

**STATE BAR COURT
REVIEW DEPARTMENT**

In the Matter of

KENNETH LAWRENCE CARR

A Member of the State Bar

[No. 87-C-17557]

Filed December 12, 1991

SUMMARY

A hearing panel of the former, volunteer State Bar Court recommended that no discipline be imposed against an attorney as a result of his conviction for driving under the influence of alcohol and/or drugs. The recommendation was based on a stipulation of the parties that the facts and circumstances surrounding the conviction did not involve moral turpitude and the hearing panel's conclusion, after considering the evidence presented at trial, that the State Bar failed to prove that the facts and circumstances involved other misconduct warranting discipline. (Donn Dimichele, Sally Rader, Hearing Referees.)

The State Bar examiner sought review, contending that the Supreme Court opinion in the attorney's prior discipline case, which resulted from two prior criminal convictions for the same offense, established that a conviction for driving under the influence on its face involves other misconduct warranting discipline. The review department rejected the examiner's contention, holding that culpability for professional misconduct is established, if at all, by an examination of the facts and circumstances surrounding the attorney's present conviction. Further, the review department concluded that the facts and circumstances surrounding the present conviction, which demonstrated that the attorney drove his car after taking legal medications which he did not know, nor reasonably should have known, would impair his driving ability, and after unexpectedly leaving his girlfriend's residence, did not involve moral turpitude or other misconduct warranting discipline. Accordingly, the department adopted the hearing panel's decision and dismissed the proceeding.

COUNSEL FOR PARTIES

For Office of Trials: William F. Stralka

For Respondent: Kenneth L. Carr, in pro. per.

HEADNOTES

- [1 a, b] **1511 Conviction Matters—Nature of Conviction—Driving Under the Influence**
 1699 Conviction Cases—Miscellaneous Issues
A conviction for driving under the influence is not professional misconduct on its face; whether such a conviction involves misconduct warranting discipline depends on consideration of all the facts and circumstances.
- [2] **139 Procedure—Miscellaneous**
 191 Effect/Relationship of Other Proceedings
 1699 Conviction Cases—Miscellaneous Issues
Where the Supreme Court's order referring a conviction matter to the State Bar required the State Bar Court to determine whether the conviction involved misconduct warranting discipline, the order demonstrated that the attorney's conviction alone did not establish that the attorney was culpable of professional misconduct.
- [3] **130 Procedure—Procedure on Review**
 135 Procedure—Rules of Procedure
 166 Independent Review of Record
The review department's inquiry into a matter does not end when it determines that the arguments of the party seeking review are unpersuasive. In all cases brought before it, the review department must independently review the record. In so doing, the review department accords great weight to findings of fact made by the hearing department which resolve testimonial issues. However, the review department has the authority to make findings, conclusions and recommendations that differ from those made by the hearing department. Moreover, the issues raised or addressed by the parties on review do not limit the scope of the issues to be resolved by the review department. (Rule 453, Trans. Rules Proc. of State Bar.)
- [4 a, b] **1511 Conviction Matters—Nature of Conviction—Driving Under the Influence**
 1527 Conviction Matters—Moral Turpitude—Not Found
Respondent's conviction for driving under the influence of alcohol and/or drugs did not involve moral turpitude, where the facts and circumstances surrounding the conviction demonstrated that respondent ingested legal medications that he did not know, nor reasonably should have known, would impair his driving ability, and thereafter unexpectedly drove his car.
- [5 a, b] **1511 Conviction Matters—Nature of Conviction—Driving Under the Influence**
 1535 Conviction Matters—Other Misconduct Warranting Discipline—Not Found
Although the circumstances of an attorney's ingestion of medications may not be a defense to the criminal charge of driving under the influence, they are relevant to whether professional discipline is necessary for the protection of the public, courts and legal profession. Where those circumstances demonstrated that the attorney ingested legal medications that he did not know, nor reasonably should have known, would impair his driving ability and thereafter unexpectedly drove his car, they did not indicate that the attorney's criminal violation demeaned the integrity of the legal profession or constituted a breach of the attorney's responsibility to society, other than any criminal violation would.

