

Filed June 11, 2012

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of)	Case No. 10-C-09383
)	
FREAR STEPHEN SCHMID,)	OPINION AND ORDER
)	
A Member of the State Bar, No. 96089.)	
_____)	

I. SUMMARY

Respondent Frear Stephen Schmid seeks review of a hearing judge's recommendation for probation and a six-month stayed suspension based on two convictions for misdemeanor resisting arrest.¹ Schmid, an attorney for 28 years without discipline, was belligerent and failed to cooperate with law enforcement officers at a sobriety checkpoint. His conduct led to the convictions in 2009.

Schmid contends that neither the convictions nor the facts and circumstances surrounding them warrant any discipline. If discipline is imposed, however, he requests no more than a public reproof. Schmid also challenges the hearing judge's evidentiary rulings, certain probation conditions, and the costs award. The Office of the Chief Trial Counsel of the State Bar (State Bar) asks us to affirm the hearing judge's decision.

After independent review of the record (Cal. Rules of Court, rule 9.12), we conclude that Schmid should be publicly reproofed with conditions. We have assigned greater mitigating weight to Schmid's lengthy discipline-free practice than the hearing judge did and find that he

¹ Schmid was convicted of violating Penal Code section 148, subdivision (a)(1), which provides: "(a)(1) Every person who willfully resists, delays, or obstructs any . . . peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment . . . shall be punished by [fine or imprisonment in county jail not to exceed one year]."

does not lack insight into his misconduct. Under guiding case authorities, a public reproof is sufficient to protect the public, the courts, and the legal profession.

II. FACTUAL FINDINGS

The hearing judge's findings of fact are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A).) We adopt these findings as summarized below, adding relevant facts from the record.

On July 24, 2009, the Petaluma Police Department conducted a Driving Under the Influence (DUI) and driver's license checkpoint. Schmid encountered the checkpoint on his way home from work. He testified that he believes sobriety checkpoints generally impose intrusive government restraints on individuals and that this one was designed to impound the vehicles of undocumented individuals who live in the area and drive without a license.

Schmid first spoke to Officer Arthur Farinha, who advised him about the checkpoint's purpose and asked to see his driver's license. Schmid became agitated and loudly replied, "Fuck off, I'm not showing you shit." Schmid also called Officer Farinha a "fucking moron," and a "Nazi prick." Schmid denied that he made these statements or refused to produce his license.

Officer Farinha then directed Schmid to the evaluation area in a nearby parking lot. Another officer, David Gilman, further waved Schmid toward the evaluation area. Schmid replied, "I need to stop first, asshole," slowed, and then quickly accelerated before screeching to an abrupt stop after "bottoming out" his vehicle on the pavement. Schmid denied driving erratically but admits calling the officer an "asshole."

Schmid exited his vehicle, leaving the door open, and walked rapidly toward Officer Gilman. He put his hand inside his jacket as he approached. Following officer safety procedures, Officer Gilman reached for his weapon and ordered Schmid to remove his hand from his jacket. Schmid kept walking toward the officer, and said: "What, are you going to shoot

me? Fucking shoot me.” Officer Gilman again told Schmid to remove his hand from his jacket. Schmid then complied, with his wallet in hand. Schmid walked quickly toward Officer Gilman, aggressively removed his license from the wallet and held it out to the officer, stating, “Here’s my fucking license.” Schmid admitted making this statement to Officer Gilman, but denied the others.

Based on Schmid’s escalating aggression, Officer Gilman took hold of his arm. Schmid resisted and Officer Gilman used a leg sweep maneuver to take him to the ground. Other officers at the scene helped handcuff and subdue Schmid, who was agitated, moving around, and yelling. Ultimately, the officers put him in maximum restraints and arrested him. During the confrontation, Schmid cut his forehead and claims that Officer Gilman “manhandled” him by unexpectedly throwing him to the ground.

