

Filed August 20, 2014

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of) Case No. 09-C-14097
)
HAROLD AUGUSTUS MCDUGALL IV,) OPINION AND ORDER
)
A Member of the State Bar, No. 234972.)
_____)

Respondent Harold Augustus McDougall IV was convicted of a misdemeanor hit-and-run resulting in property damage to another vehicle. We referred his conviction to the hearing department to recommend the discipline to be imposed, if any, if the facts and circumstances surrounding the conviction involved moral turpitude or other misconduct warranting discipline. The hearing judge found no moral turpitude but did find other misconduct warranting discipline, and ordered a public reproof with conditions. McDougall seeks review, arguing that the case be dismissed because the hearing judge committed procedural errors and his conviction does not comprise misconduct warranting discipline. The Office of the Chief Trial Counsel of the State Bar of California (OCTC) supports the hearing judge’s decision. After independent review (Cal. Rules of Court, rule 9.12), we affirm the hearing judge’s order for public reproof with the single condition that McDougall successfully complete the State Bar’s Ethics School.

I. FACTUAL BACKGROUND

McDougall has been a member of the State Bar of California since 2004. On the evening of July 9, 2009, he attended a reception, drank a beer, and later argued with his girlfriend. While driving from the reception on a section of the Pacific Coast Highway in Marina Del Rey, he took

his eyes off the road to read a text message. As a result, he hit the right rear bumper of the car in front of him, which was stopped to allow several pedestrians to cross the street in a well-marked crosswalk. McDougall did not stop, even though he felt the collision and noticed damage to his right side-view mirror. Instead, as observed by police in the vicinity, McDougall drove away at high speed, making three turns on narrow residential streets before the officers who pursued him could stop him.

Both parties presented Los Angeles Police Department Officer James Menkey's testimony by way of the criminal trial transcript. Officer Menkey testified that he was conducting a traffic stop near the collision site. His attention was drawn to the intersection when he "heard a loud bang [which] appeared to be a traffic collision." Menkey observed a Ford Expedition pull over, and "saw a silver BMW speed away from the – that area very quickly." He noticed damage to the BMW's side mirror, right front fender, and door. Officer Menkey got into his vehicle with his partner and pursued the BMW with patrol car lights flashing before McDougall finally stopped. McDougall made several spontaneous statements after he was stopped, including "I guess it was a bad idea to text and drive at the same time" and "I'm not a criminal, you should be out chasing criminals." The officers detained McDougall for investigation of a possible hit-and-run. Initially, they suspected he was driving under the influence after smelling alcohol on his breath. Ultimately, he was arrested for and charged with a misdemeanor hit-and-run resulting in property damage. (Veh. Code, § 20002, subd. (a).)¹

¹ Vehicle Code section 20002, subdivision (a) provides in relevant part: "The driver of any vehicle involved in an accident resulting only in damage to any property, including vehicles, shall immediately stop the vehicle at the nearest location that will not impede traffic or otherwise jeopardize the safety of other motorists. Moving the vehicle in accordance with this subdivision does not affect the question of fault. The driver shall also immediately do either of the following: [¶] (1) Locate and notify the owner . . . of the name and address of the driver and owner of the vehicle involved and . . . present his or her driver's license, and vehicle registration [¶] (2) Leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver"

A jury found McDougall guilty, and the conviction was upheld on appeal. At his sentencing, the criminal court placed him on a two-year summary probation, and ordered him to serve one day in the county jail, complete 50 hours of community service, complete the “M.A.D.D.” (Mothers Against Drunk Driving) program, and pay restitution to the victim, along with more than \$1,400 in fines and fees.

McDougall testified at his disciplinary trial that he failed to stop immediately because he could not find a parking spot. But, when asked about parking lots and other places to stop on Pacific Coast Highway that he had passed by, he vacillated: “I didn’t see any I don’t think.” With respect to finding a place to stop on one of the residential streets he turned onto, he was again irresolute. He testified that he was “about halfway down” and “still hadn’t seen any parking spaces . . . I thought it would be better to, you know, try to find closer parking at a different street . . . Basically I wanted to get a place where I could pull over and inspect the damage and — you know, with a parking place, then walk over to [where the collision occurred] and see if the gentleman with the other car was there and if that’s what had caused the accident.” McDougall admitted he did not tell the police he had been attempting to return to the scene to inspect the damage. Ultimately, he conceded that not stopping immediately after the accident was a “bad choice.”