- [6 a, b] **1511 Conviction Matters—Nature of Conviction—Driving Under the Influence**
1535 Conviction Matters—Other Misconduct Warranting Discipline—Not Found
1691 Conviction Cases—Record in Criminal Proceeding

An attorney's conviction is conclusive proof, for disciplinary purposes, that the attorney committed the crime for which the attorney was convicted. However, California's driving under the influence laws do not prohibit drinking or ingestion of drugs and driving. Rather, they prohibit driving under the influence of alcohol or drugs and/or driving with a specified blood alcohol content. Thus, the mere fact that an attorney ingested legal medications and then drove a vehicle did not indicate that the attorney's conduct demeaned the integrity of the profession or constituted a breach of the attorney's responsibility to society.

- [7 a-c] **1535 Conviction Matters—Other Misconduct Warranting Discipline—Not Found**

Professional discipline following an attorney's criminal conviction has been held to be warranted where the circumstances surrounding the attorney's criminal conduct, though not involving moral turpitude, closely paralleled the duties of a practicing attorney. Where an attorney's activities leading to the conviction were of a personal nature and not the kind of activities that an attorney would likely confront in the ordinary course of the attorney's duties, and the attorney's testimony did not give rise to doubt that the attorney's advice to clients in similar circumstances would be sound, no misconduct warranting discipline was involved in the conviction.

- [8] **191 Effect/Relationship of Other Proceedings**
204.90 Culpability—General Substantive Issues

- 1535 Conviction Matters—Other Misconduct Warranting Discipline—Not Found**

A nexus between an attorney's criminal misconduct and the practice of law might have been established if the State Bar had proven that the attorney's present criminal conduct had violated the terms of the attorney's previously imposed criminal probation.

- [9] **204.90 Culpability—General Substantive Issues**

- 1535 Conviction Matters—Other Misconduct Warranting Discipline—Not Found**

A nexus between an attorney's criminal misconduct and the practice of law may be established where the circumstances surrounding the attorney's conviction indicate that the attorney has problems with alcohol abuse. However, an attorney's ingestion of normal doses of legal medications for appropriate symptoms did not demonstrate a substance abuse problem.

ADDITIONAL ANALYSIS

[None.]

OPINION

NORIAN, J.:

We review the recommendation of a hearing panel of the former volunteer State Bar Court that no discipline be imposed against respondent, Kenneth Lawrence Carr, as a result of his 1987 conviction for driving under the influence of alcohol and/or drugs. The recommendation is based on a stipulation of the parties that the facts and circumstances surrounding the conviction did not involve moral turpitude and the hearing panel's conclusion, after considering the evidence presented at trial, that the State Bar failed to prove that the facts and circumstances involved other misconduct warranting discipline. The State Bar examiner sought our review contending that respondent's prior discipline, which resulted from two prior criminal convictions for the same offense, establishes that the present conviction per se involves other misconduct warranting discipline.

After our independent review of the record, we have determined that the examiner's assertions are not persuasive because the Supreme Court's order referring this matter to the State Bar demonstrates that culpability for professional misconduct is established, if at all, by an examination of the facts and circumstances surrounding the present conviction. Further, we conclude that the facts and circumstances surrounding the present conviction, which show that respondent drove his car after taking lawful medications which he did not know would impair his driving ability, and after unexpectedly leaving his girlfriend's residence, do not involve moral turpitude or other misconduct warranting discipline. Accordingly, we find that the hearing panel's decision is supported by the record and applicable law and we adopt the decision, with the minor modifications discussed below, as our own.

