

Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 20-033
District Docket No. XIV-2018-0571E

In the Matter of
Michael Collins Smith
An Attorney at Law

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Decision

Argued: July 16, 2020

Decided: February 8, 2021

Lauren Martinez appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was before us on a motion for final discipline filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-13(c)(2), following respondent's guilty plea and conviction, in the Superior Court of New Jersey, Burlington County, to third-degree possession of a controlled dangerous

substance (amphetamine), contrary to N.J.S.A. 2C:35-10a(1). This offense constitutes a violation of RPC 8.4(b) (criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects).

For the reasons set forth below, we determine to grant the motion for final discipline and to impose a three-month suspension.

Respondent was admitted to the New Jersey bar in 2013 and to the Delaware bar in 2014. At the relevant times, he practiced law with Balick and Balick, LLC, a Delaware law firm. He has no prior discipline in New Jersey.

On September 4, 2019, following respondent's waiver of indictment, the Burlington County Prosecutor's Office issued an accusation charging him with third-degree possession of a controlled dangerous substance (amphetamine), contrary to N.J.S.A. 2C:35-10a(1).¹ On September 24, 2019, respondent entered a guilty plea, acknowledged his commission of the crime, and agreed to pay a \$1,000 penalty. Respondent allocuted that, on September 28, 2018, in Mansfield Township, he possessed amphetamine, which he had not acquired via a valid prescription.

¹ N.J.S.A. 2C:35-10a(1) provides that "[i]t is unlawful for any person, knowingly or purposely, to obtain, or to possess, actually or constructively, a controlled dangerous substance or controlled substance analog, unless the substance was obtained directly, or pursuant to a valid prescription or order form from a practitioner, while acting in the course of his professional practice. . . ."

The record reveals that, on the date of the incident, as respondent was traveling northbound on Route 295, a New Jersey State Trooper stopped him for speeding and searched his vehicle. The search uncovered the Adderall, which respondent claimed he used for work purposes.

The trooper arrested respondent and charged him with third-degree possession of a controlled dangerous substance, contrary to N.J.S.A. 2C:35-10a(1); second-degree possession of a controlled dangerous substance with intent to distribute, contrary to N.J.S.A. 2C:10.5a(4); disorderly persons possession of marijuana, contrary to N.J.S.A. 2C:35-10a(4); and disorderly persons possession of drug paraphernalia, contrary to N.J.S.A. 2C:36-2. In addition, respondent received summonses for driving while under the influence of alcohol or drugs, in violation of N.J.S.A. 39:4-50; reckless driving, in violation of N.J.S.A. 39:4-96; speeding, in violation of N.J.S.A. 39:4-98.24; and unsafe lane change, in violation of N.J.S.A. 39:4-88B.

The Honorable James J. Morley, J.S.C. entered a consent order admitting respondent to the Burlington County Pre-Trial Intervention Program (PTI) for a twenty-four-month period, with respondent's agreement to the following conditions: (1) report for PTI in Burlington County; (2) maintain employment; (3) submit to random urine monitoring; (4) comply with all terms of his voluntary agreement with the Delaware Lawyers' Assistance Program

(Delaware LAP), including any recommended treatment; and (5) abide by the terms and conditions of the PTI program.

On October 11, 2018, Kim D. Ringler, Esq., who represented respondent at the time, reported his criminal charges and traffic offenses to the OAE. On October 16, 2018, respondent entered into consent agreements with the Office of Disciplinary Counsel, Supreme Court of the State of Delaware (ODC), and the Delaware LAP. The ODC agreed to stay respondent's disciplinary proceeding pending disposition of the criminal charges and respondent's compliance with certain conditions, including abstention from practicing law in Delaware and monitoring by the Delaware LAP. The Delaware LAP formal monitoring agreement required counseling and random alcohol and drug screening.

Meanwhile, on November 4, 2019, the OAE notified Ringler that it was aware of respondent's entry into the PTI program and informed her of the "pathway to accelerated suspension" pursuant to In re Schaffer, 140 N.J. 148 (1995). After Ringler stated that she no longer represented respondent, the OAE directly informed him of his eligibility for an accelerated suspension. Respondent, however, did not pursue that option. Hence, the OAE filed the instant motion for final discipline.

In respondent's brief, he asserted that, after graduating from Seton Hall Law School, in 2012, he worked for McCarter & English until December 2015, two months after he had moved to Delaware. Since then, respondent has lived and practiced law in Delaware. He does not practice in New Jersey and claims that he has no intention of doing so.

According to respondent, he is not a drug addict. Moreover, he asserted that Adderall is materially different from other controlled substances, such as cocaine, ecstasy, or crack. According to respondent, nearly a quarter of all college students use Adderall, which also is "widely used in law schools," with or without a prescription. He claimed that the drug increases "focus and stamina," thus, "increasing work quality and quantity." Respondent further asserted that, unlike cocaine, ecstasy, and crack, Adderall is classified as a controlled dangerous substance not because it is intoxicating, but rather because of its potential for abuse.

