SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 03-360

IN THE MATTER OF

MARK E. MAGEE

AN ATTORNEY AT LAW

Decision

Argued: January 29, 2004

Decided: March 31, 2004

Richard J. Engelhardt 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 based on a motion for final discipline filed by the Office of Attorney Ethics ("OAE") following respondent's guilty plea to one count of third degree eluding a police officer, in violation of *N.J.S.A.* 2C:29-2(b), one count of third degree resisting arrest, in violation of *N.J.S.A.* 2C:29-2(a), and driving while intoxicated, in violation of *N.J.S.A.* 39:4-50.

Respondent was admitted to the New Jersey bar in 1986. He has no history of discipline. According to the New Jersey Lawyers' Fund for Client Protection, he has been retired from the practice of law since 1990.

On October 31, 2002, respondent was driving his car in Shrewsbury, New Jersey. A police officer observed respondent's vehicle being driven in an erratic manner: the vehicle drifted over the double yellow line; respondent made a sharp correction to return the car back into the lane; after a green left-turn arrow appeared, respondent waited until the traffic light changed to amber before turning; when respondent turned left, the vehicle swayed to the extreme right before straightening out; and respondent accelerated to a high rate of speed. After the police officer activated the overhead lights and siren, respondent accelerated even more, operating his vehicle at speeds in excess of sixty miles per hour in a forty mile per hour zone. When respondent finally pulled his vehicle to the side of the road, the police officer was preparing to contact police headquarters when respondent pulled away, making an improper left turn. Because it was Halloween, the police officer was concerned that respondent might strike a child with his vehicle. Finally, the police officer was able to pull his vehicle in front of respondent's, requiring respondent to stop his car.

The police officer detected the odor of an alcoholic beverage when he approached respondent. Respondent's eyes were watery and his speech slurred. Respondent refused to release his hands from his vehicle when the police officer attempted to place handcuffs on respondent. At police headquarters, respondent submitted to two breathalyzer tests, both resulting in readings of .22% blood alcohol content, more than twice the legal limit.

On January 24, 2003, respondent pleaded guilty to eluding a police officer, resisting arrest, and driving while intoxicated. The Honorable Patricia D. Cleary, J.S.C., elicited the factual basis for the plea:

> Q. Count one of the accusation charges that on or about October 31st, 2002, in Shrewsbury Borough, you did commit the crime of eluding by having operated a motor vehicle on any street or highway of the State of New Jersey and having knowingly fled or attempted to elude Sgt. Louis Fitzgerald, a law enforcement officer, after having received a signal from him to bring the vehicle to a full stop. Would you tell me what happened?
>
> A. I was pursued and I panicked and took off.
>
> Q. All right. And you knew that there was an officer behind you?
>
> A. Yeah.
>
> Q. And you knew that he had signaled to you to stop?
>
> A. Yes.
>
> Q. The second count charges that on that same day, you did commit the crime of resisting arrest by preventing that Sgt. Louis Fitzgerald from effecting a lawful arrest. What did you do there?
>
> A. I was resistant to handcuffing . . . .
>
> Q. How did you do it?

A. The first one went on and it hurt and I tried to avoid the second.

Q. And it could have caused some injury to the officer.

A. Possibly.

Q. And let's see, the motor vehicle 00-1764, charges that you were driving while intoxicated. And is that correct?

A. That's correct.

Q. What were, were you drinking or were you - -

A. A Halloween party, Your Honor.

Q. And how much did you have to drink?

A. Too much.

Q. Was there a breathalyzer?

A. Yes.

Q. And what did that show?

[Respondent's Attorney]: My understanding is the breathalyzer was .22.

Q. So you're lucky you're here.

[Assistant Prosecutor]: Uh hum.

Q. So you understand that that's a per say [sic] violation. You know if you went to trial on that and it was a .22, there really wouldn't be much of a defense.

A. Obviously dumb.

Q. And probably that's why you didn't stop.

On April 17, 2003, Judge Cleary signed an order admitting respondent into the Pre-Trial Intervention Program. For the driving while intoxicated charge, respondent's driver's license was suspended for six months and he was assessed other mandatory penalties.

Citing *In re Viggiano*, 153 *N.J.* 40 (1998), and *In re Cardullo*, 175 *N.J.* 107 (2003), the OAE urged us to reprimand respondent.

The existence of a criminal conviction is conclusive evidence of respondent's guilt. *R.*1:20-13(c)(1); *In re Gipson*, 103 *N.J.* 75, 77 (1986). Respondent's guilty plea to the charges of eluding and resisting arrest constituted a violation of *RPC* 8.4(b) (commission of a criminal act that reflects adversely on his honesty, trustworthiness, or fitness as a lawyer). Only the quantum of discipline to be imposed remains at issue. *Rule* 1:20-13(c)(2); *In re Lunetta,* 118 *N.J.* 443, 445 (1989).

The level of discipline imposed in disciplinary matters involving the commission of a crime depends on numerous 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, supra,* 118 *N.J.* at 445-46. Discipline is imposed even when the attorney's offense is not related to the practice of law. *In re Kinnear*, 105 *N.J.* 391 (1987).

In *In re Viggiano, supra*, 153 *N.J.* 40 (1998), after the attorney was involved in a minor traffic accident, he reached into the car of the other driver and began to punch her. The attorney also assaulted two police officers who arrived and restrained the attorney from further assaulting

the motorist. The attorney entered a guilty plea to two counts of the disorderly persons offense of simple assault. He was suspended for three months.

In *In re Cardullo, supra,* 175 *N.J.* 107 (2003), the attorney left the scene of an accident after she rear-ended another vehicle. When she was questioned by police officers, she denied that she had been in an accident. Although she eventually admitted that she had been at the scene of the accident, she denied that she had hit the other vehicle. Finally, she admitted that she had hit the other vehicle, but claimed that the other driver was at fault for stopping suddenly. The attorney pleaded guilty to the fourth degree crime of assault by automobile, driving while intoxicated, and leaving the scene of an accident. The attorney had had two prior convictions for driving while intoxicated. In determining that a reprimand was the appropriate discipline, we considered the absence of serious injury to the other driver and the attorney's efforts to recover from alcohol addiction.

In this case, respondent's misconduct lacks the violent component exhibited by the attorney in *Viggiano*. Moreover, although respondent's blood alcohol level was dangerously high, we indicated in *Cardullo* that discipline was imposed based solely on the conviction of assault by auto, not for driving while intoxicated:

> However, our granting of this motion [for final discipline] should not be construed to mean that we would impose discipline solely on the basis of a conviction of driving while intoxicated. Here, respondent was convicted of assault by auto and sentenced to a jail term. It is the conviction of assault by auto that requires disciplinary action.
>
> [*In the Matter of Susan E. Cardullo,* Docket No. DRB 02-282 (2002), at 3]

Furthermore, the attorney in *Cardullo* had three convictions for driving while intoxicated, whereas respondent's offense was his first. A reprimand is, therefore, the appropriate sanction.

Based on the foregoing, we unanimously determine that a reprimand is the appropriate level of discipline. Two members did not participate.

We further require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Disciplinary Review Board
Mary J. Maudsley, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Mark E. Magee
Docket No. DRB 03-360

Argued: January 29, 2004

Decided: March 31, 2004

Disposition: Reprimand

Members	*Disbar*	*Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Maudsley			X				
O'Shaughnessy							X
Boylan			X				
Holmes			X				
Lolla							X
Pashman			X				
Schwartz			X				
Stanton			X				
Wissinger			X				
Total:			7				2

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel