Supreme Court of New Jersey
Disciplinary Review Board
Docket No. 20-226
District Docket No. XIV-2019-0259E

In the Matter of	:
Cary J. Frieze	:
An Attorney at Law	:

Decision

Argued: February 18, 2021

Decided: April 30, 2021

Lauren Martinez appeared on behalf of the Office of Attorney Ethics.

Peter N. Gilbreth 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 motion for final discipline filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-13(c)(2), following respondent's conviction in Hanover Municipal Court (Morris County) for disorderly persons shoplifting, in violation of N.J.S.A. 2C:20-11(b)(1). The

OAE asserted that this offense constitutes a violation of RPC 8.4(b) (commission of a criminal act that reflects adversely on a lawyer's honesty, trustworthiness or fitness as a lawyer in other respects).

For the reasons set forth below, we determine to grant the motion for final discipline and to impose a censure, with conditions.

Respondent earned admission to the New Jersey bar in 1972. He maintains a law office in Morristown, New Jersey.

In 2019, we admonished respondent for violations of RPC 1.15(d) (failure to comply with recordkeeping requirements), RPC 5.5(a)(1) (practicing law while ineligible), and RPC 8.1(b) (failure to cooperate with disciplinary authorities). In the Matter of Cary J. Frieze, DRB 19-252 (October 21, 2019)

We now turn to the facts of this matter.

On April 8, 2019, respondent, through his counsel Peter N. Gilbreth, Esq., reported to the OAE that, in March 2019, he had been arrested in Hanover, New Jersey and charged with shoplifting. Specifically, on March 12, 2019, a Hanover ShopRite employee observed respondent conceal merchandise worth $47.13 in a reusable shopping bag; purchase biscuits costing forty cents; and leave the store. ShopRite surveillance footage further revealed that

respondent had shoplifted on seven occasions in the prior twelve days, stealing merchandise worth a total of $470.23.

The Morris County Prosecutor's Office downgraded respondent's charge to a disorderly persons offense. On first review, the Honorable Brian O'Toole, J.M.C., Hanover Municipal Court, considered respondent for the "first offender" Conditional Dismissal Program (the Program), pursuant to N.J.S.A. 2C:43-13.1, et seq. Subsequent to Judge O'Toole's May 20, 2019 order granting respondent's entry into the Program, however, Judge O'Toole learned that respondent previously had been charged with shoplifting and participated in the Program and, thus, was ineligible because he was not a first offender. The previous charge stemmed from a 2017 incident in a Morris Plains Stop and Shop, where respondent had shoplifted $259.56 in merchandise. As a result of his entry into the Program for that offense, the Morris Plains municipal court dismissed the shoplifting charges.[1]

Therefore, on June 24, 2019 respondent appeared before Judge O'Toole, entered a guilty plea to disorderly persons shoplifting, in violation of N.J.S.A. 2C:20-11(b)(1), and admitted that he shoplifted merchandise worth $470.23

[1] Respondent was not charged with an ethics violation for this 2017 misconduct.

from ShopRite.[2] The Court ordered respondent to pay ShopRite $470.23 in restitution, and to complete ten days of community service.

The OAE requested that we grant the motion for final discipline and impose a three-month or six-month suspension for respondent's misconduct. The OAE acknowledged that a wide range of discipline has been imposed for theft and shoplifting. The OAE argued that, because respondent shoplifted on eight occasions over twelve days, his behavior was actively deceitful, and was not an anomaly. Citing In re Pariser, 162 N.J. 574 (2000), discussed below, as instructive, the OAE asked us to impose a suspension for respondent's misconduct.

Respondent submitted to us a letter brief in which he disputed only the quantum of discipline that the OAE sought. Respondent asserted that Pariser addressed misconduct that was far more egregious than his own. Further, respondent argued that his conduct was more akin to the facts of In re Walzer, 203 N.J. 582 (2010), discussed below, where we imposed a censure. Respondent contended that a suspension in this matter would be unduly harsh

[2] N.J.S.A. 2C:20-11(b)(1) provides: Shoplifting shall consist of any one or more of the following acts: (1) For any person purposely to take possession of, carry away, transfer or cause to be carried away or transferred, any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use or benefit of such merchandise or converting the same to the use of such person without paying to the merchant the full retail value thereof.

and "deprive [respondent's] present and prospective clients of valuable legal services." Respondent stated that he would be willing to address underlying psychological issues with counseling and to comply with monitoring and reporting requirements concerning his treatment. He, thus, asked us to impose a censure.

