PUBLIC MATTER—NOT DESIGNATED FOR PUBLICATION

Filed January 2, 2024

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	12-C-14836
	)	
SPENCER FREEMAN SMITH,	)	
	)	OPINION AND ORDER
State Bar No. 236587.	)	
	)	

On May 15, 2012, at approximately 11:30 p.m., Spencer Freeman Smith was driving from San Francisco to San Ramon when he struck Bo Hu[1] who was walking or riding in the road with his bicycle. Smith did not stop to render aid or call for help, and Hu died at the scene. On Smith's plea of nolo contendere, he was convicted of felony hit-and-run and misdemeanor vehicular manslaughter.

Disbarment is the presumed sanction for a criminal conviction in which the surrounding facts and circumstances involve moral turpitude, unless the most compelling mitigating circumstances clearly predominate. A hearing judge found that the facts and circumstances surrounding Smith's convictions involved moral turpitude, and because she did not find compelling mitigation, she recommended disbarment.

[1] While the hearing judge referred to the victim by his initials citing potential privacy concerns, we find that the public record is replete with the victim's full name and thus refer to the victim by name.

Smith appeals. He challenges the hearing judge's moral turpitude finding and asserts disbarment is not warranted. On review, he argues that his judgment of conviction is not final, stating that he successfully prevailed on appeal and therefore cannot be subject to discipline in State Bar Court. The Office of Chief Trial Counsel of the State Bar (OCTC) requests that we affirm the disbarment recommendation.

Upon our independent review (Cal. Rules of Court, rule 9.12), we determine the conviction is final, find that the facts and circumstances surrounding Smith's crimes involve moral turpitude, and the mitigation is not predominating or compelling. Given these circumstances, we affirm the disbarment recommendation.

I. FACTUAL BACKGROUND[2]

A. Smith Caused a Fatal Automobile Collision

On the evening of May 15, 2012, at around 11:30 p.m., Smith was driving northbound on Dougherty Road, between Dublin and San Ramon, on a four-lane thoroughfare with two lanes in each direction. During the disciplinary trial, Smith testified that, although he holds a valid California driver's license, he has no vision in his right eye resulting from a disease he suffered in infancy. Due to Smith's monovision, he stated that he cannot see objects to his peripheral right.

While driving that night, Smith struck Hu. Hu weighed 212 pounds and was dressed in a silver jacket and dark-colored pants, and he was either riding or walking in the road with a bicycle which had reflectors on its pedals, front spokes, and one reflector that was rear-facing. The collision occurred where there was a slight curve to the right in the road. Hu was in a

[2] The facts are based on the trial testimony, documentary evidence, and the hearing judge's factual findings, which are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A).)

northbound lane, not using the separate designated bicycle path, which ran parallel to Dougherty Road and approximately 50 feet east of the northbound traffic lanes. The approximate initial point of impact between Hu and Smith's vehicle was the front bumper and grill.

Hu and his bicycle were thrown to the ground. The bicycle's seat was detached from its frame; the rear tire was crushed flat, and the body of the bicycle contorted. Hu landed on the hood and windshield of Smith's car and was later found on the roadway. He suffered severe head and body trauma; Hu was pronounced dead on scene by the responding paramedics.[3]

1. Smith Failed to Stop and Render Aid

After striking Hu with his car, Smith did not stop or call for an ambulance. During the disciplinary trial, he testified that he stopped, exited his car, looked up and down the highway in both directions, but left the scene of the accident and drove home after not seeing anything in the road. The hearing judge rejected Smith's testimony for several reasons. She determined that Smith did not render aid because those facts were conclusively proven by Smith's no contest plea to felony hit-and-run—one element being the failure to stop and render aid. (Bus. & Prof. Code, § 6101, subd. (a) [conviction is conclusive evidence of guilt of the crime].[4]) Next, she found Smith's uncorroborated testimony as not credible and contradictory to the evidence in the criminal record: 1) there were no skid marks on the road; 2) Smith made no such contemporaneous statement when speaking with Dublin Police Lieutenant Daniel McNaughton two days later when he stated that he thought he hit a rock or a deer or something; and 3) no similar argument was raised by Smith's defense counsel during the proceedings of the underlying criminal matter.

[3] Alcohol was present in Hu's system at the time of his death. His blood alcohol concentration measured about .07 or .077.