BACKGROUND

Respondent was admitted to the practice of law in California in 1976. On February 26, 1985, a four-count misdemeanor criminal complaint was filed against him, alleging that on February 15, 1985, respondent violated: Vehicle Code section 23152, subdivision (a) (driving under the influence of alcohol and drugs), with allegations of two prior convictions for the same offense (a third prior conviction was added to the complaint by amendment); Vehicle Code section 14601.2, subdivision (a) (driving a vehicle with knowledge that driving privilege suspended or revoked for driving under the influence of alcohol or drugs); Vehicle Code section 12500, subdivision (a) (driving a vehicle without holding a driver's license); and Health and Safety Code section 11357, subdivision (a) (possession of hashish). (Exh. 1.) He pleaded no contest in September 1987 to the driving under the influence charge (Veh. Code, § 23152, subd. (a)), and admitted three prior convictions in May 1982, December 1983, and January 1984 for the same offense. (Exh. 1.) The remaining charges were dismissed. (*Ibid.*) Respondent was sentenced to 180 days in jail, with 60 days served in custody and the remaining 120 days in a release program. (*Ibid.*)

The Supreme Court referred the matter to the State Bar for a hearing, report and recommendation as to the discipline to be imposed in the event the State Bar Court concluded respondent's conviction involved moral turpitude or other misconduct warranting discipline. (See Bus. & Prof. Code, § 6102 (e).) Trial in the State Bar Court occurred before a hearing panel of former, volunteer referees.¹ The parties stipulated at trial that respondent's conviction did not involve moral turpitude. (R.T. p. 78.²) The hearing panel's decision recommended that no discipline be imposed based on the conclusion that

1. The hearing panel was to consist of three referees. (Former rule 558, Rules Proc. of State Bar.) However, one became ill prior to trial and was not able to attend. Respondent's objection to proceeding without three referees was properly overruled by the panel. (*In re Morales* (1983) 35 Cal.3d 1, 7.)

2. The record contains reporter's transcripts for proceedings held on June 14, 1989, and August 31, 1989. The case was originally set for trial before a single referee on the June 14 date. At that time, respondent appeared and moved for

appointment of counsel to represent him at State Bar expense, and for appointment of a three-person hearing panel pursuant to rule 558 of the former Rules of Procedure of the State Bar. The referee properly denied the motion for appointment of counsel (*Yokozeki v. State Bar* (1974) 11 Cal.3d 436, 447-448), and granted the request for a three-person panel. (R.T., June 14, 1989, pp. 19-20, 35-40, respectively.) As a result, the matter was continued to the August 31 date. All further references to the reporter's transcript are to the transcript of the proceedings on August 31, 1989.

the State Bar had failed to prove by clear and convincing evidence that the facts and circumstances surrounding respondent's conviction involved other misconduct warranting discipline.

FACTS

The criminal charge against respondent arose from events that occurred on February 15, 1985. (Exh. 1.) Respondent was found asleep in his car by police officers at an intersection in Los Angeles at about 2:15 a.m., with the car engine off. (R.T. pp. 7-10.) He was arrested and taken to the police station. (R.T. pp. 11-12.)

In the hours before his arrest, respondent had been at his girlfriend's residence and had planned to sleep there. (R.T. pp. 52-53.) Some three months prior to his arrest, respondent had been prescribed Valium for pain he suffered as a result of a toboggan accident. (R.T. pp. 46-47.) He did not take the entire prescription at that time and consequently had some left on the night of his arrest. (*Ibid.*) About three hours prior to his arrest, respondent took one 10-milligram pill of Valium because he was upset. (R.T. pp. 52, 59, 73-74.) Respondent knew that Valium was prescribed for "emotional upset." (R.T. p. 82.) Approximately one hour prior to his arrest, he took two to four Excedrin P.M. for a headache. (R.T. pp. 12, 52.) At some point in time after he had taken both medications, respondent's girlfriend asked him to leave, which he did. (R.T. p. 53.)

Respondent left his girlfriend's to drive to his home, which was approximately four miles away, and had traveled about two miles at the time of his arrest. (*Ibid.*) He attributes falling asleep to the combined effect of the Valium and Excedrin. (R.T. p. 75.) Respondent surmised that another motorist must have turned off his vehicle's engine. (R.T. pp. 54-55.) Respondent had not previously known Valium to have any overt effect on him, but he had never taken it in combination with Excedrin P.M., nor did he know that the Excedrin P.M. could cause drowsiness. (R.T. p. 71.) Respondent did not recall whether the Valium bottle had a warning that the drug might cause drowsiness, or that it should not be taken with any other drug. (*Ibid.*) Had respondent known earlier in the evening that he would drive later, he would not

have "taken anything that [he] would have thought would have affected [his] ability to drive." (R.T. p. 47.)

