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

Dissent

Decided: February 8, 2021

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

We write separately to express our disagreement with the five-member Board majority who recommend suspending respondent for three months based on his conviction for 3rd-degree possession of a controlled substance, amphetamine (Adderall pills), a conviction which will be nullified after he successfully completes the 24-month pre-trial intervention program into which he was admitted. Unlike the majority, we believe that respondent should be censured for his unfortunate decision to use Adderall without a prescription.

The Court first confronted the question of discipline for attorneys who possess illegal drugs for personal use over thirty years ago in 1987, in In re McLaughlin, 105 N.J. 457 (1987). There, while reprimanding three attorneys because it was the first ethics case involving personal drug use, the Court warned that such a drug offense in the future "will ordinarily call for suspension." Id. at 462. Ten years later in In re Musto, 152 N.J. 165, 173 (1997), the Court reiterated this pronouncement, saying that "a three-month suspension is generally the appropriate measure of discipline for an attorney's possession of a controlled dangerous substance."

Following Musto's guidance, numbers of disciplinary cases thereafter, some cited by the majority, adjudicated three-month suspensions for attorneys who possessed illegal substances for their own use. But as years passed, more and more exceptions arose in which both the Board and the Court recognized that an attorney's drug addiction and how he or she dealt with it after being confronted with an arrest deserves a closer, more nuanced evaluation in order that (a) the decision be sensitive to personal circumstances of such respondents who often are victims of their own addiction, In re Schaffer, 140 N.J. 148, 153 (1995) ("[d]etermining the appropriate measure of discipline . . . is extremely fact-sensitive"); and (b) the discipline not be purely punitive. In re Principato, 139 N.J. 456, 460 (1995) ("primary purpose of discipline is not to punish the

attorney but to preserve the confidence of the public in the bar"). Perhaps, too, the Court has come to recognize drug addiction for the serious disease it is.

Indeed, the majority in its current decision cites and discusses five cases decided since Musto where the Court has *not* imposed a suspension but opted for censure instead. In re Ten Broeck, ___ N.J. ___ (2020) (cocaine); In re Caratzola, 241 N.J 490 (2020) (oxycodone); In re De Sevo, 228 N.J. 461 (2017) (cocaine); In re Simone, 201 N.J. 10 (2009) (crack cocaine); In re Filomeno, 190 N.J. 579 (2007) (cocaine and drug paraphernalia). Each of these five cases is factually more closely related to the current matter than are the suspension cases. A core consideration in each of these, although not clearly articulated, seems to be the recognition that drug addiction is a disease, usually one that is not easy to control, often attributable to unfortunate life circumstances and, therefore, although the law classifies possession of these substances as a crime, simple drug possession for personal use can rightly be viewed more sympathetically than other types of criminal acts. This understanding is the reason that "drug courts" have been developed in many jurisdictions and why pretrial diversion is often offered to persons accused of these types of drug possession offenses.

We believe that respondent's case is more similar to the above censure cases than to the suspension cases cited by the majority. Indeed, the very criteria

that guided the Board to censures in those cases are for the most part present here.

Moreover, we do not believe that the majority opinion adequately credits respondent's actions in dealing with his addiction and in taking responsibility for his actions following his arrest. Accordingly, we first discuss the positive steps he has taken since then and other mitigation that should weigh in his favor but is not recognized or sufficiently credited by the majority.

Respondent, who has no disciplinary history, was arrested on September 28, 2018, over two years ago and, through counsel, self-reported his arrest to the Office of Attorney Ethics within two weeks. He also immediately reported his arrest to his law firm employer, his wife, and to State of Delaware ethics authorities, taking full responsibility for his actions. In fact, as early as October 12, 2018, only two weeks after his arrest, he entered into an agreement with Delaware's Office of Disciplinary Counsel (ODC) agreeing to voluntarily withdraw from the practice of law pending disposition of the New Jersey criminal case, to execute a formal monitoring agreement with Delaware's Lawyer's Assistance Program (LAP), and to remain in active treatment with a mental health provider. Pursuant to that agreement, a few days later, on October 16, 2018, he signed a formal Monitoring Agreement with Delaware's LAP, agreeing among other things to meet in person with LAP's monitor twice

monthly, undergo random drug/alcohol screenings, abstain from using mind-altering drugs except as prescribed, and remain in active treatment with a licensed mental health treatment provider for as long as deemed necessary. (See "Formal Monitoring Agreement" in the record of this case).

The practical effect of respondent's agreement with the ODC was his voluntary abstention from the practice of law, which also applied to his practice in New Jersey. He did not again practice in Delaware until December 13, 2019, the date when he resolved his ethics case in Delaware by agreeing to accept a private admonition – the discipline imposed by that State's ethics authorities.

In New Jersey, respondent also quickly accepted responsibility for his actions, agreeing to enter a provisional guilty plea on an accusation, waive indictment, and comply with conditions imposed when he was accepted into the pretrial intervention program (PTI).

It is relevant that Delaware, the State where respondent lives and has his practice, did not suspend him but that, after extensive investigation, the only discipline it imposed was a private admonition.

Respondent has expressed sincere remorse for his actions. As shown in the reference letters written by attorneys with whom he works, he expressed remorse to them and did so in letters written to this Board. An overriding theme in all these letters is that respondent is sincerely remorseful, completely

transparent about what happened, and never tried to excuse or minimize it. For example, in a letter dated October 30, 2019, Bartholomew Dalton, a partner in the firm where respondent works, said that respondent was "in his office the next day" after his arrest, telling me "everything that had happened .... It would be a vast understatement to say that he is remorseful.... Respondent is truly a good honest person.... He will be a credit to the Delaware Bar as soon as it is fairly determined that he may continue his career." The November 1, 2019 letter of Adam Balick, another partner with whom respondent works, says that there has never been "any suggestion of . . . substance misuse" by respondent who "has been a dependable employee in every respect, from showing up to work prepared, to his courteous and respectful interactions with staff, colleagues and the court." The Balick letter says that respondent called him the day after his arrest, reported what had happened, left out no details, was humiliated by what he had done, "made no attempt to minimize it" and although it was a "low moment for him professionally and personally, he was concerned about any embarrassment his actions could cause the firm." The letter mentions his "genuine remorse" and the fact that "he made no excuses" even though he "did not know how I would respond" and "thought that his job was in jeopardy." The letter explains the high financial and emotional price that respondent paid for his actions.

Additionally, respondent engaged wholeheartedly in therapy, as detailed in the letter from Carol Waldhauser, Executive Director of the Delaware LAP, who worked with him extensively. As she wrote in a January 15, 2020 letter, she first met with respondent in October 2018 at which time he "showed remorse and wanted to take responsibility." Waldhauser worked with him on a "regular weekly basis," saying, "[f]rom our first in-depth meeting, through numerous subsequent telephone conferences and in-person meetings, [respondent] has been in the past and continues presently to be more than compliant with our formal Voluntary Monitoring Agreement;" he has not missed one telephone check-in, in person meetings, random urine and hair follicle screenings. She pronounced respondent's "attitude towards treatment" to be "very good to excellent," adding that respondent attends continuing legal education seminars on lawyer wellness and stress management and regularly attends our resilience training group. She concluded, saying that respondent's "general moral character and professional standards could not be better.... I observe [respondent] as a man with focus, clarity and commitment to wellness."

We note the following factors mentioned in DRB opinions that steered decisions in prior cases to censures rather than suspensions: (1) the respondent's demonstrated willingness to take continuing, wide-ranging rehabilitative action to battle addiction (Caratzola; Ten Broeck; De Sevo; Simone; Filomeno); (2)

youthfulness (Caratzola); (3) efforts to rehabilitate others and/or serving as helpful role model to others (Caratzola; Simone; Filomeno); (4) sincere remorse (Ten Broeck; Filomeno); (5) admission of criminal conduct and ethics violation (Ten Broeck); (6) no disciplinary history (Ten Broeck); (7) respondent self-reported his conduct (Filomeno); (8) respondent suffered other serious consequences of his act(s) (Ten Broeck -- loss of employment as police officer); (9) self-reporting of arrest to disciplinary authorities; (10) passage of time since arrest during which respondent moved on with his personal and professional life such that a suspension could be demoralizing and derail rehabilitation efforts (De Sevo).

The most important factor and the only one universally noted as mitigation in all five censure cases was a respondent's sincere, extensive, successful rehabilitative efforts. Here, such rehabilitative efforts have likewise been documented. Also present here are respondent's sincere remorse; lack of any disciplinary history; prompt admission of criminal conduct and violation of the charged RPC; youthfulness (respondent had been a lawyer for only five years when he was arrested); passage of two years since respondent's arrest during which time he became eligible to practice law in Delaware following termination of his agreement with Delaware's ODC; self-reporting the criminal conduct; and the serious financial and emotional toll that his arrest has taken on him over the

past two years.[1] The only factor mentioned in *some* of the above censure cases that is not present here is evidence that respondent has served as a role model for others or assisted others in their rehabilitation efforts.

It should be noted that censures rather than suspensions were imposed for possessory drug offenses even where a respondent had a disciplinary history (admonition) *and* was arrested *two times* in *two separate incidents* for drug possession (De Sevo); and, in another case, where respondent not only was practicing law but also was serving as a police officer, even though illegal acts undertaken while a public servant are usually an aggravating factor (Ten Broeck).

In short, we believe that this young lawyer with no prior ethics history did everything right to combat his habitual drug habit and promptly face his criminal charge with appropriate, sincere remorse. He has suffered financially and emotionally over the past two years and now, hoping to put all this behind him, has returned to practice in Delaware in a firm that welcomed him back.

[1] Additionally, this case may be seen as distinguishable from the suspension cases on which the majority relies, all of which involved the Schedule II narcotic drug, cocaine, or the Schedule I drug, Ecstasy (MDMA). This case involves possession without a prescription of Adderall whose major constituent is amphetamine, a stimulant, which we understand is used by many college students to help them concentrate during long hours of study and is routinely prescribed to teens and younger children with difficulty concentrating in school to treat the effects of ADD and ADHD. Although Adderall is illegal when obtained without a prescription, its use may be viewed less harshly because it is a common prescription drug with accepted medical use and is not mind-altering. On the other hand, Schedule I Controlled Substances such as Ecstasy are those having "no currently accepted medical use in the United States, a lack of accepted safety for use under medical supervision, and a high potential for abuse." 21 U.S.C. § 812(b)(1).

Suspending him from practice in New Jersey would, we believe, inappropriately and punitively stain his professional record to an unwarranted degree. A censure is sufficient discipline under these circumstances.

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