[4] Further references to "section" are to this source, unless otherwise stated.

2. Smith Was Aware That He Collided with and Severely Injured a Human Being

Smith knew that he had struck Hu. This knowledge is conclusively proven by the conviction itself, because the elements for violating Vehicle Code section 20001, subdivision (a) (leaving scene of accident resulting in injury or death, "hit-and-run"), requires either actual knowledge of one's involvement in an accident that injured another, or constructive knowledge that, from the nature of the accident, it was probable another person had been injured. (*People v. Holford* (1965) 63 Cal.2d 74, 80 ["[C]riminal liability attaches to a driver who knowingly leaves the scene of an accident if he actually knew of the injury or if he knew that the accident was of such a nature that one would reasonably anticipate that it resulted in injury to a person"].)

The record also supports that Smith had actual knowledge of having seriously injured Hu based on the severity and location of the damages to the vehicle. The severity and nature of the damage to Smith's car makes it unreasonable for one to assume that the collision involved a rock or deer. There was a vertical tire mark on the front center of the car; a dent through the grill and front spoiler; the windshield sustained major damage—it was shattered and there was a six-to-eight-inch hole in the bottom center. The impact of the collision caused parts of Smith's car to break off into the roadway, including the Mercedes emblem from the front center of the car. The identifying markings on these parts would later help authorities find Smith.

The damages extended beyond the exterior of the car. Pieces of glass shattered inside Smith's car, and Hu's hair was embedded in the dashboard and speaker. Extensive damage to the windshield would have been apparent immediately to the driver of the car. Further, if Smith had stopped after impact and looked around to see if anyone was in the road, as he testified, he would have discovered the damage to the exterior, including the grill and hood.

Also, the location of the windshield damage was roughly straight on, front and center. It is unreasonable for Smith, after hitting a 212-pound man wearing a silver jacket and a bicycle with reflectors on it, to conclude it was a rock or a deer. The hearing judge found that Smith's monovision condition would not affect the ability to identify an object directly in front of one's car.[5] The severity of the windshield damage would have made it difficult for any driver to continue driving. Smith drove over four miles to get home and testified that, once he arrived home, he put his substantially damaged car in the garage and went to bed without inspecting the car. The judge did not find this testimony credible. Smith's car was a new 2012 Mercedes Benz with paper plates and custom rims. Smith testified that he only reached out to his insurance carrier the next morning to report that he had hit a rock or deer but did not complete the claim because he thought it may be easier to personally pay for the repairs as he had done so in the past for other car body work. Smith did not provide any corroboration regarding the phone call he allegedly made to his insurance carrier.

Smith still did not contact the authorities even after he arrived home, inspected his car, and had the opportunity to reflect and appreciate what had occurred. Also, two days later, when Lt. McNaughton called Smith to inquire about his car, Smith misleadingly said that he "hit a rock, or possibly a deer, or something."

[5] The hearing judge found that Smith's compromised vision potentially contributed to the fatal collision. Smith testified that while driving he is not able to see his front passenger unless he completely turns to face that person. However, Smith does not present as having a physical disability that interferes with his ability to safely operate a motor vehicle.

B. Smith Violated His Criminal Probation

On September 11, 2015, Smith pleaded nolo contendere by open plea[6] in Alameda County Superior Court to a felony violation of Vehicle Code section 20001, subdivision (a) (leaving scene of accident resulting in injury or death, "hit-and-run"), and a misdemeanor violation of Penal Code section 192, subdivision (c)(2) (vehicular manslaughter). The superior court accepted Smith's open plea and found him guilty of both crimes. On September 25, 2015, the court sentenced Smith to five years' probation and one-year in county jail, with the first 30 days to be served in actual custody and the remainder served on home electronic monitoring. Smith was ordered to obey all laws. On October 9, 2015, the superior court "conditionally reduced" Smith's felony hit-and-run conviction to a misdemeanor upon his filing of a Penal Code section 17, subdivision (b), motion.