II. MCDOUGALL’S MISCONDUCT WARRANTS DISCIPLINE

McDougall’s conviction is conclusive proof, for the purpose of attorney discipline, of the elements of the crime. (See Bus. & Prof. Code, § 6101, subds. (a) & (e); *In the Matter of Posthuma* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 813, 820.) As such, his hit-and-run conviction establishes that he did not “immediately stop the vehicle at the nearest location that [would] not impede traffic or otherwise jeopardize the safety of other motorists” (see Veh. Code,

§ 20002, subd. (a)(1), (2)), and did not locate the Ford Expedition's owner or leave his information in a conspicuous place on the car.

We agree with the hearing judge that the facts and circumstances surrounding McDougall's misdemeanor hit-and-run conviction do not involve moral turpitude. Even so, we may still recommend discipline if "other misconduct warranting discipline" surrounds the conviction. (*In re Kelley* (1990) 52 Cal.3d 487, 494-495 [Supreme Court imposes discipline for misconduct not amounting to moral turpitude as exercise of its inherent power to control practice of law and to protect legal profession and public].) Since not every violation of the law by an attorney merits discipline (*id.* at p. 496), we must examine the facts and circumstances surrounding the crime, and not merely rely on a conviction to decide if misconduct is disciplinable. (See *In re Gross* (1983) 33 Cal.3d 561, 566 [misconduct, not conviction, warrants discipline]; *In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581, 589, fn. 6 [whether acts underlying conviction amount to professional misconduct "is a conclusion that can only be reached by an examination of the facts and circumstances surrounding the conviction"].)

We find that the totality of facts and circumstances surrounding McDougall's conviction justifies professional discipline. To begin, he drove in a congested area after drinking alcohol. Then, distracted by a text message, he made the "bad choice" of reading it while driving,² resulting in his running into a car stopped to let pedestrians cross the road and causing damage to his own vehicle. Next, he fled the scene at a high speed down a major highway and then on narrow residential streets. Finally, he bypassed a number of opportunities to stop, only doing so when the police caught up to him. Whatever resolve McDougall may have had, if any, to return

² Though McDougall was not charged, we note that reading a text message while driving is prohibited by Vehicle Code section 23123.5 (added by Stats. 2008, ch. 270, § 2, eff. Jan. 1, 2009).

to the scene of the accident was half-hearted at best.³ It was merely fortuitous that the collision caused only minor property damage since McDougall had no idea if the other driver or the pedestrians at the accident scene had been injured.

To be clear, it is McDougall's conviction taken *together* with the facts and circumstances surrounding it that warrant public discipline. McDougall made a conscious decision to leave the scene of an accident he caused *and* then endangered others when he sped away on residential streets while being pursued by the police. These circumstances reflect poorly on McDougall's judgment and the legal profession. (See *In re Kelley*, *supra*, 52 Cal.3d at pp. 495-496 [public reproof for two drunk-driving convictions where attorney disrespected legal system by committing second offense while on probation for first and had continuing alcohol abuse problem]; see also *In re Flannery* (2002) 47 P.3d 891 [in Oregon discipline case, public reprimand for misdemeanor for intentionally misrepresenting address when renewing driver's license].) By fleeing the accident scene, McDougall placed himself above the serious public policy goals of the hit-and-run statutory provisions — to prevent the driver from leaving the scene of the accident without proper identification, to compel the driver to render necessary assistance to those who may be injured, and to prevent the driver from seeking to avoid civil or criminal liability resulting from the accident. (See 8 Cal.Jur.3d (2003) Automobiles, § 278, citing cases; see also *In re Rohan* (1978) 21 Cal.3d 195, 203 [conscious decision to not file income tax returns “evidences an attitude on the part of the attorney *of placing himself above the law*” (italics added)]; *In the Matter of Burns* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 406,

³ The hearing judge found “it appears that respondent was attempting to return to the scene of the minor, property-damage-only accident.” While this finding is entitled to great weight (Rules Proc. of State Bar, rule 5.155(A)), the evidence does not support an inference that McDougall was trying to return in order to fulfill his legal duties after the collision. His testimony was equivocal on this issue. Moreover, despite the hearing judge's finding, the recommended discipline below was a public reproof, which we affirm. All further references to rules are to the Rules of Procedure of the State Bar unless otherwise noted.