Respondent did not have a valid California driver's license at the time of his arrest, but did have a Nevada driver's license which had expired. (R.T. p. 13.) He did not know at the time of his arrest that the Nevada license had expired because he had not received the expiration notice in the mail. (R.T. p. 15.)

DISCUSSION

[1a] The State Bar examiner requested our review arguing that respondent's prior discipline (*In re Carr* (1988) 46 Cal.3d 1089 [respondent's previous conviction for driving under the influence of alcohol (Veh. Code, § 23152, subd. (a)), with the admission of two prior convictions for the same offense, was other misconduct warranting discipline]), establishes that his present conviction is per se other misconduct warranting discipline. According to the examiner, *In re Carr* stands as notice to all attorneys that a conviction for driving under the influence is professional misconduct on its face. In reply, respondent asserts that the hearing panel's decision is supported by the record and should stand. We conclude that the examiner's arguments are not persuasive.

In re Carr involved respondent's no contest pleas in 1983 and 1984 to separate counts of driving under the influence of alcohol. (*In re Carr, supra*, 46 Cal.3d at p. 1090.) The State Bar Court recommended Carr's suspension from the practice of law after concluding that the facts and circumstances surrounding the convictions did not involve moral turpitude, but did involve other misconduct warranting discipline. (*Ibid.*) The Supreme Court, without a factual discussion, adopted the State Bar Court's recommendation. (*Id.* at p. 1091.) The examiner asserts that by not pursuing a factual discussion, the Court intended, by omission, to warn attorneys that driving under the influence is per se misconduct.

[1b] We find the examiner's analysis of *In re Carr* contradicted by the express conclusion reached by the Court: "This court, after reviewing the entire record and considering all the facts and circum-

stances, has concluded that Carr's conduct did not involve moral turpitude, but did involve other misconduct warranting discipline." (*In re Carr, supra*, 46 Cal.3d at p. 1091, emphasis added.) The Court clearly considered the facts and circumstances surrounding the convictions in reaching its conclusion.

[2] The Supreme Court's order referring the present matter to the State Bar also demonstrates that the conviction alone does not establish that respondent is culpable of professional misconduct. The Court referred this case to the State Bar for a hearing, report, and recommendation as to the discipline to be imposed in the event the State Bar Court determined that the facts and circumstances surrounding respondent's conviction involved moral turpitude or other misconduct warranting discipline. The Court would not have referred this matter to the State Bar for a determination of whether misconduct occurred if respondent's prior conviction per se established misconduct.

In addition, the Supreme Court has indicated that the record of the conviction alone does not establish professional misconduct. "Our order referring the matter to the State Bar demonstrates that the fact of conviction alone does not evidence moral turpitude." (*In re Strick* (1983) 34 Cal.3d 891, 904.) The Court held in *Strick* that charges of unprofessional conduct were not sustained by clear and convincing proof where the only evidence presented regarding the facts and circumstances surrounding a conviction consisted of copies of the criminal judgment and a transcript of the hearing on entry of the plea and sentencing. (*Id.* at p. 905.) For the above reasons, we conclude that the examiner's assertions are not persuasive.

[3] Our inquiry, however, does not end with our determination that the examiner's arguments on review are unpersuasive. Rule 453 of the Transitional Rules of Procedure of the State Bar provides that in all cases brought before it, this review department, like the Supreme Court, must independently review the record. (See *Sands v. State Bar* (1989) 49 Cal.3d 919, 928.) We accord great weight to findings of fact made by the hearing department which resolve testimonial issues. (*In re Bloom* (1987) 44 Cal.3d 128, 134; rule 453(a), Trans. Rules Proc. of State Bar.)

