Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 20-037
District Docket No. XIV-2018-0535E

In the Matter of Charles Canning Daley, Jr., An Attorney at Law	Dissent

Decided: February 3, 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 six months based on his conviction for unlawful possession of a handgun, a 2nd-degree crime, a conviction which will be nullified after he successfully completes a 36-month pre-trial intervention program. Unlike the majority, we believe that respondent, a Board Certified Civil Trial attorney who has no ethics history over a 35-year legal career, should be censured for his charged conduct which involved no violence and caused no harm to anyone. We also highlight at the outset, as

discussed in more detail below, that no precedent supports the majority's sanction.

This case involves a loaded and unregistered handgun. As the majority opinion details, a handgun inside respondent's backpack set off a metal detector when the backpack, also carrying respondent's legal files, was scanned as respondent entered the Ocean County Courthouse to argue a motion on September 17, 2018. Respondent, who did not possess a permit to carry a concealed gun, forgot that he had placed the gun inside that backpack days earlier, intending at that time to go with a friend to a firing range. When that plan changed, he forgot to return the firearm to the locked safe where he usually kept it. He had owned the gun since his days as a member of the District Attorney's Office in Philadelphia when, in that capacity, he was authorized to carry a firearm and had legally obtained it.

There are three points central to the majority's analysis with which we take issue: (1) the majority opinion fails to identify any case remotely similar to the facts here which justifies imposing a six-month suspension or indeed any suspension at all; (2) the majority accords "significant weight" as an aggravating factor that respondent brought the handgun to a courthouse; and (3) the majority strongly criticizes respondent for asserting that he was not conscious that the gun was in his backpack when he entered the Ocean County Courthouse. The

majority sees this as inconsistent with his guilty plea to knowingly possessing a handgun. Our disagreement with each of these points is now discussed in turn.

1. **There is no precedent supporting a six-month suspension in this case**. The majority opinion terms this case one "of first impression." It then discusses cases of respondents who were disciplined based on criminal convictions which it implies should be considered, never identifying any of the cases as comparable. In fact, all of the three cited cases where respondents were suspended involved violence or the threat of violence. (Opinion, at 14-18). In re Gonzalez, 229 N.J. 170 (2017) (three-month suspension for attorney with prior ethics infractions who possessed a weapon, initiating a "road rage" incident, swinging a club at the victim's vehicle); In re Marcinkiewicz, 240 N.J. 207 (2019) (one-year suspension for attorney who seriously injured her eight-week old child and pleaded guilty to aggravated assault and endangering the welfare of a child); and In re Guzzino, 165 N.J. 24 (2000) (two-year suspension for attorney convicted of second-degree manslaughter and driving intoxicated). Here, there is not even a scintilla of evidence suggesting that this was a violent act or that violence was threatened.

Further, the majority acknowledges (Opinion, at 18) that the case relied on by the OAE to support a six-month suspension, In re Wallace, 153 N.J. 31 (1998), is distinguishable "because Wallace involved a near murder-suicide

where the attorney intended to use the handgun to kill a victim," whereas here respondent's crime "was non-violent, did not involve a victim, and no one was harmed."

Even the conduct in the two censure cases cited by the majority (Opinion, at 16) was more serious than that here: In re Milita, 217 N.J. 19 (2014) (brandishing a knife at two teenagers and hindering apprehension by providing false information to police officer) and In re Osei, 185 N.J. 249 (2005) (causing $72,000 worth of damage over a period of time to his own house which was in foreclosure).

Lacking any precedent for its decision, the majority stretches to justify it. Thus, it says that although no violence or threat of violence was involved here, respondent's conduct "created the potential for violence" (Opinion, at 18), "created an egregious potential for danger to the public, judiciary employees, and other judges" and was "extreme[ly] reckless[]" (Opinion, at 19). It does not explain these conclusory remarks, leaving the reader to imagine what "potential for violence" exists and by whom it would be committed, especially when the gun was in a backpack with legal files and respondent himself didn't know it was there.

2. **That respondent unknowingly brought the gun to a courthouse is not an aggravating factor**. We do not consider the fact that the handgun was discovered when respondent was entering a courthouse to be an aggravating factor, much less deserving the "significant weight" accorded by the majority. Aggravating factors include conduct, circumstances, or characteristics that reflect added culpability. It is hard to see how something that was an unconscious mistake, without intent or pattern, that says nothing about respondent's character or capacity, can fairly be weighed as an aggravating factor.

There is no dispute that respondent was not conscious that the firearm was in his backpack at the time he entered the courthouse. That is what he told the arresting officers. It was confirmed by his passing a voluntary polygraph examination which detected no dissembling when he denied such knowledge. Respondent has never said anything to the contrary, and there is no evidence to the contrary. Significantly also, the gun had not been detected when he previously had entered other courthouses with that same backpack, leaving him unaware of his oversight until the incident in Ocean County. That respondent was unaware that the handgun was in his backpack at the moment he went into a courthouse was not a defense to the underlying criminal charge — and is not

a defense to the ethics charge — but it certainly negates treating the gun's presence in a courthouse lobby as an aggravating factor.