In order to start home electronic monitoring, Smith was required to take a drug test administered by the electronic monitoring company, contracted by the court. On October 29, 2015, Smith tested positive for cocaine and its metabolite, which was confirmed on November 5 and reported November 12. On December 15, the District Attorney moved to revoke Smith's probation based on the positive drug test. Smith admitted the probation violation. On February 11, 2016, the superior court "reinstated" Smith's felony conviction due to his probation violation following the positive drug test and ordered him to serve one year in county jail and five years' felony criminal probation. On March 25, 2016, Smith appealed the felony reinstatement. On August 29, 2018, the Court of Appeal found the superior court's act was in excess of jurisdiction and unauthorized by law. The Court of Appeal vacated the superior court's

[6] An "open plea" is one in which there is no plea agreement between the prosecutor and the defendant; rather it is a submission to the court on the issue of guilt and sentencing. (See *People v. Cuevas* (2008) 44 Cal.4th 374, 381, fn. 4.)

October 9, 2015, order that reduced Smith's felony to a misdemeanor and remanded the matter back to the superior court to reconsider Smith's Penal Code section 17, subdivision (b), motion. On December 6, 2019, the superior court's docket entry and minute order stated Smith's criminal case was dropped from the court's calendar. Smith remained on criminal probation until September 25, 2020.

II. STATE BAR COURT PROCEEDINGS AND FINALITY

On December 8, 2015, OCTC submitted its second supplemental transmittal of Smith's conviction records to this court[7] showing that he had been convicted of felony hit-and-run and misdemeanor vehicular manslaughter, crimes that may or may not involve moral turpitude. OCTC's second supplemental transmittal did not reflect finality of Smith's convictions. It did indicate, however, that Smith's felony hit-and-run charge was reduced to a misdemeanor under Penal Code section 17, subdivision (b). We determined that Smith's felony hit-and-run violation was a felony for the purposes of attorney discipline because he pled no contest to the felony violation on September 11, 2015, and was sentenced. Smith's motion to reduce his conviction from a felony to a misdemeanor was granted because of "postconviction proceedings" that occurred on October 9, 2015, and did not impact the felony conviction for purposes of discipline. (§ 6102, subd. (b).) Therefore, on February 1, 2016, we placed Smith on interim suspension from the practice of law effective February 22, 2016, pending final disposition of the conviction proceeding. (§§ 6101, 6102; Cal. Rules of Court, rule 9.10(a); Rules Proc. of State Bar, rule 5.342.)

[7] OCTC submitted its first transmittal of Smith's convictions on March 3, 2015, and a supplemental record on April 9, 2015. The supplemental transmittal showed that Smith withdrew his initial no contest plea on March 20, 2015, therefore invalidating the convictions. OCTC stated in its supplemental transmittal that it would inform the court if Smith was later convicted, which it did on December 8, 2015.

On June 6, 2018, we ordered OCTC to file evidence or a report regarding the status of Smith's convictions, and OCTC reported that his convictions were on appeal before the California Court of Appeal, First District. On March 3, 2020, OCTC submitted evidence of finality regarding Smith's convictions by reporting that the Court of Appeal's opinion and remand in the criminal case was final, and that the case had been dropped from the superior court's calendar. On March 27, 2020, we ordered OCTC to file a supplemental report clarifying the evidence of finality regarding the case being "dropped" from the calendar. On April 9, 2020, OCTC submitted its supplemental report and included a register of actions from the superior court, showing that the court completed its review of remittitur between November 13, 2018, and November 8, 2019, and that Smith was resentenced on January 25, 2019.

After receiving OCTC's supplemental report regarding finality, we found that the matter was final, and we issued an order on May 1, 2020, referring the matter to the Hearing Department to determine whether the facts and circumstances surrounding the convictions involved moral turpitude or other misconduct warranting discipline and, if so, the appropriate level of discipline. (§ 6102, subd. (e).) Smith did not raise any issue regarding finality of his convictions at this time or in response to the Hearing Department's Notice of Hearing on Conviction filed and served on May 7, 2020. Following a trial and posttrial briefing, the hearing judge issued her decision on November 2, 2020. She found that the facts and circumstances surrounding Smith's convictions involved moral turpitude and recommended Smith's disbarment.

