on the contested issue before it moved to dismiss for lack of a record. So to the extent *Meyer* represents the possibility of an exception to the filing requirement, thus triggering the permissive "cause for dismissal" language in Indiana Code Section 4-21.5-5-13(b), any such exception is extremely narrow.

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[2] Dr. Wilcox focuses much of his argument on whether the court erred when it declined to take judicial notice of various statutes he had provided. However, as AOPA creates a bright line rule and precludes consideration of his petition based on his failure to provide the agency record, we need not address that issue.

TOPS, 20 N.E.3d at 153-54 (emphasis in original; discussing *Ind. Fam. & Soc. Servs. Admin. v. Meyer*, 900 N.E.2d 74 (Ind. Ct. App. 2009)).

[16] Dr. Wilcox contends that, because the Commission conceded that it had imposed a ten-year sanction on him, he did not need to file the agency record in order for the court to address the merits of his petition for judicial review. But the Commission did not concede that it *erred* in imposing that sanction. Further, there is no allegation of a mere arithmetic error. Thus, Dr. Wilcox has not demonstrated that any extremely narrow exception to the bright-line rule applies.

[17] In sum, the trial court did not err when it granted the Commission's motion to dismiss Dr. Wilcox's petition for judicial review. We therefore affirm the trial court.

[18] Affirmed.

Pyle, J., and Tavitas, J., concur.