3. **There is no basis to penalize respondent for his argument that he forgot about the gun in his backpack**. The majority criticizes respondent for calling his misconduct "an inadvertent mistake" because, it says, this "does not comport with the knowing element of the crime to which he pleaded guilty, under oath." (Opinion, at 19). In substance, the majority seems to be accusing respondent of lying, either under oath in entering his guilty plea or now before the Board. We submit that this conclusion wrongly characterizes respondent's plea and his allocution and, in doing so, penalizes respondent for making a perfectly proper mitigation argument.

As to this point, we first note the Supreme Court's holding that in motions for final discipline, it will "examine the totality of the circumstances" including details of the offense and background of respondent. In re Spina, 121 N.J. 378, 389 (1990). We also note, as did the majority (at p. 20), that the Court has expressed concerns about an attorney arguing that he entered a guilty plea for reasons other than the truth of that plea because it amounted to potentially admitting that he had lied under oath. We share that concern. However, we do not believe this to be such a case. That respondent raised his lack of awareness

of the gun in his backpack when he entered the courthouse was part of the "totality of the circumstances." If he had intended to bring a loaded gun into a courthouse, that would have been a relevant fact. Therefore, that he lacked such intent must also be a relevant fact.

Here, respondent never claimed that his allocution in entering his plea was inaccurate or tried to back away from it. He pleaded guilty to violating N.J.S.A. § 2C:39-5(b)(1), providing that, "[a]ny person who knowingly has in his possession any handgun including any antique handgun, without first having obtained a permit to carry the same . . . is guilty of a crime of the second degree." Whether respondent was conscious that the handgun was in his backpack as he entered the Ocean County Court House was not an element of the offense and was not part of the plea.

In his allocution, respondent testified: (a) that on September 17, 2018, he went through a metal detector at the Ocean County Courthouse; (b) at that time he had a backpack with a gun in it; and (c) the gun belonged to him, being one that he had purchased in 1982 when he was, as a member of the Philadelphia DA's office, authorized to carry a firearm. He never allocated that he knew the gun was there *when he entered the courthouse* nor did he need to do so in order to provide a factual basis supporting the elements of knowing possession. Rather he admitted simply that the firearm that was found in his backpack in the

courthouse belonged to him, and that he had owned it since 1982. (See transcript of guilty plea in the record of this case). His recent statements in this ethics case that he didn't know the gun was in his backpack *when* he entered the courthouse do not contradict the facts to which he allocuted nor do they disavow any element of the crime of knowing possession to which he pled guilty. Pursuant to Spina, he was entitled, and some might say obligated, to explain "the totality of circumstances" of his offense.

It would be a different situation entirely if respondent had pleaded guilty to a criminal statute making it unlawful to carry a firearm into a courthouse. However, the statute to which he pleaded guilty does not include the location in which possession was found as an element of the offense. All that is required is that he was in possession of the unlicensed firearm. Respondent clearly was. He knew that that the firearm was his, had been placed in a backpack owned and controlled by him, and that, whether at his home, in his car or on his person, it was in his possession. Pleading guilty and allocuting to facts supporting the elements of the offense at issue does not mean that he knew his unlawfully possessed firearm was in the backpack *when he took it into the Courthouse* on

the date in question.[1] Nothing in the transcript of his guilty plea indicates that either.

Respondent's position has always been consistent -- that the gun was his, that he had it in his backpack (and thereby in his possession) and that when he went into the Courthouse he did not realize it was in the backpack he took into the Courthouse. He told this to the arresting officers in the courthouse when the gun was discovered, to the polygraph examiner whose polygraph indicated he was being truthful, and more recently to this Board. His statements are not only not contradicted, they are inherently credible. It makes no sense that an attorney would knowingly go through a courthouse metal detector with a handgun that he had to believe surely would be detected. All the evidence shows that respondent has been consistently truthful throughout what must have been an agonizing process for him. None of his statements contradict those he made in entering his guilty plea.

In addition to these points, we find compelling the significant evidence of mitigation that is given only cursory mention by the majority. This was an isolated, aberrant incident; respondent immediately reported his arrest to the OAE; he has no disciplinary history in 35 years at the bar; he expressed sincere

[1] There was evidence suggesting that respondent had two different backpacks and that he had mistakenly brought the wrong one to the Courthouse on the day in question.

remorse; he cooperated fully in the investigation, he documented his good character and reputation with many character letters; and his offense caused no harm.

In light of the above, the majority's determination to impose a six-month suspension is, in our view, too harsh. Under all of the circumstances presented, we believe that a censure is the appropriate discipline for this lawyer with no prior ethics history. A suspension would be unjustified and unduly punitive for what we see as being an unfortunate act of negligent forgetfulness, which already has had dire consequences for this respondent, who has by all accounts otherwise had a distinguished and unblemished career.

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