Schmid asserts that he acted within his legal rights at the checkpoint although he admits to using some profanity. The hearing judge found that his recollection of events was not credible when compared with the officers and concluded that Schmid had yelled profanities toward at least two officers, drove faster than normal through the checkpoint, and “bottomed out” his vehicle before screeching to a stop.

Schmid was charged with misdemeanor violations of Penal Code sections 243, subdivision (b) (battery on Officer Gilman) and 148, subdivision (a)(1) (resisting, delaying or obstructing peace officer). In December 2009, a jury found him guilty of resisting arrest but was unable to reach a verdict on the battery charge. Rather than face another trial, Schmid pled guilty to a second count of resisting arrest and the battery charge was dismissed. The criminal court imposed a 36-month conditional sentence, ordered Schmid to pay \$1,500 in fines and fees, complete 15 hours of volunteer service, and serve 15 days in jail with credit for one day. Schmid was referred to work release to serve the remaining 14 days.

III. SCHMID’S EVIDENTIARY, CONSTITUTIONAL AND NOTICE CHALLENGES

A. The Hearing Judge’s Evidentiary Rulings Were Correct

Schmid contends he could not adequately present his case because the hearing judge made several erroneous evidentiary rulings that either limited his evidence or admitted irrelevant evidence. This contention lacks merit.

The hearing judge has broad discretion to determine the admissibility and relevance of evidence. (*In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, 499.) To prevail on a claim of error, Schmid must show abuse of discretion and *actual* prejudice resulting from the rulings. (*In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 241 [absent actual prejudice, party not entitled to relief from hearing judge’s evidentiary ruling].) Schmid’s general assertion that he was prevented from “putting on his case” does not meet these requirements.

B. Schmid’s Challenge to Law Enforcement Is Not Constitutionally Protected

Schmid argues that his conduct does not warrant discipline because verbally challenging law enforcement officers is constitutionally protected. He told the hearing judge: “I don’t think I should be punished for using swear words.” His argument is misplaced – Schmid did far more than use profanity. He acted in a threatening manner toward the officers and created a dangerous situation for himself and others. While the First Amendment may protect Schmid’s “verbal criticism and challenge directed at police officers” (*City of Houston, Texas v. Hill* (1987) 482 U.S. 451, 461), it does not protect his aggressive behavior, erratic and unsafe driving, belligerent attitude, and physical resistance to the officers. (See *United States v. O’Brien* (1968) 391 U.S. 367, 376 [discussing limits of constitutionally protected “speech” activity].)

C. Schmid Had Adequate Notice that his Misconduct Could Result in Discipline

We reject Schmid’s claim that he had no notice that his misconduct could result in attorney discipline. Business and Professions Code section 6068, subdivision (a) requires an attorney to “support the Constitution and laws of the United States and of this state.” Also, the Supreme Court has held that “ ‘[t]he other misconduct warranting discipline’ standard permits discipline of attorneys for misconduct not amounting to moral turpitude as an exercise of our inherent power to control the practice of law to protect the profession and the public. [Citations.]” (*In re Kelley* (1990) 52 Cal.3d 487, 494; see also Rules Proc. of State Bar, tit IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 3.4² [conviction of crime that does not involve moral turpitude but involves other misconduct warranting discipline shall result in sanction].)

IV. LEVEL OF DISCIPLINE

We determine the appropriate discipline in light of all relevant circumstances, including any factors in aggravation or mitigation. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) The State Bar must establish aggravating circumstances by clear and convincing evidence, while Schmid has the same burden to prove mitigating circumstances. (Std. 1.2(b) and (e).) We find one significant factor in mitigation and none in aggravation.

A. Twenty-Eight Years of Discipline-Free Practice Is Significant Mitigation

Schmid was admitted to the Bar in 1980 and had practiced law for 28 years without discipline when he was arrested. This lengthy period significantly mitigates his misconduct. (Std. 1.2(e)(i); *Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [significant mitigation for over 10 years of discipline-free practice]; *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 49 [significant mitigation for 17 years of discipline-free practice].)