In mitigation, respondent requested that we consider that he reported his arrest within a week; that, since then, he has been "subject to monitoring, drug testing, therapy and more at all times;" and that he had "voluntarily abstained from the practice of law for over a year."

The record contains several documents that shed light on respondent's treatment, compliance, and character. On January 15, 2020, Carol P.

Waldhauser, the Executive Director of the Delaware LAP, wrote that she first met with respondent in October 2018, at which time he expressed remorse and was willing to take responsibility for what she described as his “isolated poor judgment during this period in his life.” At that time, he agreed to enter into a formal monitoring agreement with the Delaware LAP.

Since October 2018, Waldhauser has worked with and observed respondent on a weekly basis. According to Waldhauser, respondent has, and continues to be, “more than compliant with [the] formal monitoring agreement.” He has not missed any telephone check-ins, weekly meetings with Waldhauser, or random drug screenings, all of which have been negative. In addition, respondent has attended continuing legal education programs on lawyer wellness and stress management, in addition to his regular attendance at the Delaware LAP resilience training group.

Waldhauser concluded that respondent’s “conduct, general character and professional standards could not be better;” that he is “a man with focus, clarity and commitment to wellness;” and that his “prognosis for continued success was . . . very good with the safeguards that he has placed in his life.”

Four lawyers, with whom respondent has worked, submitted letters of support in his behalf. The letters attested to respondent’s intellect; his skill as a

lawyer; his forthrightness about the arrest; his remorse; his devotion to his family; and his good character.

Following a review of the record, we determine to grant the OAE's motion for final discipline. Final discipline proceedings in New Jersey are governed by R. 1:20-13(c). Under that Rule, a criminal conviction is conclusive evidence of guilt in a disciplinary proceeding. R. 1:20-13(c)(1); In re Magid, 139 N.J. 449, 451 (1995); and In re Principato, 139 N.J. 456, 460 (1995). Respondent's conviction of third-degree possession of a controlled dangerous substance (amphetamine), contrary to N.J.S.A. 2C:35-10(a)(1), thus, establishes a violation of RPC 8.4(b). Pursuant to that Rule, it is professional misconduct for an attorney to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer." Hence, the sole issue is the extent of discipline to be imposed. R. 1:20-13(c)(2); In re Magid, 139 N.J. at 451-52; and In re Principato, 139 N.J. at 460.

In determining the appropriate measure of discipline, we must consider the interests of the public, the bar, and the respondent. "The primary purpose of discipline is not to punish the attorney but to preserve the confidence of the public in the bar." In re Principato, 139 N.J. at 460 (citations omitted). Fashioning the appropriate penalty involves a consideration of many factors, including the "nature and severity of the crime, whether the crime is related to

the practice of law, and any mitigating factors such as respondent's reputation, his prior trustworthy conduct, and general good conduct." In re Lunetta, 118 N.J. 443, 445-46 (1989).

That an attorney's conduct did not involve the practice of law or arise from a client relationship will not excuse an ethics transgression or lessen the degree of sanction. In re Musto, 152 N.J. 165, 173 (1997). Offenses that evidence ethics shortcomings, although not committed in the attorney's professional capacity, may, nevertheless, warrant discipline. In re Hasbrouck, 140 N.J. 162, 167 (1995). The obligation of an attorney to maintain the high standard of conduct required by a member of the bar applies even to activities that may not directly involve the practice of law or affect his or her clients. In re Schaffer, 140 N.J. 148, 156 (1995).

In sum, we find that respondent violated RPC 8.4(b). The only remaining issue is the appropriate quantum of discipline to be imposed for respondent's misconduct.

The OAE recommends a three-month suspension. Respondent requested that we impose an admonition. In the event of a suspension, he requested that we impose it retroactively, based on his voluntary abstention from the practice of law.

A three-month suspension is generally the appropriate measure of discipline for an attorney's possession of a controlled dangerous substance (CDS). See, e.g., In re Musto, 152 N.J. at 174 (possession of cocaine and heroin); In re Holland, 194 N.J. 165 (2008) (possession of cocaine); In re Sarmiento, 194 N.J. 164 (2008) (possession of ecstasy); and In re McKeon, 185 N.J. 247 (2005) (possession of cocaine).