416 [discipline system is responsible for preserving integrity of legal profession as well as protection of public].)

III. NO MERIT TO MCDOUGALL'S PROCEDURAL CHALLENGES

McDougall raises two procedural challenges. He contends: (1) the transcript from his criminal trial was improperly admitted, violating due process; and (2) his motion to dismiss, filed at the conclusion of OCTC's case-in-chief, should have been granted because OCTC improperly relied solely upon the record of conviction. Neither challenge has merit.

A. The Criminal Trial Transcript Was Properly Admitted

Two weeks prior to trial, the parties stipulated to OCTC's list of four exhibits. However, OCTC inadvertently omitted McDougall's criminal trial transcript from that list. Thereafter, McDougall's counsel provided OCTC with his exhibit list, which identified excerpts of the criminal trial transcript, including portions of Officer Menkey's testimony. OCTC advised McDougall that the entire transcript should be admitted and, three days before trial, filed a Supplemental Pretrial Statement listing it as OCTC Exhibit 5.

At the beginning of trial, the hearing judge deemed the Supplemental Pretrial Statement a "motion." McDougall's counsel objected to admission of the full transcript, claiming only that it "contained lots of stuff." But he added that he "had no problem with relying just on the transcripts . . . on the testimony of the officers, the two investigating officers, Mr. McDougall, and . . . some references in the jury instructions." Counsel for McDougall did not claim prejudice or unfair surprise and, in fact, asked that certain excerpts from the criminal trial transcript be admitted at the outset of trial. The hearing judge delayed ruling on the admission of the full transcript until the close of trial. During trial, OCTC and McDougall's counsel referred to the excerpted transcript already in evidence, including parts of Officer Menkey's testimony. When questioning McDougall, OCTC also referred to portions of the criminal trial transcript not

yet in evidence, without objection by McDougall's counsel. At the trial's conclusion, the hearing judge granted OCTC's "motion" to admit the entire transcript. Again, McDougall's counsel neither objected nor asked to continue the hearing to present further evidence or argument.

On review, McDougall argues the trial transcript was prejudicial and admitted in error.⁴ We disagree. To prevail on this claim of error, McDougall must show abuse of discretion and *actual* prejudice resulting from the rulings. (*In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, 499 [hearing judge has broad discretion to determine admissibility of evidence]; *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].) McDougall was not prejudiced as he possessed the transcript for more than two years before his disciplinary trial, testified he had read it, and relied on excerpts in his defense. Moreover, McDougall waived his objection by offering portions of the transcript and by not protesting at trial about admission of the entire transcript or by seeking a continuance to further address the issue or present rebuttal evidence. (*In the Matter of Kaplan* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 509, 522 [waiver for failure to object to admission of evidence].)

B. The Motion to Dismiss Was Properly Denied

After OCTC concluded its case-in-chief, which consisted entirely of documentary evidence, McDougall made a motion to dismiss pursuant to rule 5.110.⁵ The hearing judge

⁴ Exhibit 5 was not made part of the official record due to OCTC's oversight. Concurrently with the filing of its responsive brief, OCTC made a motion to the review department to augment the record with the exhibit, which we granted.

⁵ This rule provides that "after the party with the burden of proof has rested and before the proceeding is submitted to the Court, the opposing party may make a motion for a determination that the party with the burden of proof has failed to meet its burden The Court must consider and weigh all the evidence introduced and determine credibility."

tentatively denied the motion, and McDougall presented his evidence.⁶ (Rule 5.110(B).) McDougall argues on review that the hearing judge should have granted his motion because OCTC relied *solely* on the record of conviction. In support, McDougall cites *In the Matter of Carr* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 756, 761 (“order referring the . . . matter to the State Bar . . . demonstrates that the conviction alone does not establish that respondent is culpable of professional misconduct”). After reviewing de novo the hearing judge’s denial of McDougall’s motion to dismiss (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 171), we affirm the ruling.