Following a review of the record, we determine to grant the OAE's motion for final discipline. Final discipline proceedings in New Jersey are governed by R. 1:20-13(c). Under that Rule, a criminal conviction is conclusive evidence of guilt in a disciplinary proceeding. R. 1:20-13(c)(1); In re Magid, 139 N.J. 449, 451 (1995); In re Principato, 139 N.J. 456, 460 (1995). Respondent's guilty plea and conviction for disorderly persons shoplifting, contrary to N.J.S.A. 2C:20-11(b)(1), thus, establishes a violation of RPC 8.4(b). Pursuant to that Rule, it is misconduct for an attorney to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer." Hence, the sole issue is the extent of discipline to be imposed on respondent for his violation of RPC 8.4(b). R. 1:20-13(c)(2); In re Magid, 139 N.J. at 451-52; and In re Principato, 139 N.J. at 460.

In determining the appropriate measure of discipline, we must consider the interests of the public, the bar, and the respondent. "The primary purpose of discipline is not to punish the attorney but to preserve the confidence of the

public in the bar." Ibid. (citations omitted). Fashioning the appropriate penalty involves a consideration of many 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, 118 N.J. 443, 445-46 (1989).

The Court has noted that, although it does not conduct "an independent examination of the underlying facts to ascertain guilt," it will "consider them relevant to the nature and extent of discipline to be imposed." In re Magid, 139 N.J. at 452. In motions for final discipline, it is acceptable to "examine the totality of the circumstances" including the "details of the offense, the background of respondent, and the pre-sentence report" before "reaching a decision as to [the] sanction to be imposed." In re Spina, 121 N.J. 378, 389 (1990). The "appropriate decision" should provide "due consideration to the interests of the attorney involved and to the protection of the public." Ibid.

That an attorney's conduct did not involve the practice of law or arise from a client relationship will not excuse an ethics transgression or lessen the degree of sanction. In re Musto, 152 N.J. 165, 173 (1997). Offenses that evidence ethics shortcomings, although not committed in the attorney's professional capacity, may, nevertheless, warrant discipline. In re Hasbrouck,

140 N.J. 162, 167 (1995). The obligation of an attorney to maintain the high standard of conduct required by a member of the bar applies even to activities that may not directly involve the practice of law or affect his or her clients. In re Schaffer, 140 N.J. 148, 156 (1995).

Here, respondent was convicted of disorderly persons shoplifting, in violation of N.J.S.A. 2C:20-11(b)(1), after he admitted that he shoplifted merchandise valued at $470.23 from ShopRite.

In sum, we find that respondent violated RPC 8.4(b). The only remaining issue is the appropriate quantum of discipline to be imposed for respondent's misconduct.

The discipline for theft and shoplifting has ranged greatly, depending on the nature of the crime and the presence of mitigating or aggravating factors. See, e.g. In re Devaney, 181 N.J. 303 (2004) (reprimand for attorney convicted of two counts of third-degree theft of movable property and third-degree obtaining a controlled dangerous substance by fraud; the attorney stole prescription pads from two doctors and used them to unlawfully obtain prescription pain medication, to which she had become addicted after a series of serious physical ailments for which she had been prescribed painkillers; the attorney cooperated fully with police and ethics authorities, was remorseful, entered pre-trial intervention (PTI), and took steps to overcome her addiction;

no prior discipline); In re Walzer, 203 N.J. 582 (censure for attorney employed by the New Jersey Department of Human Services; on fourteen occasions, he stole food and beverage items from a refreshment counter operated by a blind individual associated with the Commission for the Blind and Visually Impaired Enterprise Program; fourteen separate criminal acts of third-degree shoplifting found; the total value of the items was less than $100; in aggravation, the attorney victimized an individual who was blind; in mitigation, the attorney completed PTI and made restitution of $1,200; no prior discipline); In re Jaffe, 170 N.J. 187 (2001) (three-month suspension for attorney convicted of third-degree theft by deception; over a nine-month period, he improperly obtained $13,000 from a healthcare provider by submitting false health insurance claims to reimburse him for prescription formula purchased for his infant child, who was born with life-threatening medical problems; the attorney was entitled to reimbursement of only $4,400; mitigation included lack of prior discipline, the attorney's physical and emotional stress over his child's illness, his acceptance of responsibility for his actions, payment of full restitution ($15,985) to the insurer, a $10,000 civil penalty, and completion of PTI); In re Pariser, 162 N.J. 574 (six-month suspension for deputy attorney general convicted of third-degree official misconduct after stealing items from coworkers; the attorney was sentenced to a three-year probationary term, ordered to pay a $5,000 fine,

