BEFORE THE BOARD OF DISCIPLINARY APPEALS
APPOINTED BY THE SUPREME COURT OF TEXAS

No. 30611

IN THE MATTER OF DIMITRI A. FILIPPOV

PETITION FOR COMPULSORY DISCIPLINE

OPINION AND ORDER

Heard November 14, 2003

COUNSEL:

For Petitioner, State Bar of Texas Commission for Lawyer Discipline, Michael E. McClendon, Assistant Disciplinary Counsel, Austin, Texas.

For Respondent, Dimitri A. Filippov, Wayne M. Paris, Gillis, Paris & Heinrich, P.L.L.C., Houston, Texas

OPINION:

In this compulsory attorney discipline action, we must decide whether the first degree felony of unlawful delivery of a controlled substance, TEXAS HEALTH & SAFETY CODE ANN. § 481.113 (Vernon 2003), is a felony involving moral turpitude *per se*, and is, therefore an "Intentional Crime" as that term is defined by the Texas Rules of Disciplinary Procedure ("the Rules").[1] Filippov, the

[1] All references to "Rule(s)" are to the Texas Rules of Disciplinary Procedure. *Reprinted in* TEXAS GOVERNMENT CODE, tit. 2, subtit. G, app. A-1. Amendments to the Rules went into effect January 1, 2004 by order of the Supreme Court (Misc. Order 03-9209; 12/29/2003). This case was decided under the Rules in effect on November 14, 2003.

attorney whose conduct is the subject of this action, argues that unlawful delivery of a controlled substance has not been held to involve moral turpitude *per se* and, thus, his conviction of that felony raises only the factual question of his own personal fitness to practice law under the circumstances of his conviction. As a result, he contends that any action against him by the State Bar of Texas Commission for Lawyer Discipline ("the Bar") must be handled through the standard grievance process. Filippov further contends that, even if the offense involves moral turpitude *per se*, the most severe penalty that we can impose is suspension, not disbarment. Because both of Filippov's arguments lack merit, we today render judgment disbarring him.

Factual Background

On or about August 26, 2000, Filippov was arrested after he attempted to sell Ecstasy (3,4-methylenedioxy methamphetamine; also known as MDMA, or MDM), a controlled substance under Penalty Group 2, TEXAS HEALTH & SAFETY CODE ANN. § 481.103(a)(1), to an undercover police officer. Filippov was subsequently indicted for unlawful delivery of more than four (4) but less than four hundred (400) grams of that controlled substance, a first degree felony. TEX. HEALTH & SAFETY CODE ANN. § 481.113(d) (Vernon 2003). Before the charges against him were resolved, Filippov learned that he had passed the bar examination and been admitted to the State Bar of Texas. On December 6, 2000, having been licensed for less than two months, Filippov pled guilty to the unlawful delivery charge. The district court deferred its adjudication of his guilt or innocence and placed Filippov on community supervision for seven years.[2] The Bar then filed a petition with us, initiating this compulsory discipline action pursuant to Part VIII of the Rules.

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[2] Case Number F00020831-MW; *State of Texas v. Dimitri Andrei Filippov*; 363rd Judicial District Court of Dallas County, Texas; 01/05/01.

Jurisdiction

We must begin by addressing Filippov's challenges to our jurisdiction to hear this compulsory discipline matter. Filippov asserts that we lack jurisdiction for two reasons: (1) the crime to which he confessed has not been determined to be an Intentional Crime and we lack the power to make that determination, and (2) although the conduct resulting in the conviction occurred after Filippov had taken his bar examination, it occurred before he was admitted to practice law.

Filippov's first assertion is without merit. An adjudicatory body, such as this Board, always has jurisdiction to determine its own jurisdiction. *Lipshy Motorcars, Inc. v. Sovereign Assocs., Inc.*, 944 S.W.2d 68, 71-72 (Tex. App.—Dallas 1997, orig. proceeding). In addition, Rule 8.04 acknowledges the Supreme Court's delegation of this power to us, providing that we shall:

> hear and determine all questions of law and fact . . . . Upon introduction into evidence of a certified copy of the judgment of conviction or order of deferred adjudication and a certificate of the Clerk of the Supreme Court that the attorney is licensed to practice law in Texas, the *Board of Disciplinary Appeals shall immediately determine whether the attorney has been convicted of an Intentional Crime or granted probation without an adjudication of guilt for an Intentional Crime.*

Rule 8.04 (emphasis added). Thus, not only do we possess the power to determine whether delivery of a controlled substance in violation of TEXAS HEALTH & SAFETY CODE § 481.113 is an Intentional Crime, we have an affirmative duty to do so.

