SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 17-425
District Docket No. XIV-2014-0490E

IN THE MATTER OF

TYLER J. LARSEN

AN ATTORNEY AT LAW

Decision

Argued: February 15, 2018

Decided: June 20, 2018

Eugene A. Racz appeared on behalf of the Office of Attorney Ethics.

Respondent waived appearance for oral argument.

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

This matter was before us on a motion for reciprocal discipline filed by the Office of Attorney Ethics (OAE), following an order from the Supreme Court of the State of Utah (SCSU) suspending respondent for six months. Respondent was found guilty of violating the equivalent of New Jersey RPC

3.8(d) (a prosecutor in a criminal case shall timely disclose exculpatory evidence to the defense).

The OAE recommended that respondent "receive discipline of a reprimand or any more severe discipline that [we] might deem appropriate." At oral argument, the OAE requested the imposition of a reprimand. Respondent requests that we impose no more than a reprimand.

For the reasons detailed below, we determine to impose the identical discipline that the SCSU imposed, a six-month prospective suspension.

Respondent earned admission to the New Jersey bar in 2001, the Pennsylvania bar in 2004, the Idaho bar in 2006, and the Utah bar in 2007. In a letter to us, dated December 18, 2017, respondent represented that he received identical reciprocal discipline – six-month suspensions – in both Pennsylvania and Idaho, and that both terms ran concurrently with his Utah suspension.

Following a disciplinary hearing in Utah's Third Judicial District, the Honorable Andrew H. Stone issued a written decision, dated June 19, 2014. Judge Stone found that respondent, a prosecutor in a criminal case, had failed to

timely disclose to the defense that, a few weeks prior to trial, he had improperly shown a photograph of the defendant to the eyewitnesses scheduled to testify for the government. Judge Stone concluded that respondent had violated the Utah equivalents of RPC 3.3(a) (false statement of material fact or law to a tribunal) and RPC 3.8(d) (a prosecutor in a criminal case shall timely disclose exculpatory evidence to the defense). He recommended a six-month suspension for the RPC 3.8(d) violation and a one-month consecutive suspension for the RPC 3.3(a) violation.

Respondent appealed both Judge Stone's decision and sanctions. Utah disciplinary authorities requested that respondent receive a three-year suspension; the amicus Utah Association of Criminal Defense Lawyers requested respondent's disbarment. The SCSU issued a June 16, 2016 opinion dismissing the charged violation of RPC 3.3(a), but affirming the finding that respondent violated RPC 3.8(d).[1] Thus, the SCSU affirmed the six-month term of suspension that Judge Stone had imposed for

[1] Although Utah's and New Jersey's RPC 3.8(d) are similar, Utah's version is slightly more expansive, requiring prosecutors to timely disclose not only all exculpatory evidence, but also all exculpatory information.

respondent's RPC 3.8(d) violation, but, having dismissed the RPC 3.3(a) charge, vacated the additional one-month consecutive suspension.

The specific facts are as follows. Respondent was a prosecutor with the Davis County Attorney's Office, in Utah, from 2007 through 2010. In 2010, he was assigned, as trial counsel, to prosecute a defendant charged with first-degree armed robbery of two stores, Kim's Fashions and Baskin-Robbins, in 2006.[2] Because no physical evidence connected the defendant to the crimes, the crux of the trial was the identification of the defendant as the perpetrator by four eyewitnesses. If convicted, the defendant faced a sentence of five years to life in prison.

Prior to the trial, respondent and a detective met with both the Kim's Fashions eyewitnesses and the Baskin-Robbins eyewitnesses. Respondent was aware that, in respect of the Baskin-Robbins robbery, law enforcement had conducted a photo array that did not include a photo of the defendant, and had conducted no photo array in the Kim's Fashions case. At the end

[2] Although respondent's misconduct in this matter dates back to 2010, the initial Utah ethics matter did not conclude until June 2014. Respondent then successfully stayed the discipline, pending appeal to the SCSU, which did not issue its decision until June 2016.

of both meetings, respondent showed each eyewitness a single photograph of the defendant, asking whether they would be able to identify the defendant at trial. All four witnesses replied in the affirmative. Respondent did not show the witnesses pictures of any other individual.