However, the review department has the authority to make findings, conclusions and recommendations that differ from those made by the hearing department. (Rule 453(a), Trans. Rules Proc. of State Bar.) Moreover, the issues raised or addressed by the parties on review do not limit the scope of the issues to be resolved by the review department. (*Ibid.*)

Preliminarily, we note that neither party contends that the hearing panel's findings of facts are not supported by the record. Our review of the record indicates that with two minor exceptions, the findings are well supported and we adopt them as our own. The exceptions are, first, the panel found that respondent had a fight with his girlfriend, became upset and left. (Decision pp. 3, 4.) We find no evidence that respondent had a fight with his girlfriend. Respondent testified that his girlfriend asked him to leave, which he vaguely attributed to the girlfriend having someone come over to give her a ride to work the next day. (R.T. p. 53.) Second, the hearing panel attributed respondent's ingestion of the Valium to his being upset because of the fight with the girlfriend. (Decision p. 3.) Respondent testified that he was mentally upset, without attributing that condition to any particular event. (R.T. p. 73.) These discrepancies in the findings are minor and do not affect the essential findings that respondent ingested medications that he did not expect to impair his driving ability and drove his vehicle after unexpectedly leaving his girlfriend's residence.

[4a] As indicated, the parties stipulated that the facts and circumstances surrounding the crime did not involve moral turpitude. After our independent review of the record, we find no basis for departing from this stipulated legal conclusion.

The examiner was content to rely on the record of the present conviction and *In re Carr, supra*, 46 Cal.3d 1089, to establish that the present conviction involved other misconduct warranting discipline. He did not call any witnesses other than respondent and, except for the record of the conviction, did not present any other admissible evidence of the facts and circumstances surrounding the conviction. In addition, the record of the present conviction is sparse in terms of the surrounding facts and circumstances of the crime. The referee concluded, after

hearing the evidence, that the facts and circumstances did not amount to other misconduct warranting discipline. In reaching that conclusion, the referee applied the legal principles regarding the application of the "other misconduct warranting discipline" standard articulated by the Supreme Court in *In re Rohan* (1978) 21 Cal.3d 195.

Rohan had been convicted of wilfully failing to file his federal income tax return. (*Id.* at p. 198.) The State Bar found Rohan's conviction did not involve moral turpitude, but did involve other misconduct warranting discipline. (*Ibid.*) In a decision consisting of three separate opinions, the Supreme Court unanimously agreed that discipline was warranted. The lead opinion concluded that an attorney's violation of the law which did not involve moral turpitude was subject to State Bar discipline if the violation "demeans the integrity of the legal profession and constitutes a breach of the attorney's responsibility to society." (*In re Rohan, supra*, 21 Cal.3d at p. 204 (lead opn. of Clark, J. and Richardson, J.)) A concurring opinion concluded that discipline was warranted because the circumstances surrounding the conviction reflected on Rohan's fitness to practice law: "In sum, the relationship of the offense to the practice of law, not its seriousness, is the crucial element justifying the imposition of discipline." (*Id.* at p. 205 (conc. opn. of Tobriner, Acting C.J. and Mosk, J.)) A second concurring opinion concluded that discipline was warranted, but disagreed with the lead opinion's formulation of the bases for imposing the discipline. (*Id.* at pp. 206-207 (conc. opn. of Sullivan, J. and Wright, J.))

The referee in the present matter found that the evidence presented indicated that respondent did not expect the Valium and Excedrin he had ingested to impair his driving ability and that respondent drove his car only after unexpectedly leaving his girlfriend's residence. (Decision p. 9.) Applying *In re Rohan, supra*, 21 Cal.3d 195, the referee concluded the respondent's conduct did not demean the integrity of the legal profession and did not amount to a breach of respondent's responsibility to society, except to the extent that any violation of the law would do. (Decision p. 9.) The referee also concluded that there was no relationship between the conviction and the practice of law, again except to the extent any violation of the law would have. (*Ibid.*)

[5a] We agree with the referee's analysis. There is no evidence in the record that indicates respondent was aware one Valium would have an adverse effect on his driving ability, nor is there any evidence to suggest he was aware that Excedrin P.M. would have such an effect. Indeed, respondent had taken Valium before the night of his arrest and had not known the drug to have any overt effect on him. In addition, there is no evidence to suggest that respondent was aware that the medications, taken together, would impair his driving ability. There is also no evidence that either the Valium or Excedrin P.M. containers had any kind of warning regarding the effects the medications would have on a person or his/her driving ability. In addition, at the time he took the medications, respondent had every intention of spending the night at his girlfriend's residence. In short, respondent drove his car after ingesting medications that he did not know would impair his driving ability and after unexpectedly leaving his girlfriend's residence.

[6a] We recognize that respondent's conviction is conclusive proof that he committed the crime for which he was convicted. (*In re Crooks* (1990) 51 Cal.3d 1090, 1097; Bus. & Prof. Code, § 6101, subd. (a).) However, our driving under the influence laws do not prohibit drinking (or in this case, ingestion of drugs) and driving. (See Veh. Code, § 23152.) Rather, they prohibit driving *under the influence* of alcohol or drugs (Veh. Code, § 23152, subd. (a)) and/or driving with a specified blood alcohol content (Veh. Code, § 23152, subd. (b)). A person is "under the influence" when, as a result of drinking or using a drug, his/her physical or mental abilities are impaired to such a degree that he/she no longer has the ability to drive a vehicle with the caution characteristic of a sober person of ordinary prudence, under same or similar circumstances. (CALJIC No. 16.831; *People v. Schoonover* (1970) 5 Cal.App.3d 101, 105-107.) It is not unlawful under these laws to drink and/or use drugs and drive as long as driving ability is not impaired. Thus, the mere fact that respondent ingested the medications and drove his vehicle does not indicate that his conduct demeans the integrity of the profession or constitutes a breach of his responsibility to society.

[5b] Respondent's conviction is conclusive evidence that his driving ability was impaired. However,

the record indicates that he did not have any prior warning that the medications he ingested would have that effect. Although the circumstances of respondent's ingestion of the medications is not a defense to the criminal charge of driving under the influence, they are relevant to whether professional discipline is necessary for the protection of the public, courts and legal profession. The facts and circumstances surrounding respondent's ingestion of the medications and thereafter driving his car indicate to us that this criminal violation does not demean the integrity of the legal profession nor constitute a breach of his responsibility to society, other than any criminal violation would.

[7a] As noted above, one of the concurring opinions in *In re Rohan* found that discipline was warranted in that case because: "The maintenance of clear and accurate financial records and the preparation and filing of timely tax returns closely parallel the duties of a practicing attorney. Petitioner's carelessness in these matters suggests that, for the protection of clients, his practice should be subject to probationary supervision by the State Bar." (*In re Rohan, supra*, 21 Cal.3d at p. 206 (conc. opn. of Tobriner, Acting C.J. and Mosk, J.)) In other cases the Supreme Court has also found that discipline was warranted where the circumstance surrounding the attorney's criminal conduct, though not involving moral turpitude, closely paralleled the duties of a practicing attorney. For example, in *In re Morales, supra*, 35 Cal.3d 1, the attorney had been convicted of 27 misdemeanor offenses involving the failure to withhold or pay certain payroll taxes and unemployment insurance contributions for his employees. (*Id.* at pp. 3-4.) The Court stated: "It is reasonably foreseeable that petitioner's legal advice could be solicited by clients in similar circumstances, and we have grave doubts whether the advice he would offer would be sound in view of petitioner's apparent failure even now to recognize that what he did was not justified simply because no 'excess funds' existed with which to pay the state." (*Id.* at p. 6.)

[7b] In the present case, we do not find the circumstances surrounding respondent's conviction to closely parallel his duties as an attorney. Respondent's activities on the night of his arrest were of a personal nature and not the kind of activi-

ties that an attorney would likely confront in the ordinary course of the attorney's duties. In addition, respondent testified that he would not have taken the medications if he had known earlier in the evening that he would drive later. Respondent's perception of his conduct distinguishes this case from *In re Morales, supra*, 35 Cal.3d 1, and does not indicate that we should have grave doubts that his advice to clients in similar circumstances would be sound.

