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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 05-065
District Docket No. XIV-04-210E

IN THE MATTER OF :
 :
DAVID L. KERVICK :
 :
AN ATTORNEY AT LAW :
 :

Decision

Argued: May 19, 2005

Decided: July 28, 2005

Richard J. Engelhardt appeared on behalf of the Office of Attorney Ethics.

Richard S. Lehrich appeared on behalf of respondent.

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

This matter was before us on a recommendation for discipline filed by the Office of Attorney Ethics ("OAE"), based on respondent's conviction for loitering with intent to obtain a controlled dangerous substance, in violation of RPC 8.4(b) (criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer).

Respondent was admitted to the practice of law in New Jersey in 1975. In October 2002, the Court suspended him for three months pursuant to a motion for discipline by consent. In re Kervick, 174 N.J. 377 (2002). The suspension was based on respondent's guilty plea to possession of cocaine, use of a controlled dangerous substance, and possession of drug paraphernalia. Respondent has not applied for reinstatement and remains suspended to date.

Respondent was arrested in April 2004, and charged with possession of cocaine and possession of drug paraphernalia. In June 2004, respondent pleaded guilty to the disorderly persons' offense of loitering with intent to obtain a controlled dangerous substance, in violation of N.J.S.A. 2C:33-2.1.¹

During the plea hearing, the Honorable Joseph P. Donohue, J.S.C., elicited the following factual basis for respondent's plea:

The Court: . . . All right, Mr. Kervick, on April 14th, 2004, you were in the Town of Westfield, correct?

¹ N.J.S.A. 2C:33-2.1(b) states, in relevant part:

A person, whether on foot or in a motor vehicle, commits a disorderly persons offense if (1) he wanders, remains or prowls in a public place with the purpose of unlawfully obtaining or distributing a controlled dangerous substance or controlled substance analog; and (2) engages in conduct that, under the circumstances, manifests a purpose to obtain or distribute a controlled dangerous substance or controlled substance analog.

Defendant: Yes, Sir.

The Court: And immediately before your arrest, you were in a particular area of Westfield?

Defendant: Correct.

The Court: And your purpose in being in that area was to obtain CDS?

The Defendant: Correct.

[Ex.C at 6.]

Respondent was fined \$350 and assessed penalties of \$125.

The OAE recommends the imposition of a three-month suspension.

Upon a de novo review of the record, we determine to grant the OAE's motion for final discipline.

Respondent pleaded guilty to loitering with intent to obtain a controlled dangerous substance. 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 conviction 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). The sole issue to be determined is the quantum of discipline to be imposed. R. 1:20-13(c)(2); In re Lunetta, 118 N.J. 443, 445 (1989).

The level of discipline imposed in disciplinary matters based on the commission of a crime depends on a number of 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 though an attorney's offense was not related to the practice of law. In re Kinnear, 105 N.J. 391, 395 (1987).

The discipline imposed in cases involving the use of cocaine has varied greatly, depending on pertinent factors such as the extent of the use, the harm to clients, the presence of other ethics infractions, and any mitigating factors.

The Court has warned members of the bar that even a single instance of possession of cocaine will ordinarily call for a suspension. In re McLaughlin, 105 N.J. 457, 462 (1987). In McLaughlin, three individuals who, at the time of their offense, were serving as law secretaries to members of the Judiciary, were publicly reprimanded for use of a small amount of cocaine. The Court noted that, while a public reprimand had been issued in that case of first impression, in the future, similar conduct would be met with a suspension from practice:

We forebear the imposition of a period of suspension only because this is the first time

that we have spoken to the question of discipline for a private drug incident of the sort revealed by this record. We very much hope that infractions of this type will be rare, but our confidence in that regard has its limits. Members of the Bar would be well advised not to rely on our indulgent treatment of these respondents: similar conduct henceforth will ordinarily call for suspension.

[Id. at 462.]

This case does not involve the wide-scale use or distribution of controlled dangerous substances for financial gain, or a conspiracy, warranting disbarment, such as in In re Goldberg, 105 N.J. 278 (1987) (knowing participation in an extensive narcotics conspiracy with a known drug-dealer and fugitive), or In re McCann, 110 N.J. 496 (1988) (participation in a large-scale and prolonged criminal narcotics conspiracy involving the purchase of large quantities of cocaine in various South American countries).