About a week before the trial, respondent informed the defendant's attorney that the prosecution's "[eye]witnesses had ID'd [the defendant]," but did not disclose that he had shown them a photograph of the defendant.

At the trial, the (wife and husband) owners of Kim's Fashions testified as eyewitnesses. Testifying first, the husband denied, during cross-examination, that he was shown a photograph of the defendant as part of preparation for trial. On redirect, respondent made no effort to correct that testimony, despite knowing it was false. The wife truthfully testified, during cross-examination, that respondent had shown both her and her husband a photograph of the defendant during trial preparation. In response, the defense moved for a mistrial.

The SCSU opinion noted the existence of competing versions of the events that occurred following the defense's motion for a mistrial. According to respondent, at a sidebar conference, the

judge "inquired into the possibility of salvaging the Baskin-Robbins robbery charges if those witnesses had not been shown the photograph." Respondent asserted that, because he was not sure what the judge meant at the time, he did not disclose that he also had shown defendant's photograph to the Baskin-Robbins eyewitnesses. Respondent claimed that, following the sidebar, he made this disclosure to the defense attorney, who then notified the judge. The judge then declared a mistrial on all counts.

According to the Utah disciplinary authorities, however, respondent knowingly allowed the Baskin-Robbins portion of the trial to proceed, despite his awareness that he had improperly tainted the eyewitnesses. The SCSU found that theory "plausible," based on the record, but determined that that portion of the trial did not go "forward in any meaningful sense" before respondent admitted to defense counsel that he had shown the photograph to all of the eyewitnesses. At the conclusion of the ethics hearing, Judge Stone found that, when the trial judge indicated, at sidebar, a willingness to proceed on the second robbery charge, respondent "did not volunteer at the time that he had shown the photos" to the Baskin-Robbins

eyewitnesses, and, thus, "intentionally concealed the fact of the photo show from the defense."

As previously noted, the SCSU affirmed the determination that respondent's conduct violated RPC 3.8(d). According to the SCSU's opinion, this case presented a matter of first impression in Utah:

> We are aware of no Utah cases under rule [sic] 3.8(d). But cases in other jurisdictions seem to generally sustain the proportionality of the discipline imposed in this case. *See, e.g., Comm. On Prof'l Ethics and Conduct of the Iowa State Bar Ass'n v. Ramey*, 512 N.W.2d 569, 572 (Iowa 1994) (indefinite suspension, but with possibility of reinstatement after three months); *Disciplinary Counsel v. Wrenn*, 790 N.E.2d 1195, 1198 (Ohio 2003) (six-month suspension); *Disciplinary Counsel v. Jones*, 613 N.E.2d 178, 180 (six-month suspension); *State ex rel. Okla. Bar Ass'n v. Miller*, 309 P.3d 108 (Okla. 2013) (six-month suspension, but for numerous other counts as well). *But see In re Jordan*, 913 So. 2d 775, 784 (La. 2005) (three-month suspension, but deferred due to mitigating factors). We have found cases in which prosecutors have been given a lighter sanction. *See In re Kline*, 113 A.3d 202 (D.C. 2015) (no sanction due to confusion over the meaning of the rule); *In re Jordan*, 91 P.3d 1168, 1175 (Kan. 2004) (public censure for two counts of not making timely disclosure and for another professional conduct violation); *Cuyahoga Cty. Bar Ass'n v. Gerstenslager*, 543 N.E.2d 491, 491 (Ohio 1989) (public censure); *In re Grant*, 541 S.E.2d 540, 540 (S.C. 2001)

> (public reprimand). But to our knowledge none of these cases involved a prosecutor deemed to have *intentionally* failed to make a timely disclosure.
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> [OAEEx.Gpp13-14,fn5].[3]

The SCSU found that, although respondent eventually disclosed his misconduct, his disclosure was not "timely." Under Utah Rules of Criminal Procedure 16(a) and (b), prosecutors must "make all disclosures [of exculpatory evidence] as soon as practicable following the filing of charges and before the defendant is required to plead." Under the same Rules, prosecutors have a "continuing duty to make disclosures [without a request]," and an obligation to do so "as soon as practicable." Moreover, the Rule stresses the requirement of timely disclosure as necessary to allow the "defendant to adequately prepare his defense."

The SCSU further found that respondent knew, before trial, that he had improperly shown the defendant's photograph (and no other photographs) to the eyewitnesses of two armed robberies.[4]

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[3] "OAEEx" refers to the exhibits to the OAE's November 29, 2017 brief and appendix (OAEb) in support of the motion for reciprocal discipline.

[4] Utah's law regarding the presentation of photos to eyewitnesses

(footnote cont'd on next page)

He then failed to disclose that fact "as soon as practicable," which would have been prior to trial, when he met with the defense attorney, as was required to allow the "defendant to adequately prepare his defense." The SCSU further held that

> [i]f the prosecutor's possession of exculpatory evidence is uncovered at trial, a subsequent admission of that fact may be somewhat mitigating at the sanction phase. But the admission is not itself a fulfillment of the rule [sic] 3.8(d) duty of disclosure. If that were enough, the rule would be rendered practically toothless, as any savvy prosecutor could avoid an ethics violation by the simple expedient of an after-the-fact admission of a prior failure of disclosure once it is exposed by someone else.
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> [OAEEx.Gp10.]

Finally, the SCSU found "ample evidence in the record" to support the finding that respondent's violation of RPC 3.8(d)

(footnote cont'd)

makes clear that respondent's pre-trial conduct was improper. Specifically, the presentation of a photo array violates a defendant's due process rights when it is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." State v. Lopez, 886 P.2d 1105, 1111 (Utah 1994) (quoting State v. Thamer, 777 P.2d 432, 435 (Utah 1989)). If a photo array is impermissibly suggestive, any in-court identification must be based on an untainted, independent foundation. Thamer, 777 P.2d at 435 (quoting Manson v. Brathwaite, 432 U.S. 98, 114 (1977)).

was knowing and intentional as to all four eyewitnesses. In respect of mitigation, the SCSU found that respondent had no prior record of discipline; lacked a dishonest or selfish motive; and was inexperienced in the practice of law at the time of his misconduct. In aggravation, the SCSU determined that respondent "showed an unwillingness to acknowledge the wrongfulness of his misconduct, and harmed a particularly vulnerable victim." Consequently, the SCSU suspended respondent for six months, affirming Judge Stone's finding that respondent's violation was "knowing" and that "the potential harm to the defendant was significant."

* * *

The OAE asserted that, pursuant to New Jersey disciplinary precedent, respondent's misconduct warrants only a reprimand. The OAE noted that few New Jersey disciplinary cases have addressed prosecutorial misconduct, and cited the following reprimand cases in support of the recommended discipline: In re Whitmore, 117 N.J. 472 (1990) (municipal prosecutor failed to disclose to the court that a police officer whose testimony was critical to the prosecution of a driving while intoxicated (DWI) charge had intentionally left the courtroom before the case was

called, resulting in the dismissal of the charge); In re McDonald, 99 N.J. 78 (1985) (assistant county prosecutor failed to disclose to trial court that the defendant had made partial restitution in a bad checks case; the willful nondisclosure caused significant harm to the defendant, who received a much harsher jail sentence as a result); and In re Shafir, 92 N.J. 138 (1983) (assistant county prosecutor forged his supervisor's name on internal plea disposition forms and misrepresented information to another assistant prosecutor to consummate a plea agreement).

The OAE acknowledged that harsher discipline has been imposed on prosecutors who have attempted to "fix" the outcome of cases: In re Norton, 128 N.J. 520 (1992) (three-month suspension imposed on attorney who arranged for a client's DWI case to be transferred to a municipality where attorney's former law partner, Kress, served as municipal prosecutor; in order to manipulate the judge into dismissing the case, Kress withheld a material fact – that the officers did not want the defendant prosecuted because he was a police booster; in mitigation, attorney had unblemished disciplinary record; Kress also received a three-month suspension for his role (In re Kress, 130 N.J. 425 (1992)); In re Mott, 231 N.J. 22 (2017) (six-month suspension imposed on a municipal