required to forfeit his public office and, as a condition of his probation, was to continue psychological counseling until discharged; the thefts included small items taken from offices, after hours, using a master key, as well as the inappropriate use of official telephones; video surveillance was used to observe the attorney taking $70 in cash that had been planted in one office; mitigation included the attorney's psychiatric problems; in aggravation, the attorney had engaged in a pattern of thefts over time); In re Burns, 142 N.J. 490 (1995) (six-month suspension for attorney who committed three instances of knowing and unlawful burglary of an automobile, two instances of theft by unlawful taking, and one instance of unlawful possession of burglary tools); In re Breyer, 163 N.J. 502 (2000) (three-year suspension for a law librarian employed by the Administrative Office of the Courts (AOC) who took law books worth more than $16,000 from the library and sold or traded them to several companies, without the knowledge or approval of the AOC, and kept the money for himself); and In re Bevacqua, 185 N.J. 161 (2005) (three-year suspension for attorney who attempted to use a fraudulent credit card to purchase items at a department store; his wallet contained credit cards in different names; he was charged with identity theft, credit card fraud, and theft, and was accepted into PTI; prior reprimand and six-month suspension).

Here, the OAE compared respondent's misconduct to that of the attorney in Pariser, a deputy attorney general who was found guilty of official misconduct after stealing items from coworkers, and received a six-month disciplinary suspension. Respondent compared his misconduct to that of the attorney in Walzer, who was employed by the Department of Human Services and stole food and beverage items from a refreshment counter, on fourteen occasions, with a total value of less than $100, and received a censure.

Indeed, respondent has had two arrests for shoplifting from supermarkets: one that occurred in Morris Plains in 2017, which was dismissed as part of the first offender Conditional Dismissal Program, as well as the arrest and conviction at issue in this matter. However, in Pariser, the attorney was prosecuted in Superior Court and sentenced to a three-year probationary term. Here, respondent's thefts were addressed in municipal court, after his charge was downgraded to a disorderly persons offense. We, thus, find that respondent's misconduct is most comparable to that of the attorney in Walzer, who shoplifted items from a refreshment stand, entered PTI, and made restitution.

In mitigation, besides the 2019 admonition, respondent has no other formal discipline in forty-eight years at the bar. In aggravation, respondent has

a troubling history of shoplifting, and engaged in a pattern of theft, over the course of twelve days, in the present case.

In light of respondent's willingness to address his shoplifting behavior via counseling and his almost unblemished forty-eight years as a member of the bar, we determine that a censure is the quantum of discipline necessary to protect the public and preserve confidence in the bar. Additionally, we require respondent to attend psychological counseling and, within sixty days of the Court's disciplinary Order in this matter, provide proof of fitness to practice law, as attested to by a mental health professional approved by the OAE. Further, respondent is to provide to the OAE quarterly reports documenting his continued psychological counseling, for a period of two years.

Vice-Chair Gallipoli voted to impose a six-month, suspended suspension, with the same conditions. Member Josephs voted to impose a three-month suspension with the same conditions.

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
Bruce W. Clark, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Cary J. Frieze
Docket No. DRB 20-226

Argued: February 18, 2021

Decided: April 30, 2021

Disposition: Censure

Members	Censure	Three-Month Suspension	Six-Month Suspended Suspension	Recused	Did Not Participate
Clark	X				
Boyer	X				
Gallipoli			X		
Hoberman	X				
Joseph		X			
Petrou	X				
Rivera	X				
Singer	X				
Zmirich	X				
Total:	7	1	1	0	0

/s/ Timothy M. Ellis
Timothy M. Ellis
Acting Chief Counsel