After the referee's decision in this matter, the Supreme Court decided *In re Kelley* (1990) 52 Cal.3d 487. Kelley had been convicted of driving under the influence of alcohol (Veh. Code, § 23152, subd. (b)), with a prior conviction for the same offense, and of violating the terms of her probation imposed as a result of the first conviction (Pen. Code, § 1203.2). (*Id.* at p. 491.) The prior conviction occurred some 31 months before the second conviction. (*Id.* at pp. 492-493.) The State Bar concluded Kelley's conduct did not involve moral turpitude, but did involve other misconduct warranting discipline, and recommended that discipline be imposed. (*Ibid.*) The Supreme Court adopted the State Bar's disciplinary recommendation with the exception of a probation term related to abstinence from the use of intoxicants. (*Id.* at p. 490.) The Court, citing *In re Rohan, supra*, 21 Cal.3d 195, noted that it had disagreed about the application of the "other misconduct warranting discipline" standard but that disagreement focused on whether the application of the "other misconduct warranting discipline" standard required a nexus between the attorney's misconduct and the practice of law. (*In re Kelley, supra*, 52 Cal.3d at p. 495.) The Court concluded that resolution of that issue was unnecessary because a nexus had been established in *Kelley* in two ways. (*Ibid.*)

[8] First, the Supreme Court concluded that Kelley violated a court order when she violated the conditions of her probation which had been imposed as a result of Kelley's previous driving under the influence conviction. (*Ibid.*) The sparse record in the present matter does not contain any indication that respondent violated any previously imposed criminal probation order. The Supreme Court noted in *In re Carr, supra*, 46 Cal.3d 1089, that as a result of respondent's driving under the influence convictions in 1983 and 1984, the criminal court imposed sen-

tences that included three years probation. (*In re Carr, supra*, 46 Cal.3d at p. 1090.) However, we do not know, on the present record, whether that probation remained in effect at the time of respondent's arrest in February 1985, and if so, the terms and conditions of the probation, and therefore we have no way of knowing whether respondent violated his probation by driving under the influence in the present case.

[9] The second way a nexus had been established in *Kelley* was the Court's conclusion that Kelley's two driving under the influence convictions within a 31-month period indicated problems with alcohol abuse. (*In re Kelley, supra*, 52 Cal.3d at p. 495.) "Her repeated criminal conduct, and the circumstances surrounding it, are indications of alcohol abuse that is adversely affecting petitioner's private life. We cannot and should not sit back and wait until petitioner's alcohol abuse problem begins to affect her practice of law." (*Ibid.*) Although the present conviction is respondent's fourth driving under the influence offense within a relatively short period of time, we cannot conclude on this record that the present conviction indicates a substance abuse problem. Respondent's ingestion of Excedrin P.M. for a headache and one prescription Valium because he was upset do not demonstrate, in our view, a substance abuse problem.

[4b] In conclusion, we do not view the record as clearly and convincingly establishing that the facts and circumstances surrounding respondent's conviction involve either moral turpitude or other misconduct warranting discipline. [6b] We do not find that respondent's operation of his car after ingesting medications that he did not know would impair his driving ability and after unexpectedly leaving his girlfriend's residence to demean the integrity of the legal profession or constitute a breach of respondent's responsibility to society. [7c] We also do not find a nexus between respondent's conduct and the practice of law because the conduct does not closely parallel the duties of a practicing attorney and taking Excedrin P.M. and one Valium does not indicate that respondent has a substance abuse problem.

DISPOSITION

After our independent review of the record, we adopt the hearing panel's conclusion that the State Bar failed to prove by clear and convincing evidence that the facts and circumstances surrounding respondent's conviction involved moral turpitude or other misconduct warranting discipline. Accordingly, we hereby dismiss this proceeding.

We concur:

PEARLMAN, P. J.
STOVITZ, J.