

FILED 

AUG 13 2008

STATE BAR COURT CLERK'S OFFICE
SAN FRANCISCO

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No.: 07-C-11625-LMA
)	07-C-12707 (Cons.)
DAVID MICHAEL SMITH,)	
)	DECISION
Member No. 242063,)	
)	
<u>A Member of the State Bar.</u>)	

I. Introduction

On August 22, 2006 and March 20, 2007, respondent David Michael Smith (respondent) was convicted of two separate violations of Vehicle Code section 23152, driving while under the influence of alcohol and/or with a blood alcohol content of .08 percent or more. The later of these two matters resulted in a felony conviction, because it marked the fourth time that respondent had been convicted of violating Vehicle Code section 23152 in the past ten years.¹

This matter comes before the court based on referral orders filed by the Review Department of the State Bar Court on June 22, 2007 and July 26, 2007 for a hearing and decision as to whether the facts and circumstances surrounding these two convictions involved moral turpitude or other misconduct warranting discipline and, if so found, a recommendation as to the discipline to be imposed.

¹ Respondent's first two convictions occurred prior to his admission to the California State Bar of California.



Respondent was represented by Charles Hicks, Jr. The Office of the Chief Trial Counsel of the State Bar of California (State Bar) was represented by Deputy Trial Counsel Maria Oropeza.

In view of respondent's misconduct and the aggravating and mitigating evidence, the court recommends, among other things, that respondent be suspended from the practice of law for one year, that execution of the suspension be stayed, and that he be placed on probation for three years with conditions, including an actual suspension of 60 days from the practice of law. The court further recommends that respondent receive credit towards the period of actual suspension for the period of interim suspension which commenced on July 2, 2007.² (See *In re Young* (1989) 49 Cal.3d 257, 270.)

II. Pertinent Procedural History

On August 22, 2006 and on March 20, 2007, Respondent entered pleas of nolo contendere to separate violations of Vehicle Code Section 23152.

The State Bar reported the pleas to the Review Department on May 11, 2007 and July 16, 2007. Respondent was placed on interim suspension, and the Review Department subsequently referred both of respondent's conviction matters to the Hearing Department for a hearing and decision recommending the discipline to be imposed in the event that the Hearing Department finds that the facts and circumstances surrounding respondent's convictions involved moral turpitude or other misconduct warranting discipline. In accordance with the Review Department's orders, this case proceeded to trial on May 20, 2008. The parties entered into an extensive stipulation of facts and the trial lasted only one day. The court took this matter under submission immediately following the completion of trial.

² Pursuant to Evidence Code section 452, subdivision (h), the court takes judicial notice of the fact that respondent remained on interim suspension for 106 days, from July 2, 2007 to October 16, 2007.

III. Findings of Fact and Conclusions of Law

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on April 25, 2006, and has since been a member of the State Bar of California.

B. Findings of Facts

1. Respondent's July 24, 2006 Arrest & Conviction

On July 24, 2006, respondent was arrested by the California Highway Patrol for driving while under the influence of alcohol. The arresting officer, after observing respondent's erratic driving, positioned his vehicle directly behind respondent's vehicle. Respondent proceeded to pull into a parking lot and parked his car.

The arresting officer activated his forward red lights and initiated an enforcement stop. As he did so, respondent exited his vehicle and threw his keys into his car. Respondent began to walk away from his vehicle and the arresting officer.

The arresting officer contacted respondent and advised him of the reason for the stop. The arresting officer requested respondent's driver's license. Respondent advised the officer that he did not have his driver's license, or any other form of identification, with him. Respondent provided the arresting officer with his name and date of birth. The arresting officer ran respondent's name through CHP dispatch and learned that respondent had two prior convictions for driving under the influence of alcohol or drugs.

While speaking with respondent, the arresting officer observed signs and symptoms of intoxication, including red and watery eyes, a strong odor of an alcoholic beverage emitting from respondent's person, and unstable balance.

Respondent informed the arresting officer that his father was a retired CHP Officer and asked if the arresting officer would park respondent's vehicle and let him walk home.³ When the arresting officer advised respondent that he was not going to do that, respondent replied by stating, "Okay man. You're doing the right thing. I have a problem."

Respondent was arrested and transported to the Sacramento County Jail. A subsequent breath test revealed that respondent's blood alcohol concentration was 0.16%.

On August 7, 2006, respondent was charged by the Sacramento County District Attorney in a two count criminal misdemeanor complaint. Count One alleged a violation of Vehicle Code section 23152(a), driving under the influence of alcohol or drugs, with at least two prior convictions. Count Two alleged a violation of Vehicle Code section 23152(b), driving while having a 0.08% blood alcohol level or more with at least two prior convictions.

On August 22, 2006, respondent entered a nolo contendere plea to Count Two of the criminal complaint, to wit, a misdemeanor violation of Vehicle Code section 23152(b). Respondent's nolo contendere plea was accepted and he was convicted of the misdemeanor offense that same day.⁴

Respondent was placed on a five-year informal probation and required to: (1) abstain from drinking while driving; (2) drive only with a valid license; (3) serve 135 days in county jail;⁵ and (4) enroll in a multiple offender program. Respondent's license was revoked for a three-year period, and respondent was required to attend at least two Alcoholics Anonymous or 12-Step meetings.

Respondent's informal probation, however, was short-lived. It was revoked on January 12, 2007, due to his fourth arrest for driving under the influence of alcohol, as discussed *post*.

2. Respondent's September 30, 2007 Arrest & Conviction

On September 30, 2006, at 2:37 a.m., Sergeant Gibson, of the Auburn Police Department, was on patrol. He observed respondent's vehicle traveling at a high rate of speed and nearly colliding with the median. Sergeant Gibson positioned his police vehicle behind respondent's

³ The arrest report indicates that respondent informed the arresting officer that he was a student, despite the fact that respondent was a member of the State Bar of California at the time of his arrest.

⁴ A nolo contendere plea has the same effect as a guilty plea.

⁵ The jail time was to be served via home detention.

vehicle and followed respondent's vehicle into a parking lot. Respondent then exited his vehicle and begin walking towards Sergeant Gibson's police vehicle.

While speaking with respondent, Sergeant Gibson noted the strong odor of an alcoholic beverage on respondent's breath and person. Sergeant Gibson also observed that respondent's eyes were blood shot and watery, and that he slurred his speech. Sergeant Gibson asked for respondent's driver license, and respondent stated that he did not have it. Sergeant Gibson later located a valid Nevada driver's license in respondent's wallet.

At this point, Sergeant Gibson asked Officer Hardesty to respond to the scene to conduct a DUI investigation. Officer Hardesty arrived and proceeded to conduct field sobriety tests (FSTs) on respondent. During the FSTs, respondent stated that he had not had anything to drink that evening. Respondent refused to continue to perform the walk and turn FST and refused to participate in the one leg stand FST.

Respondent was arrested and a subsequent breath test revealed that respondent's blood alcohol concentration was 0.18% and 0.19%. Respondent informed Officer Hardesty during the first portion of the breath test that he had a shot of tequila just before driving. Officer Hardesty noted that respondent's attitude was deceptive.

On November 3, 2006, respondent was charged in a four-count felony complaint by the Placer County District Attorney. Count One alleged a violation of Vehicle Code sections 23152(a) and 23550, a felony, for driving under the influence of alcohol/or drugs with three or more prior convictions of driving under the influence. Count Two alleged a violation of Vehicle Code sections 23152(b) and 23550, a felony, for driving while having a 0.08% or higher blood alcohol level with three or more prior convictions. Count Three alleged a violation of Vehicle Code section 14601.5(a), a misdemeanor, for driving with a suspended or revoked license. Count Four alleged a violation of Vehicle Code section 12951(a), an infraction, for failing to possess a driver's license.

On March 20, 2007, respondent entered a nolo contendere plea to Counts One, Two and Three of the criminal complaint; to wit, a felony violation of Vehicle Code section 23152(a), a felony violation of Vehicle Code section 23152(b), and a misdemeanor violation of Vehicle

Code section 14601.5(a). Respondent's nolo contendere plea was accepted and he was convicted of the two felonies⁶ and the misdemeanor on that same day.

On April 10, 2007, respondent was sentenced to 240 days in county jail. Respondent was designated a habitual traffic offender and placed on formal probation for a period of five years. The terms of respondent's probation included, inter alia, the following conditions:

- (1) Upon his release from custody, respondent must immediately enter the Ohloff House in San Francisco (a drug and alcohol residential treatment facility) and successfully complete their program;
- (2) Respondent must attend a multiple offender program for a period of 18 months;
- (3) Respondent must submit to drug, narcotic, or alcohol testing as directed by his probation officer or any peace officer;
- (4) Respondent must totally abstain from the use or possession of intoxicants and not frequent places where alcohol is the chief item for sale; and
- (5) Respondent must not operate a motor vehicle unless properly licensed and insured; and he must not operate any motor vehicle without an ignition interlock device for a period of three years.

Respondent currently remains on probation with the Placer County Superior Court. He has been participating in the Lawyer Assistance Program (LAP), on a voluntary basis, since November 2006. Respondent has been sober since November 2, 2006.

C. Conclusions of Law

An attorney's conviction of drunk driving, even with prior convictions of that offense, does not per se establish moral turpitude. (*In re Kelley* (1990) 52 Cal.3d 487, 494.) The court finds that the facts and circumstances surrounding respondent's two convictions for driving under the influence of alcohol do not involve moral turpitude, but do involve other misconduct

⁶ Although respondent was convicted on two separate felonies, the court acknowledges that these two convictions arose from the same misconduct, charged under alternative prosecutorial theories.

warranting discipline. (See *In re Carr* (1988) 46 Cal.3d 1089, and *In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208.)

IV. Mitigating and Aggravating Circumstances

A. Mitigation

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.2(e).)⁷ Here, the court found respondent to be extremely cooperative with the State Bar during these proceedings. (Standard 1.2(e)(v).) Respondent's cooperation with the State Bar warrants some consideration as a mitigating circumstance.

Respondent does not have a prior record of discipline, however, the court affords this factor no weight in mitigation due to the fact that respondent had only been entitled to practice law for three months prior to his July 24, 2006 arrest for driving under the influence of alcohol.

B. Aggravation

Respondent's multiple acts of misconduct are an aggravating factor. (Standard 1.2(b)(ii).) His two convictions for nearly identical misconduct demonstrate a repeated failure to adhere to the law, a willingness to jeopardize the safety of others, and a failure to comply with court ordered probation.

V. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; standard 1.3.)

⁷ All further references to standards are to this source.

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline.

Standard 3.4 provides that the final conviction of a member of a crime which does not involve moral turpitude but which does involve other misconduct warranting discipline shall result in a sanction that is appropriate to the nature and extent of the misconduct found to have been committed by the member. (See also *In the Matter of Carr* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 108, 118; *In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 510.)

The standards, however, “do not mandate a specific discipline.” (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.) It has long been held that the court is “not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, [the Supreme Court is] permitted to temper the letter of the law with considerations peculiar to the offense and the offender.” (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) Yet, while the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

In a conviction referral proceeding, “discipline is imposed according to the gravity of the crime and the circumstances of the case.” (*In the Matter of Katz, supra*, 1 Cal. State Bar Ct. Rptr. 502, 510.) An attorney’s commission of a crime involving moral turpitude is always a matter of serious consequence but does not always result in disbarment; the sanction imposed is determined in each case depending on the nature of the crime and the circumstances presented by the record. (*In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 103.)

The State Bar, citing *In re Carr, supra*, 46 Cal.3d 1089, seeks a six-month actual suspension in this matter. In *Carr*, the attorney was convicted of two separate violations of

driving under the influence of alcohol. As a result, he was suspended for two years, stayed, with a five year probationary period including a six month actual suspension. *Carr*, however, is an extremely condensed decision that provides little guidance due to its abbreviated analysis including the lack of any discussion regarding mitigating and aggravating factors.⁸

The court finds the Review Department's analysis in *In the Matter of Anderson, supra*, 2 Cal. State Bar Ct. Rptr. 208, to be much more instructive than *Carr*. In *Anderson*, an attorney was convicted, among other things, of four separate counts of driving under the influence of alcohol over a six-year period.⁹ The Review Department found that the attorney's misconduct did not constitute moral turpitude, but did demonstrate conduct warranting discipline. In aggravation, the attorney was uncooperative and aggressive towards the arresting officers and had been twice disciplined in the past.¹⁰ In mitigation, the attorney presented "impressive character evidence." (*Id.* at 213.) The Review Department recommended a one-year stayed suspension, a three-year probation, and a 60-day actual suspension.