Smith filed his request for review on November 30, 2020.[8] Oral argument was held on December 16, 2021. During oral argument, Smith notified the court of a pending appeal and

[8] On June 18, 2021, we ordered this matter abated for 120 days to allow time for Smith to obtain new counsel; we terminated the abatement on October 15.

contested finality; therefore, the matter was not submitted at that time. On December 17, we ordered the parties to submit supplemental briefing regarding the status of the underlying criminal convictions in this matter. Upon expiration of the time for the parties to submit post-oral argument briefing, and pursuant to our December 17, 2021 order, this case was submitted for opinion on February 1, 2022, and we informed the parties we may take judicial notice of court documents regarding Smith's appeal. On February 2, we abated this matter pending resolution of Smith's appeal in the First District Court of Appeal, *People v. Smith*, Case No. A163609, involving post-conviction matters in which Smith sought to reduce his conviction from a felony to a misdemeanor pursuant to Penal Code section 17, subdivision (b).[9] On June 22, 2023, the Court of Appeal issued its opinion in the underlying criminal matter. On August 30, 2023, OCTC filed a report stating Smith had filed a petition for review with the Supreme Court, which was denied on August 30, 2023. On October 12, 2023, his court of appeal case having concluded, we terminated the abatement that was previously ordered, and this case remained as submitted for opinion based on our December 17, 2021 order.[10]

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[9] While the Court of Appeal opinion is unpublished, we cite it here to clarify the procedural position of the case and to show that the issues did not affect matters of culpability or finality in the State Bar Court. It is not cited for its other conclusions of law.

[10] On December 11, 2023, Smith filed a motion entitled "Respondent's Motion to Dismiss for the Hearing Department's Failure to File Its Opinion Within 90 Days After the Matter Was Submitted." The motion raised three reasons for dismissal: that OCTC initiated disciplinary proceedings before his conviction was final; that the hearing was unlawful because his conviction was not final; and that the Review Department violated his due process rights in failing to comply with rule 5.155(E) by not filing its opinion within 90 days after submission. We have considered Smith's motion, OCTC's December 13, 2023 opposition, and Smith's December 18, 2023 reply. As discussed *supra,* we find that the conviction was final when referred to the Hearing Department. The appeal that Smith referred to during oral argument involved post-conviction matters which did not affect finality in the State Bar Court. Further, this opinion will be timely filed within 90 days after submission when the period of abatement is considered.

Smith has not shown that the State Bar Court failed to act appropriately or that he has been denied due process. We find that the motion lacks merit, and it is denied.

III. FACTS AND CIRCUMSTANCES INVOLVE MORAL TURPITUDE

The issue before us is whether the facts and circumstances surrounding Smith's criminal convictions, which were not committed in the practice of law, constitute moral turpitude. We are guided by the Supreme Court's definition of moral turpitude: "a deficiency in any character trait necessary for the practice of law (such as trustworthiness, honesty, fairness, candor, and fidelity to fiduciary duties) or if it involves such a serious breach of a duty owed to another or to society, or such a flagrant disrespect for the law or for societal norms, that knowledge of the attorney's conduct would be likely to undermine public confidence in and respect for the legal profession." (*In re Lesansky* (2001) 25 Cal.4th 11, 16.) We find that the facts and circumstances surrounding Smith's felony and misdemeanor offenses meet this definition of moral turpitude, as discussed below.

In attorney disciplinary proceedings, the record of an attorney's conviction is conclusive evidence of guilt of the crime of which he or she has been convicted. (§ 6101, subd. (a); *In re Gross* (1983) 33 Cal.3d 561, 567.) Thus, Smith's felony hit-and-run and misdemeanor vehicular manslaughter convictions provide conclusive proof that he knew he was involved in a collision that seriously injured a person when he struck Hu with his vehicle and fled the scene without rendering assistance or calling for help. Any finding of moral turpitude must be made after considering the facts and circumstances of the criminal conviction. (§ 6102, subd. (e).) In determining whether the facts and circumstances surrounding Smith's criminal convictions involve moral turpitude, we are not restricted to examining elements of the crime but must look at the whole course of misconduct. (*In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 935.)

First, Smith's conduct represents a serious breach of his duty to society and demonstrates a flagrant disrespect for the law, such that knowledge of his conduct would undermine public

confidence in and respect for the profession. On review, Smith argues that the facts and circumstances here do not establish moral turpitude, by attempting to distinguish the facts of *Alkow*, a 1966 Supreme Court case involving an attorney's misdemeanor vehicular manslaughter where moral turpitude was found. (*In re Alkow* (1966) 64 Cal.2d 838.) Smith contends that, unlike *Alkow*, he had no prior traffic violations, his driver's license was in good standing, and he was not on probation. While *Alkow* is distinguishable from the facts and circumstances in this case, whether Smith previously had a traffic violation or not, he knew or should have known that it was unlawful to hit a pedestrian and flee the scene. Smith should have stopped driving after he hit Hu and either rendered aid or called for help, yet he did neither. Smith made a conscious decision to leave the scene of an accident that he caused without concern for the safety of the person who may have been seriously injured.