² Unless otherwise noted, all further references to “standard(s)” are to this source.

B. State Bar Did Not Prove Schmid Lacks Insight or Remorse as Aggravation

The hearing judge found, and the State Bar contends, that Schmid's misconduct is aggravated by his lack of insight or remorse. (Std. 1.2(b)(v).) We find that the State Bar did not establish this by clear and convincing evidence.

Schmid admits in his opening brief on review that he was "belligerent and aggressive" at the checkpoint, and expressed insight into his misconduct. He wrote that he "sincerely regrets the way the events unfolded that day and in retrospect clearly would have done numerous things differently, but nonetheless . . . this was an isolated event in over 30 years of practice" He also testified at trial: "I regret the whole thing. There's no question about that. In looking back on it, I would do it differently I'm not going to try and lie, or change myself to try and get away with something here. So I'm willing to suffer the consequences, because I have to." Given these statements to the hearing department and this court, we cannot say that Schmid lacks insight as a factor in aggravation.

C. Schmid's Misconduct Warrants Public Reproval

Standard 3.4 provides that conviction of a crime involving misconduct warrants discipline that appropriately reflects the nature and extent of the misconduct. The discipline system is responsible for preserving the integrity of the legal profession as well as public protection. (*In the Matter of Burns* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 406, 416; std. 1.3.) Schmid's aggression toward the officers and disregard for public safety violated that integrity and exhibited his disrespect for law enforcement authority.

Schmid attacks the hearing judge's factual findings that he was overly aggressive at the checkpoint, claiming that the officers' testimony about him "was not credible and truthful." We reject his claim because we give great weight to the hearing judge's credibility findings, particularly since other officers at the scene corroborated certain aspects of Farinha's and

Gilman's accounts. (Rules Proc. of State Bar, rule 5.155(A); *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 280 [great deference given to hearing judge's credibility determinations because judge saw and heard witnesses testify].)

In sum, we find that Schmid engaged in an isolated incident of misconduct toward law enforcement officers. At the time, he had been practicing law without discipline for 28 years and was not under the influence of alcohol or other substance. However, his unreasonable and aggressive conduct at the checkpoint created potential harm to himself, the officers, and the public. Moreover, it reflects poorly on his judgment and fitness to practice and on the legal profession in general. Therefore, public discipline is warranted.

The hearing judge relied on *In the Matter of Stewart* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 52 to support her recommendation for a stayed suspension and probation. We do not find *Stewart* to be analogous to Schmid's case. In *Stewart*, we recommended a 60-day actual suspension subject to a two-year stayed suspension and two years' probation where the attorney was under the influence of alcohol and had been convicted of a more serious offense – misdemeanor battery on a police officer. That altercation caused cuts and bruises to the officer, and the case was aggravated by Stewart's multiple acts of wrongdoing, indifference to his misconduct, and a prior record of discipline. Here, Schmid committed less serious crimes, did not physically harm the officers, and has significant mitigation with no factors in aggravation.

We consider *In re Kelley*, *supra*, 52 Cal.3d 487 to be instructive as it is more comparable to Schmid's circumstances. Kelley was twice convicted of drunk driving following two arrests in a 31-month period. The second violation occurred while she was on probation for the first conviction. Kelley was agitated and uncooperative with law enforcement during her arrest. The Supreme Court found that this conduct was disrespectful to the legal system. (*Id.* at p. 495.) Kelley's mitigating factors of no prior record, community service, and cooperation warranted

“relatively minimal discipline” even though her crimes “were serious and involved a threat of harm to the public.” (*Id. at* p. 498.) The Supreme Court concluded that a public reproof was “sufficient to protect the public from the threat of future professional misconduct.” (*Ibid.*)