In some cases, however, the Court has refrained from imposing a suspension. See, e.g., In re Ten Broeck, 242 N.J. 152 (2020) (censure, with conditions, for attorney's unlawful possession and use of cocaine; the attorney successfully completed all conditions of the PTI program; participated in the New Jersey Lawyers Assistance Program; attended counseling; and submitted negative urinalysis results; the attorney also established significant rehabilitation and remorse, including regularly donating blood, regularly attending meetings for current and former law enforcement officers and lawyers, and traveling to self-help recovery meetings to speak about his experience and recovery); In re Caratzola, 241 N.J. 490 (2020) (censure, with conditions, for attorney's unlawful possession and use of oxycodone; mitigation included the attorney's extreme youth and rehabilitative efforts); In re De Sevo, 228 N.J. 461 (2017) (censure imposed on attorney against whom an accusation and an indictment had issued for two separate incidents

involving his possession of CDS (cocaine); the attorney was admitted into the PTI program for a twelve-month period, which he successfully completed; the attorney had participated in four inpatient drug treatment programs and an intensive out-patient program, followed by a period of time living in a half-way house, and then a sober living house where he served as an active member for almost two years; in addition to attendance at more than 1,000 recovery meetings, the attorney had a sponsor and, in turn, sponsored two men, and had been clean and sober for forty-one months; professionally, after he had been away from the practice of law for two years, a law firm hired the attorney as the director of litigation, where he handled a number of cases that were resolved successfully; because the attorney had made great strides to achieve rehabilitation, had successfully and diligently returned to practice, and had moved on with his personal life, we found that a suspension would be demoralizing and could derail his rehabilitation efforts; prior admonition); In re Simone, 201 N.J. 10 (2009) (censure for attorney charged in Florida with possession of crack cocaine; the attorney was admitted to the Florida Drug Court Program, which was equivalent to New Jersey's PTI program; we considered that the attorney had successfully completed inpatient treatment; attended twice weekly counseling sessions after his release from inpatient treatment, and then weekly sessions; attended ten to twelve Alcoholics

Anonymous meetings per week; successfully completed PTI, resulting in the dismissal of all criminal charges against him; and submitted clean drug screens to the OAE and to us; in addition, the drug court judge believed that the attorney was doing so well with his recovery, he could inspire others, and, thus, invited him to address a drug court graduation, which the attorney accepted); and In re Filomeno, 190 N.J. 579 (2007) (censure for attorney arrested for possession of cocaine and drug paraphernalia; numerous mitigating circumstances considered, including the attorney's quick action to achieve rehabilitation; his attendance at 415 meetings in that process; his instrumental role in re-establishing the New Jersey Lawyers Concerned for Lawyers Program meetings in Bergen County, the fact that he acted as a "very distinctive and helpful role model," from which other participants in that program profited; his conclusion of the PTI program three months early because of his commitment and diligence in exceeding its terms; and his expression of deep regret for his conduct).

In our view, this case warrants a three-month suspension. In mitigation, respondent has no disciplinary history; he has demonstrated remorse; and he has complied with the conditions imposed on him by the ODC and, presumably, he is complying with his PTI obligations in New Jersey. However, nothing in the record suggests that respondent is doing anything above and

beyond the requirements imposed on him, as did the attorneys in Ten Broeck, De Sevo, Simone, and Filomeno. Thus, there is no basis for imposing less than a suspension. Moreover, the facts in the record provide a basis to conclude that respondent was operating a motor vehicle while under the influence of drugs and in possession of illegal marijuana. Thus, there is no reason to deviate from the standard form of discipline in cases involving possession of CDS.

Finally, we deny respondent's request that the suspension be retroactive. His voluntary withdrawal from the practice of law in Delaware bears no relation to his continued ability to practice law in New Jersey. To impose a retroactive suspension would amount to no meaningful sanction on respondent, in New Jersey, for his misconduct.

Finally, respondent's attempt to persuade us that there is a "meaningful difference" between Adderall and drugs such as cocaine, ecstasy, and crack and, thus, he should receive less than a suspension, is disturbing. Respondent asserted that Adderall is different because (1) it is used by students in institutions of higher learning for the purpose of "increas[ing] focus and stamina . . . work quality and quantity," and (2) it is non-intoxicating. We reject these hollow arguments. Respondent produced no evidence that he has been diagnosed with any condition that Adderall is prescribed to treat. To the contrary, he admittedly used Adderall "for work purposes," thus, rendering his

use of the drug illegal.

We, thus, determine that a three-month suspension is the quantum of discipline necessary to protect the public and preserve confidence in the bar.

Chair Clark and Members Petrou, Rivera, and Singer voted to impose a censure.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bruce W. Clark, Chair

By: /s/ Timothy M. Ellis
Timothy M. Ellis
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Michael Collins Smith
Docket No. DRB 20-033

Argued: July 16, 2020

Decided: February 8, 2021

Disposition: Three-Month Suspension

<i>Members</i>	Three-Month Suspension	Censure	Recused	Did Not Participate
Clark		X		
Boyer	X			
Gallipoli	X			
Hoberman	X			
Joseph	X			
Petrou		X		
Rivera		X		
Singer		X		
Zmirich	X			
Total:	5	4	0	0

/s/ Timothy M. Ellis
Timothy M. Ellis
Acting Chief Counsel