Smith claims that he did not know he hit a person, but the hearing judge did not find his testimony credible.[11] These findings are entitled to great weight. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032.) Although our review of the record is independent (Cal. Rules of Court, rule 9.12), we find that the record lacks sufficient evidence for us to contradict the judge's credibility conclusions. The severity and nature of the damage to Smith's car is inconsistent with him hitting "a rock or deer" as he claimed. There was a vertical tire mark on the front and center of the car; a dent through the grill and front spoiler; the windshield was shattered; parts of the car were broken off and left in the roadway; and pieces of glass were shattered inside Smith's car, along with Hu's hair embedded in the dashboard and speaker. After the collision, and once

[11] We affirm the hearing judge's finding that Smith's testimony was not credible when he stated that he stopped, exited his car, and looked up and down the highway in both directions. Smith's testimony is uncorroborated, and the evidence in the record—including a forensic report by a defense expert during Smith's criminal trial—states that there was "no evidence that the [car] stopped short of Hu's rest position after the collision."

Smith inspected his car after arriving home, which was only a few miles away from the scene of the accident, he still did not contact the authorities to notify them of a potentially fatal accident or seriously injured person in the roadway. Thus, we find that Smith's behavior exhibited contempt for the law and disregard for the safety of others, which demonstrates moral turpitude. (*In re Craig* (1938) 12 Cal.2d 93, 97 [moral turpitude is act of baseness, vileness, or depravity in duties owed to others or society in general and is contrary to accepted and customary rule of right and duty between people].)

Even assuming that Smith did not know he hit Hu but, rather, stopped the car and did not notice Hu's body in the roadway as he asserts, we do not consider Smith's belated claim because it would negate the elements of the felony hit-and-run and vehicular manslaughter to which he pled no contest and was convicted of committing. (*In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581, 588 [court may not reach conclusions inconsistent with conclusive effect of attorney's convictions].)

Next, the facts and circumstances surrounding Smith's convictions reveal deficiencies in his honesty and candor. The hearing judge found that Smith was dishonest and misleading when he spoke to Lt. McNaughton two days after the accident and claimed that he hit a rock or possibly a deer. Smith also testified that he only reached out to his insurance carrier the next morning to report that he had hit a rock or deer but did not complete the claim because he decided he would personally pay for the repairs. These facts reveal Smith's attempts to conceal the extent of his misconduct in order to preserve his own interests—such instances of his dishonesty involve moral turpitude. (*In re Glass* (2014) 58 Cal.4th 500, 524 [honesty is absolutely fundamental in the practice of law; without it, the profession is worse than valueless in the place it holds in the administration of justice].) We find that Smith was deceitful when he

spoke with the police and his insurance carrier because, as evidenced in the record, he knew, based on the nature and severity of the damage to his car, that he had hit a human being.

Smith exhibited further contempt for the law by violating his criminal probation just two weeks after it was imposed, when his drug test showed the presence of cocaine and its metabolite in his system. Despite having admitted to violating probation in the superior court, Smith testified during his disciplinary trial that he never consumed cocaine and explained that he admitted to the violation only so he could be released in time for his daughter's birth. The hearing judge rejected Smith's testimony and determined there was clear and convincing evidence in the record, which included the laboratory test results showing the presence of cocaine and its metabolite in Smith's system. Smith did not present any evidence to contradict these findings, and we affirm the judge's determination.

Smith also argues on review that this court may not consider his probation violation in determining moral turpitude because the Court of Appeal vacated the conditional part of the superior court's sentencing order placing him on misdemeanor, as opposed to felony, probation. We reject Smith's argument. The underlying facts in support of Smith's probation violation are relevant to consider in his disciplinary proceeding. (See *In re Kelley* (1990) 52 Cal.3d 487, 495 [finding misconduct warranting discipline based, in part, on the attorney disregarding her probation conditions while driving intoxicated].) Also, when determining moral turpitude, 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*, *supra*, 33 Cal.3d at p. 566 [misconduct, not conviction, warrants discipline].) Smith's failure to fully adhere to his probation terms shows disdain for the law, which demonstrates moral turpitude. (See *In the Matter of Miller* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 110, 115 ["wide ambit of facts

surrounding the commission of a crime is appropriate to consider in a conviction referral proceeding"].)