Contrary to McDougall’s assertion, far more than the fact of McDougall’s conviction was in evidence when the hearing judge made his ruling on the motion to dismiss. The record consisted of, among other things, the record of conviction, the superior court appellate division’s opinion, and excerpts of the criminal trial transcript that McDougall’s counsel submitted. The appellate division’s opinion summarized facts from the criminal trial including McDougall’s departure from the accident scene, his testimony that he failed to stop because he did not want to cause traffic congestion, that McDougall could have pulled over at a nearby parking lot or at the curb since traffic was not heavy, and the nature of the police pursuit — that Officer Menkey reached speeds of 65 to 70 miles per hour in his effort to stop McDougall. The transcript excerpts referenced portions of Officer Menkey’s testimony, including that McDougall quickly drove away from the scene, Officer Menkey had to pursue him at 65 to 70 miles per hour, and McDougall told police that texting while driving was a bad idea. Since all of this evidence had already been introduced when OCTC rested its case-in-chief, the hearing judge properly denied McDougall’s motion to dismiss.

⁶ OCTC did not call McDougall as a witness. He testified in his own case and was cross-examined by OCTC.

IV. NO AGGRAVATION OR MITIGATION

The offering party bears the burden of proof for aggravation and mitigation. OCTC must establish aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.5.)⁷ McDougall has the same burden to prove mitigating circumstances. (Std. 1.6.) The hearing judge found no factors in aggravation and we agree. As to mitigation, the judge found two factors that carried nominal weight: no prior record of discipline for five years before the conviction (std. 1.6(a)), and remorse and recognition of wrongdoing for writing an apology letter to the driver of the other vehicle two weeks before the disciplinary trial (std. 1.6(g)). We find that this evidence does not clearly and convincingly establish either factor in mitigation. (See *In the Matter of Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61, 66 [five years of discipline-free practice not entitled to mitigation credit]; *In re Naney* (1990) 51 Cal.3d 186, 196 [seven years without discipline “not a strong mitigating factor”]; *In re Aquino* (1989) 49 Cal.3d. 1122, 1132 [inconclusive evidence of remorse].)

V. DISCIPLINE⁸

Standard 2.12(b) provides that suspension or reproof is appropriate discipline for a conviction of a misdemeanor not involving moral turpitude but involving other misconduct warranting discipline. Beyond the standard, there is little guidance for discipline where an attorney with no prior record is convicted of misdemeanor hit-and-run. We have, however,

⁷ All further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, and reflect the modifications to the standards effective January 1, 2014. Since this case was submitted for ruling in 2014, the new standards apply and do not conflict with the relevant former standards.

⁸ The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession; maintain high professional standards; and preserve public confidence. (Std. 1.1.) We begin our analysis with the standards. (*In re Silverton* (2005) 36 Cal.4th 81, 91.)

recommended suspension for attorneys with prior disciplines who commit a single misdemeanor crime that does not involve moral turpitude and is unrelated to the practice of law.⁹ But suspension is not warranted here because McDougall has not been disciplined before and has no criminal record. We are mindful that it is not our role to impose punishment for McDougall's conviction, as the superior court has taken care of that. Instead, we consider the standards, the case law, and our purpose in imposing discipline — to protect the public and maintain high professional standards. Accordingly, we find that a public reproof with the condition that McDougall successfully complete the State Bar's Ethics School is appropriate discipline in this conviction proceeding.

VI. ORDER

Harold Augustus McDougall IV, is ordered publicly reproofed, to be effective 15 days after service of this opinion and order. (Rule 5.127(A).) He must comply with the specified condition attached to the public reproof. (Cal. Rules of Court, rule 9.19; rule 5.128.) Failure to comply with this 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.

McDougall is ordered to comply with the following condition:

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. (Rule 3201.)

⁹ See, e.g., *In the Matter of Bouyer* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 888 (90-day suspension for misdemeanor conviction for failing to file reports of state employment taxes aggravated by three prior disciplines); *In the Matter of Jensen* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 283 (120-day suspension for misdemeanor child endangerment though conviction not related to practice of law, child not injured, and no substance abuse involved; aggravated by two prior disciplines).

Costs are 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.

PURCELL, J.

WE CONCUR:

EPSTEIN, Acting P. J.

McELROY, J.*

* Hearing Judge of the State Bar Court, assigned by the Presiding Judge pursuant to rule 5.155(F) of the Rules of Procedure of the State Bar.