prosecutor who improperly dismissed a speeding ticket for an employee of her family farm, failed to disclose her conflict of interest to the court, and misrepresented to the court, both verbally and in writing, that the dismissal was due to a problem with discovery); and In re Weishoff, 75 N.J. 326 (1978) (one-year suspension imposed on a municipal prosecutor who was a "knowing party" to the improper dismissal of a speeding ticket in municipal court; the attorney knew that neither the defendant nor the police officer would be present on the court date, asked a member of the court staff to impersonate the defendant to facilitate the sham, and ultimately convinced the municipal court judge to dismiss the matter; in imposing only a suspension, the Court acknowledged that the attorney had resigned as prosecutor).

The OAE argued that, although respondent violated RPC 3.8(d), his "prosecutorial misconduct fell short of overtly and directly fixing the final outcome of a matter" as in Norton, Kress, Mott, and Weishoff, who received terms of suspension. The OAE maintained that respondent's misconduct is more akin to that of the attorneys in Whitmore and Shafir, where the prosecutors either concealed or misrepresented key facts about defendants.

In a December 18, 2017 letter to us, respondent objected to the imposition of any discipline more severe than a reprimand. Subsequently, on January 29, 2018, we received respondent's brief and appendix in opposition to the motion for final discipline, wherein respondent initially objected to the OAE's motion, claiming that the Utah disciplinary proceedings were baseless and retaliatory. Respondent asserted that the Utah proceeding was "so lacking in due process that New Jersey should not impose any sanction." He failed to support that argument with any specific facts to explain in what manner the Utah proceedings had violated his due process rights. Moreover, respondent incorrectly argued that we carry the burden of proof of "clear and convincing evidence" to impose a more severe sanction than the sanction imposed in Utah, a six-month suspension.[5]

Respondent made these arguments, despite the fact that he agreed to identical reciprocal discipline in both Pennsylvania and Idaho. Respondent concluded his brief by stating that he did

[5] Rather, R. 1:20-14(a)(4) provides that the "Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record" that certain enumerated facts require a different outcome.

not object to the imposition of a reprimand, but did object to more severe discipline, and was available, by telephone, "if and when the Board wants to talk to him." Notably, on December 27, 2017, respondent waived oral argument, disagreed with the conclusions and recommendations of the trier of fact, and agreed with the OAE's recommendation that he be reprimanded.

* * *

Following a review of the full record, we determine to grant the OAE's motion for reciprocal discipline.

Reciprocal discipline proceedings in New Jersey are governed by R. 1:20-14(a)(4), which provides in pertinent part:

> The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record on which the discipline in another jurisdiction was predicated that it clearly appears that:
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> (A) the disciplinary or disability order of the foreign jurisdiction was not entered;
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> (B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;
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> (C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;

> (D) the procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
>
> (E) the unethical conduct established warrants substantially different discipline.

A review of the record does not reveal any conditions that would fall within the ambit of subparagraphs (A) through (E).

"[A] final adjudication in another court, agency or tribunal, that an attorney admitted to practice in this state . . . is guilty of unethical conduct in another jurisdiction . . . shall establish conclusively the facts on which it rests for purposes of a disciplinary proceeding in this state." R. 1:20-14(a)(5). Thus, with respect to motions for reciprocal discipline, "[t]he sole issue to be determined . . . shall be the extent of final discipline to be imposed." R. 1:20-14(b)(3).

We adopt the SCSU's disciplinary findings and determine that respondent's conduct violated New Jersey RPC 3.8(d). In so finding, we specifically reject, as meritless, respondent's due process arguments, which sought to undermine the SCSU's imposition of a six-month suspension. In this respect, respondent failed to demonstrate, under R. 1:20-14(a)(4), that the identical discipline should not be imposed, and the record

does not otherwise support a departure from the six-month suspension imposed in Utah. Rather, the record reveals that respondent's conduct was examined during the course of a three-day ethics hearing, and that his appeal from the initial disciplinary decision was fully considered by the SCSU, which affirmed the finding that he had committed misconduct and must be suspended for six months. Accordingly, there is no compelling reason to impose discipline different from that imposed in Utah, Pennsylvania, and Idaho.