Smith asserts that the hearing judge improperly relied on Lt. McNaughton's testimony to support her findings, which he argues contained inadmissible hearsay statements. We reject Smith's argument.[12] Under rule 5.104(D) of the Rules of Procedure of the State Bar, "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection will not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." In this case, the police reports from some of the officers who worked with Lt. McNaughton on the investigation were admitted into evidence. And while Smith's counsel may have objected at trial to certain questions asked of Lt. McNaughton, which would have elicited hearsay statements from other officers, the fact those objections were sustained by the judge has no effect on the statements made in the admitted police reports. (See *In the Matter of Pierce* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 382, 388, fn. 5 [declarations admitted into evidence without limitation in lieu of live testimony for all purposes, including for truth of matter asserted].) Without the hearsay evidence and contrary to Smith's argument, the record is replete with sufficient evidence to establish that the facts and circumstances surrounding Smith's felony hit-and-run and misdemeanor vehicular manslaughter convictions reveal moral turpitude.

[12] Having independently reviewed all arguments set forth by Smith, those not specifically addressed have been considered and rejected as without merit.

IV. AGGRAVATION AND MITIGATION

Standard 1.5 of the Standards for Attorney Sanctions for Professional Misconduct[13] requires OCTC to establish aggravating circumstances by clear and convincing evidence.[14] Standard 1.6 requires Smith to meet the same burden to prove mitigation.

A. Aggravation

1. Indifference (Std. 1.5(k))

The hearing judge found moderate weight in aggravation for Smith's lack of remorse and acceptance of responsibility. She determined that, despite pleading no-contest to felony hit-and-run and misdemeanor vehicular manslaughter, Smith testified that he did stop and maintained his doubt whether he was responsible for Hu's death, which she determined was not credible. Such findings are entitled to great weight. (*McKnight v. State Bar*, *supra*, 53 Cal.3d at p. 1032 [hearing judge best suited to resolve credibility having observed and assessed witnesses' demeanor and veracity firsthand].) We agree and assign moderate weight.

OCTC argues that Smith's indifference warrants substantial weight by asserting that Smith was frequently non-responsive and "repeatedly complained" during his testimony that the State Bar, District Attorney, judges, and police treated him unfairly. However, during his criminal trial, Smith admitted to culpability by entering into an open plea of no contest to the charges. The record also shows that he fully paid restitution to the victim's family. Smith has a right to defend himself against these serious charges, which is what he has done through these

[13] All further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

[14] Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

proceedings. (See *In re Morse* (1995) 11 Cal.4th 184, 209 [attorney accused of misconduct has right to defend himself vigorously].) Thus, we decline to assign additional aggravating weight.

2. Prior Record of Discipline (Std. 1.5(a))

The hearing judge assigned moderate weight to Smith's one prior record of discipline. Smith argues that, since his prior record occurred after the misconduct in this case began, the weight assigned, if any, should be significantly diminished. OCTC requests that we affirm the judge's finding. On May 16, 2019, Smith received a six-month actual suspension for his failure to comply with California Rules of Court, rule 9.20, as a condition of his interim suspension we ordered in February 2016. Like the judge, we acknowledge that the underlying misconduct here preceded the rule 9.20 violation. We view the timing of Smith's prior disciplinary record as a reason to assign less than substantial weight; however, it is still relevant to the level of discipline and reflects on Smith's rehabilitation ability. (See *Lewis v. State Bar* (1973) 9 Cal.3d 704, 715; *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619.) Under these circumstances, we conclude the judge correctly found Smith's prior record of discipline warrants moderate weight in aggravation.

3. No Other Aggravation Warranted

The hearing judge declined to find aggravation for concealment (std. 1.5(f)) based on Smith not producing his cell phone or clothes to law enforcement. She found that OCTC failed to meet its burden of proof showing that Smith lied or concealed evidence from the authorities. OCTC does not challenge this finding on review. We affirm this finding.