The instant case merits a level of discipline comparable to that found in *Anderson*. Although the instant case involves less mitigation than *Anderson*, it also involves less aggravation. Here, considering the fact that respondent has been sober for less than two years, the court's primary concern is one of public protection against the threat of recidivism. Therefore, the court's discipline recommendation includes a probationary condition requiring respondent's continued participation in the LAP during the entire period of probation. This

⁸ The court notes that the attorney in *Carr* had a prior record of discipline, stemming from two convictions (from 1981 and 1982) relating to his possession and manufacturing of phencyclidine (PCP), which resulted in, among other things, a 60-day actual suspension. This fact can be gleaned from the Review Department's analysis in *Carr*'s subsequent discipline matter- *In the Matter of Carr, supra*, 2 Cal. State Bar Ct. Rptr. 108, 115.

⁹ There is no indication that any of these convictions resulted in a felony conviction.

¹⁰ The attorney's prior record of discipline consisted of a private reproof for failing to perform services for a client and a public reproof for failing to communicate with his clients, failing to use reasonable diligence on their behalf, and failing to promptly return his clients' files following his withdrawal.

requirement is geared toward promoting respondent's continued sobriety- a goal that is in the best interests of both respondent and the public.

Accordingly, the court recommends that respondent be suspended for one year, that execution of the suspension be stayed, and that he be placed on probation for three years subject to the conditions of probation as noted *post*, including a 60-day actual suspension with credit given for respondent's period of interim suspension which commenced on July 2, 2007.

VI. Recommended Discipline

Accordingly, it is recommended that **David Michael Smith** be suspended from the practice of law for one year, that execution of the suspension be stayed, and that respondent be placed on probation for three years, with the following conditions:

1. Respondent must be actually suspended from the practice of law for the first 60 days of probation; credit will be given for respondent's period of interim suspension which commenced on July 2, 2007.
2. During the period of probation, respondent must comply with the State Bar Act and the Rules of Professional Conduct;
3. Respondent must continue his participation in the Lawyer Assistance Program ("LAP") and comply with all provisions and conditions of the LAP. Respondent must provide an appropriate waiver authorizing the LAP to provide the Office of Probation and this court with information regarding the terms and conditions of respondent's participation in the LAP and his compliance or non-compliance with the LAP requirements. Revocation of the written waiver for release of the LAP information is a violation of this condition;
4. Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, respondent must state whether respondent has complied with the State Bar Act, the

Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than thirty (30) days, the report must be submitted on the next following quarter date, and cover the extended period.

In addition to all the quarterly reports, a final report, containing the same information is due no earlier than twenty (20) days before the last day of the probationary period and no later than the last day of the probationary period;

5. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation, which are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with the conditions contained herein;

6. Within ten (10) days of any change, respondent must report to the Membership Records Office of the State Bar, 180 Howard Street, San Francisco, California 94105-1639, **and** to the Office of Probation, all changes of information, including current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code;

7. Within one year after the effective date of the discipline herein, respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the State Bar Ethics School, given periodically by the State Bar at either 180 Howard Street, San Francisco, California, 94105-1639, or 1149 South Hill Street, Los Angeles, California, 90015, and passage of the test given at the end of the session. Arrangements to attend Ethics School must be made in advance by calling (213) 765-1287, and paying the required fees. This requirement is separate from any Minimum Continuing Legal Education requirement (MCLE), and respondent will not receive MCLE credit for attending Ethics School (Rules of Proc. of State Bar, rule 3201.);

8. The period of probation must commence on the effective date of the order of the Supreme Court imposing discipline in this matter; and

9. At the expiration of the period of this probation, if respondent has complied with all the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for one year will be satisfied and that suspension will be terminated.

It is also recommended that respondent take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners, MPRE Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, (telephone 319-337-1287) and provide proof of passage to the Office of Probation, within one year after the effective date of the discipline herein. Failure to pass the MPRE within the specified time results in actual suspension by the Review Department, without further hearing, until passage. (But see Cal. Rules of Court, rule 9.10(b), and Rules Proc. of State Bar, rule 321(a)(1) and (3).)

VII. Costs

The court recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: August 13, 2008



LUCY ARMENDARIZ
Judge of the State Bar Court

CERTIFICATE OF SERVICE
[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on August 13, 2008, I deposited a true copy of the following document(s):

DECISION

in a sealed envelope for collection and mailing on that date as follows:

- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

CHARLES HICKS JR
LAW OFC CHARLES HICKS
5122 KATELLA AVE #307
LOS ALAMITOS, CA 90720

- by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

MARIA OROPEZA, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on **August 13, 2008**.



Bernadette C. O. Molina
Case Administrator
State Bar Court