As always, our focus is to determine the discipline that will: (1) protect the public, the courts, and the legal profession; (2) maintain high professional standards; and (3) preserve public confidence in the profession. (Std. 1.3.) We are also mindful that attorney discipline is not intended as punishment for criminal wrongdoing – that is left to the criminal courts. Based on Schmid’s lengthy discipline-free practice and guided by cases in this and other jurisdictions, we conclude that a public reproof will adequately meet the goals of attorney discipline. (See *In the Matter of Buckley* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 201 [public reproof for misdemeanor disorderly conduct of soliciting lewd act]; *In the Matter of Thomason* (S.C. 1983) 304 S.E.2d 821 [public reprimand for resisting arrest, public drunkenness, and disorderly conduct]; *In the Matter of McFadden* (Ind. 2000) 729 N.E.2d 137 [public reprimand for deputy county prosecutor after conviction for public intoxication].)

V. ORDER

Frear Stephen Schmid is ordered publicly reproofed, which will be effective 15 days after service of this opinion and order. (Rules Proc. of State Bar, rule 5.127(A).)

Further, Schmid must comply with specified conditions attached to the public reproof. (Cal. Rules of Court, rule 9.19; Rules Proc. of State Bar, rule 5.128.) Failure to comply with any condition may constitute cause for a separate proceeding for willful breach of rule 1-110 of the Rules of Professional Conduct of the State Bar of California.

Schmid is ordered to comply with the following conditions for a period of one year following the effective date of this order:

1. He must comply with the provisions of the State Bar Act and the Rules of Professional Conduct.

2. Within 30 days after the effective date of this public reproof, he must contact the Office of Probation and schedule a meeting with a probation deputy to discuss these conditions attached to his public reproof. Upon direction of the Office of Probation, he must meet with a probation deputy either in-person or by telephone. During the one-year period in which these conditions are in effect (reproof period), he must promptly meet with probation deputies as directed and upon request.
3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.
4. He must submit written quarterly reports to the Office of Probation on January 10, April 10, July 10, and October 10 of his reproof period. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his reproof during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the reproof period and no later than the last day of the reproof period.
5. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.
6. Within one year of the effective date of this public reproof, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School.³

VI. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment. As detailed below, we reject Schmid's arguments that imposing costs is unconstitutional.

³ Schmid asserts that he should not have to attend State Bar Ethics School because it does not relate to his misconduct. We disagree. The ethics school is required in "all dispositions or decisions imposing discipline." (Rules Proc. of State Bar, rule 5.135.)

Schmid contends that imposing costs violates equal protection. We disagree. Section 6086.10 awards the State Bar costs in all cases where a public reproof or greater level of discipline is required. Since the statute provides for assessment of costs against the *State Bar* in case of a complete exoneration of an accused attorney, it is neutral in its application and does not violate equal protection. (*In the Matter of Stewart, supra*, 3 Cal. State Bar Ct. Rptr. at p. 59.)

Schmid also claims that imposing costs violates due process. We disagree. Section 6086.10 provides that: “Any order imposing a public reproof on a member of the State Bar shall include a direction that the member shall pay costs.” (*In the Matter of Stewart, supra*, 3 Cal. State Bar Ct. Rptr. at p. 59.) Therefore, we find that imposing costs is mandated and does not violate due process.

Finally, Schmid asserts that imposing costs infringes on his right to petition and to access the courts. An incidental restriction on an attorney’s “right to petition as a result of the financial burden” does not violate the First Amendment where it is “justifiable and narrowly tailored” to promote an important government interest. (*Mejia v. City of Los Angeles* (2007) 156 Cal.App.4th 151, 163 [attorney fees award under Code Civ. Proc., § 1021.5 did not impermissibly infringe on party’s First Amendment petitioning right].) Discipline costs are such an incidental restriction that are imposed to support public protection in attorney discipline matters.

PURCELL, J.

WE CONCUR:

REMKE, P. J.

EPSTEIN, J.