The hearing judge also found no additional aggravation for multiple acts (std. 1.5(b)), significant harm (std. 1.5(j)), or vulnerability of the victim (std. 1.5(n)), because she determined these factors were considered in the culpability findings based on the acts involving moral turpitude surrounding Smith's misconduct. OCTC argues that the judge should have found that

the factors and circumstances surrounding Smith's convictions involved significant harm and vulnerability as aggravating factors, in reliance on *In the Matter of Peters* (Review Dept. 2018) 5 Cal. State Bar Ct. Rptr. 536. We decline to give these circumstances additional independent weight in aggravation because they were considered in determining culpability for Smith's misconduct involving the facts and circumstances surrounding his convictions. This court has routinely held that the same conduct should not be relied upon in both aggravation and culpability. (*In the Matter of Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61, 68 [where factual finding used for culpability, improper to consider them in aggravation]; see also *In the Matter of Guillory* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 402, 409, fn. 13 [improper to consider factual findings in aggravation relied upon in finding culpability]; *In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 132-133 [hearing judge erred in considering same conduct in finding moral turpitude as an aggravating factor].)

B. Mitigation

1. Candor and Cooperation (Std. 1.6(e))

We agree with the hearing judge that Smith is entitled to limited mitigation credit for his cooperation with the State Bar by entering into a narrow stipulation encompassing the procedural history of the criminal conviction and agreeing that the elements of the convicted offenses have been conclusively proven. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive mitigation weight for admission of culpability and facts].)

2. No Prior Record of Discipline (Std. 1.6(a))

On review, Smith attempts to argue he is entitled to substantial mitigation for 10 years of discipline-free practice prior to his criminal convictions, relying on *Hawes v. State Bar* (1990) 51 Cal.3d 587, 596. Standard 1.6(a) explicitly states mitigation may be established for "absence of any prior record of discipline." The attorney in *Hawes* did not have a prior record of

discipline over his 10 years of practice before his misconduct. Because this is Smith's second disciplinary case, his reliance on *Hawes* is misplaced. As discussed above, we assigned moderate aggravation for Smith's first disciplinary case, which involved his failure to adhere to rule 9.20. Thus, Smith is not entitled to mitigation under standard 1.6(a).

V. DISBARMENT IS THE APPROPRIATE DISCIPLINE

Our role is not to punish Smith for his crimes—the superior court has already done so—but to recommend professional discipline. (*In re Brown* (1995) 12 Cal.4th 205, 217 ["aim of attorney discipline is not punishment or retribution; rather, attorney discipline is imposed to protect the public, to promote confidence in the legal system, and to maintain high professional standards"]; std. 1.1.) We do so by following the standards whenever possible and balancing all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) At the time of the misconduct, disbarment was the presumed sanction for a conviction in which the surrounding facts and circumstances involve moral turpitude, unless the "most compelling mitigating circumstances clearly predominate[.]" (Std. 3.2 (effective, Jan. 1, 1986 [renumbered and revised Standard 2.15, eff. July 1, 2014]).)[15]

[15] This version of the applicable standard applied at the time of the hearing judge's decision. The standards were revised and renumbered on July 1, 2015, to provide that disbarment is the presumed sanction for a final felony conviction in which the facts and circumstances of the offense involved moral turpitude. (See Std. 2.15(b).) On May 17, 2019, standard 2.15 was revised to provide that *summary* disbarment is the sanction for a final felony conviction, inter alia, where the facts and circumstances of the offense involved moral turpitude. (See Std. 2.15(a), italics added.) Because the revised standard is based on revisions made to Business and Professions Code section 6102, subdivision (c), effective in 2019 and is not retroactive, we apply the standard that existed at the time the misconduct occurred (see *In the Matter of Jebbia* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 51, 55 [changes to § 6102 may not be applied retroactively to attorney's criminal conviction that predated those changes].)

We agree with the hearing judge and OCTC that no recent relevant case law exists that is substantially comparable to this case. The judge found some guidance from *Alkow v. State Bar, supra,* 64 Cal.2d 838 and *In the Matter of Guillory, supra,* 5 Cal. State Bar Ct. Rptr. 402. OCTC also requests that we consider *In the Matter of Peters, supra,* 5 Cal. State Bar Ct. Rptr. 536.