Significant terms of suspension were imposed in In re Morris, 153 N.J. 36 (1998) (three-year suspension where attorney pleaded guilty to official misconduct and conspiracy to obtain cocaine); In re Musto, 152 N.J. 165 (1997) (three-year suspension for conspiracy to possess heroine and cocaine, possession of heroine and cocaine, and possession of methyl

ecgonine²; although the attorney was also guilty of conspiracy to distribute cocaine, the Court considered that he had no other ethics infractions in his twelve-year legal career, he was not practicing law at the time of his arrest, he was primarily a drug user, rather than a seller, he did not harm any clients, he cooperated fully with federal agents, and he confronted his addiction both before and after he was arrested); and In re Kinnear, 105 N.J. 391 (1987) (one-year suspension where the attorney pleaded guilty to one count of distribution of CDS; the attorney was placed on probation for three years and was directed to continue outpatient treatment; the Court considered the relationship of the crime to the practice of law, the good reputation of the attorney, his prior conduct and character, and that his misconduct was limited to one episode, unrelated to the practice of law, and unlikely to recur).

Less severe discipline was imposed in In re Peia, 111 N.J. 318 (1987) (nine-month suspension imposed following the attorney's guilty plea to a charge of possession of cocaine; the Court noted that he had a prior arrest for assault, and was again arrested for illegal drug possession eight months after his arrest on the matter before the Court); In re Pleva, 106

² Methyl ecgonine is a substance useful in cocaine synthesis. J.F. Casale & RFX Klein, Illicit Production of Cocaine, 5 Forensic Science Review 95-107 (1993).

N.J. 637 (1987) (six-month suspension for possession of 9.5 grams of cocaine, 11 grams of hashish and 52 grams of marijuana; the Court considered that the attorney had at least one additional prior arrest involving drugs, and noted that his drug usage was neither innocuous nor casual);³ In re Kaufman, 104 N.J. 509 (1986) (six-month suspension for an attorney who pleaded guilty to two separate charges of drug possession (methaqualude and cocaine) and had a prior drug incident and history of drug abuse); In re Lisa, 152 N.J. 455 (1998) (three-month suspension for attorney who admitted being under the influence of cocaine, having unlawful, constructive possession of cocaine, and possessing drug paraphernalia; Lisa had a previous admonition for recordkeeping violations); In re Schaffer, 140 N.J. 148 (1995) (three-month suspended suspension where attorney was guilty of possession of cocaine, being under the influence of cocaine, and possession of drug-related paraphernalia); In re Benjamin, 135 N.J. 461 (1994) (three-month suspension for attorney who admitted to the possession of cocaine and marijuana); In re Karwell, 131 N.J. 396 (1993) (three-month suspension where the attorney possessed small amounts of marijuana, cocaine, and drug paraphernalia, but engaged in efforts to combat his dependency); In re Shepphard, 126 N.J. 210

³ Pleva received an additional three-month suspension for firearm violations.

(1991) three-month suspension where attorney pleaded guilty to two disorderly persons' offenses: possession of under fifty grams of marijuana, and failure to deliver a controlled dangerous substance (cocaine) to a law enforcement officer); and In re Nixon, 122 N.J. 290 (1991) (three-month suspension for an attorney who was indicted for the third degree crime of possession of a controlled dangerous substance (cocaine); the attorney was admitted into PTI, whereupon the indictment was dismissed).

The cause of respondent's return to illegal drugs was a key issue for us in determining the quantum of discipline. Respondent's counsel advised us that respondent had suffered a serious injury, requiring hospitalization, and treatment with narcotic pain medication. Counsel explained that, following respondent's discharge, and after his prescribed medication ran out, he "briefly relapsed and self-medicated with illegal drugs." Counsel also advised us that respondent has been drug-free for almost a year. Following oral argument before us, counsel submitted a letter from respondent's treating psychiatrist, attesting to his continued sobriety.⁴ In light of these circumstances, we determine to impose only a three-month

⁴ We considered counsel's offering of the psychiatric report as a motion to supplement the record, which we granted.

suspension. The suspension is to be effective from the date of our review of this matter, May 19, 2005.

Member Matthew Boylan did not participate and Member Reginald Stanton recused himself.

We further determine to 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

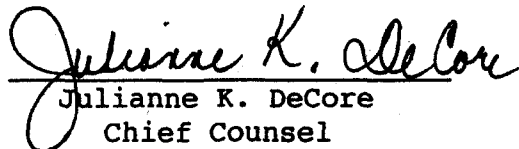
In the Matter of David L. Kervick
Docket No. DRB 05-065

Argued: May 19, 2005

Decided: July 28, 2005

Disposition: Three-month suspension

Members	Disbar	Three-month Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Maudsley		X				
O'Shaughnessy		X				
Boylan						X
Holmes		X				
Lolla		X				
Neuwirth		X				
Pashman		X				
Stanton					X	
Wissinger		X				
Total:		7				


Julianne K. DeCore
Chief Counsel