Respondent's misconduct was serious. He prosecuted a defendant for two armed robberies, who, if convicted, faced a potential sentence of life in prison. The crimes had occurred four years before the trial, and no physical evidence linked the defendant to the robberies. The testimony of two sets of eyewitnesses, thus, would make or break the prosecution's case.

Despite that knowledge, in preparation for trial, respondent improperly showed each eyewitness defendant's photograph. He did not show the witnesses lawful photo arrays, or pictures of any other individual. His motivation, clearly, was to ensure that each eyewitness would identify the defendant from the witness stand at the trial.

When, during the trial, the first eyewitness lied on the stand, testifying that he had not been shown a photograph of the defendant just prior to the trial, respondent took no action to correct that false testimony. Rather, respondent's misconduct came to light only after the second eyewitness testified, during cross-examination, that respondent had shown both her and the first witness, her husband, a photograph of the defendant during trial preparation. In response, the defense moved for a mistrial.

The judge and the attorneys then held a sidebar conference during which the judge "inquired into the possibility of salvaging the Baskin-Robbins robbery charges if those witnesses had not been shown the photograph." During that sidebar, Judge Stone found, respondent "did not volunteer at the time that he had shown the photos" to the Baskin-Robbins eyewitnesses, and, thus, "intentionally concealed the fact of the photo show from the defense."

The SCSU found that respondent knew, before trial, that he had improperly shown the defendant's photograph to the eyewitnesses and then failed to disclose that fact "as soon as practicable" to allow the "defendant to adequately prepare his

defense." Moreover, the SCSU determined that respondent's RPC 3.8(d) violation was knowing and intentional as to all four eyewitnesses.

Given these factual findings, which we must accept, the parties' contention that a reprimand is sufficient discipline for respondent's misconduct widely misses the mark. We are troubled by the gravity of respondent's misconduct. He was engaged in the prosecution of a defendant charged with two counts of armed robbery, who, if convicted, faced a potential life sentence of imprisonment. Because respondent had no physical evidence to link the defendant to the crimes, he needed the eyewitnesses to identify the defendant, from the witness stand, while under oath. In a brazen attempt to secure that testimony, he improperly showed all four witnesses a photograph of the defendant, ten days before trial, to refresh their recollections regarding his appearance. Respondent's conduct was clearly an attempt to "fix" the outcome of the case and to secure significant felony convictions against the defendant. Consequently, his conduct is similar to, and, given the stakes, more egregious than, that of the attorneys in Norton, Kress,

Mott, and Weishoff, all of whom received terms of suspension for their unethical behavior.

We adopt the aggravating factors that the SCSU found - that respondent "showed an unwillingness to acknowledge the wrongfulness of his misconduct, and harmed a particularly vulnerable victim." Similarly, in mitigation, we adopt two of the three factors found by the SCSU - that respondent had no prior record of discipline, and was inexperienced in the practice of law at the time of his misconduct. However, we reject the SCSU's finding that respondent lacked a dishonest or selfish motive. Rather, his conduct speaks for itself — a prosecutor who knowingly and intentionally taints eyewitness testimony in an attempt to secure felony robbery convictions does so with dishonest, if not selfish, motive.

In light of the fact that respondent's egregious misconduct took place in the context of a felony case, while he served in the trusted and powerful position of a trial-level prosecutor, we see no reason to diverge from the discipline imposed in Utah. Rather, as occurred in Pennsylvania and Idaho, we determine that a six-month suspension is the appropriate quantum of discipline in this case.

Vice-Chair Baugh and Member Gallipoli did not participate.

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
Bonnie C. Frost, Chair

By: Ellen A. Brodsky
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Tyler J. Larsen
Docket No. DRB 17-425

Argued: February 15, 2018

Decided: June 20, 2018

Disposition: Six-Month Suspension

Members	Six-Month Suspension	Did not participate
Frost	X	
Baugh		X
Boyer	X	
Clark	X	
Gallipoli		X
Hoberman	X	
Rivera	X	
Singer	X	
Zmirich	X	
Total:	7	2

Ellen A. Brodsky
Chief Counsel