The attorney in *Alkow* was suspended for six-months upon finding that his vehicular manslaughter conviction involved moral turpitude. Alkow had multiple traffic violations and his driver's license was suspended at the time of the fatal collision. However, *Alkow* is a 1966 decision that predates our disciplinary standards and was decided 35 years prior to *Lesansky*. (*In re Lesansky*, *supra*, 25 Cal.4th at p. 16 [summary disbarment appropriate for criminal misconduct involving moral turpitude which did not involve practice of law].) The six-month discipline imposed in *Alkow* is not applicable here, but instead we rely on standard 3.2 which requires that "the most compelling mitigating circumstances [that] clearly predominate" be present to warrant a downward departure from the presumed discipline of disbarment.

In the Matter of Guillory involved an attorney convicted of four misdemeanors where the facts and circumstances included, inter alia, driving under the influence of alcohol, driving on a suspended license, and attempting to leverage his position as an assistant district attorney to avoid arrest (i.e., "badging"). Guillory received a two-year actual suspension and reinstatement upon proof of his rehabilitation. The attorney in *In the Matter of Peters* was also driving under the influence when she was convicted of vehicular manslaughter. This court found that Peters's conviction involved moral turpitude based on both prongs of *Lesansky* and recommended disbarment.

In formulating our discipline recommendation, we acknowledge that Smith's convictions did not involve driving under the influence, like the attorneys in *In the Matter of Peters* and *In the Matter of Guillory*. We also agree that Smith's vision impairment could have contributed to

the collision. However, we find that Smith's actions toward Hu were reprehensible. Smith showed a flagrant disregard for the law and the duty he owed to Hu by leaving the scene of the accident and not rendering aid after fatally striking Hu. Smith established limited mitigation for cooperation, but with the aggravation found for his indifference and prior record of discipline, his cooperation fails to be "most compelling" in light of the seriousness of his criminal misconduct. (See *In re Strick* (1987) 43 Cal.3d 644, 656 [in conviction involving moral turpitude, level of discipline must correspond to reasonable degree with gravity of misconduct].)

This serious breach of Smith's duty to society caused a death. The physical and emotional consequences of Smith's misconduct cannot be overstated. We also emphasize that Smith lacked candor in dealing with the police in the aftermath of the collision, and he further disregarded his probation conditions. Honesty and candor are critically important traits to the legal profession, and any deficiency is of serious concern.

Based on the facts of this case, we conclude that anything less than disbarment would fail to protect the public and the courts and would undermine the confidence in the legal profession that our high standards are meant to maintain. Accordingly, Smith should be disbarred and required to demonstrate by clear and convincing evidence in a reinstatement proceeding that he is fully rehabilitated over an extended period of time before he is entitled to again practice law.

VI. RECOMMENDATIONS

We recommend that Spencer Freeman Smith, State Bar Number 236587, be disbarred from the practice of law in California and that his name be stricken from the roll of attorneys.

VII. CALIFORNIA RULES OF COURT, RULE 9.20

We further recommend that Spencer Freeman Smith be ordered to comply with California Rules of Court, rule 9.20, and to perform the acts specified in (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the date the Supreme Court order imposing

discipline in this matter is filed.[16] (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45 [the operative date for identification of clients being represented in pending matters and others to be notified is the filing date of the Supreme Court order imposing discipline].)

VIII. MONETARY SANCTIONS

We do not recommend the imposition of monetary sanctions in this matter as this disciplinary proceeding commenced prior to April 1, 2020. (Rules Proc. of State Bar, rule 5.137(H).)

IX. COSTS

We further recommend 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, and may be collected by the State Bar through any means permitted by law. Unless the time for payment of discipline costs is extended pursuant to subdivision (c) of section 6086.10, costs assessed against an attorney who is actually suspended or disbarred must be paid as a condition of applying for reinstatement or return to active status.

[16] Smith is required to file a rule 9.20(c) affidavit even if he has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or contempt, an attorney's failure to comply with rule 9.20 is, inter alia, cause for disbarment, suspension, revocation of any pending disciplinary probation, and denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d).)

X. ORDER

The hearing judge's order that Spencer Freeman Smith be transferred to involuntary inactive status pursuant to Business and Professions Code section 6007, subdivision (c)(4), effective November 5, 2020, will remain in effect pending consideration and decision of the Supreme Court on this recommendation.

HONN, P. J.

WE CONCUR:

McGILL, J.

STOVITZ, J.*

* Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tempore by appointment of the California Supreme Court.