We also reject Filippov's contention that we lack jurisdiction because the conduct underlying his conviction occurred before his admission to the Bar. The Chief Disciplinary Counsel may not initiate a compulsory discipline action until "an attorney licensed to practice law in Texas has been convicted of an Intentional Crime or has been placed on probation for an Intentional Crime with or without an adjudication of guilt." Rule 8.01. The Chief Disciplinary Counsel must allege that the attorney has been adjudged guilty (or subjected to probation without having been adjudged guilty) of

an Intentional Crime. Rule 8.03. In compulsory discipline proceedings, the "record of conviction or order of deferred adjudication is conclusive evidence of the attorney's guilt." Rule 8.02.[3] The very gravamen of a compulsory discipline action is the fact of the attorney's conviction of an Intentional Crime. *In the Matter of Lock,* 54 S.W.3d 305, 307 (Tex. 2001); *In the Matter of Ament*, 890 S.W.2d 39 (Tex. 1994) (discussing compulsory discipline and standard grievance processes). Consequently, if a person is "an attorney licensed to practice law in Texas" when he is adjudged guilty or is subjected to probation with or without being adjudged guilty of an Intentional Crime, then he is subject to our jurisdiction. The Rules do not impose the additional requirement urged by Filippov that his conduct occur after admission to the Bar.

Whether Delivery is an Intentional Crime

We now turn to Filippov's principal challenge to our jurisdiction, his contention that delivery of a controlled substance is neither a Serious nor an Intentional crime under the Rules because it does not involve moral turpitude *per se.* Based on this contention, Filippov asserts that this matter should be dismissed, and the Bar should bring any further proceeding against him using the standard grievance procedure. We disagree.

The "standard grievance procedure" is an action brought by the Bar pursuant to Part II of the Rules. Such actions involve consideration of the facts underlying the alleged misconduct and any

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[3] In this case, Filippov argues that the "record of conviction" is limited to the order of deferred adjudication and that the introduction into evidence and the consideration by us of other portions of the criminal record offered by the Bar constitute an impermissible inquiry into the facts or circumstances surrounding the conviction. We do not believe that Rules 8.02 and 8.04 are that restrictive. The "record of conviction" includes not only the order of deferred adjudication, but also the indictment and Filippov's judicial confession. To the extent other portions of the criminal record were offered and admitted, we considered them only on the issue of the appropriate sanction.

mitigating circumstances and afford the adjudicating entity discretion in determining the appropriate sanction to impose. *In the Matter of Birdwell*, 20 S.W.3d 685, 687 (Tex. 2000). Compulsory discipline, on the other hand, is sought by the Bar pursuant to Part VIII of the Rules and is only available when an attorney has been convicted of an "Intentional Crime." *Id.* The Rules define an Intentional Crime as "(1) any Serious Crime that requires proof of knowledge or intent as an essential element or (2) any crime involving misapplication of money or other property held as a fiduciary." Rule 1.06O. A "Serious Crime" includes:

> barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes.

Rule 1.06U.

> To obtain a conviction for delivery of a controlled substance, a prosecutor must prove that:
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> (1) the defendant knowingly
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> (2) manufactures, delivers, or possesses with intent to deliver a substance listed in TEX. HEALTH & SAFETY CODE ANN. § 481.103.

TEX. HEALTH & SAFETY CODE ANN. § 481.113(a) (Vernon 2003). To establish that the violation is a first degree felony, the prosecutor must also establish that the amount of the substance manufactured, delivered, or possessed with intent to deliver is more than four (4) grams, but less than four hundred (400) grams. TEX. HEALTH & SAFETY CODE ANN. § 481.113(d) (Vernon 2003). One "delivers" a controlled substance by transferring it, actually or constructively, to another person, or by offering to sell the controlled substance to another person. TEX. HEALTH & SAFETY CODE ANN. § 481.002(8) (Vernon Supp. 2004).

Delivery of a controlled substance does not involve barratry, theft, embezzlement, or misappropriation of property. As a result, institution of a compulsory discipline action based on

delivery of a controlled substance is not appropriate unless the offense involves moral turpitude as a matter of law and requires proof of knowledge or intent as an essential element.[4] We resolve the legal question of whether an offense necessarily involves moral turpitude by looking only at the elements of the offense.[5] *Lock,* 54 S.W.3d at 307*; In the Matter of Thacker,* 881 S.W.2d 307, 309 (Tex. 1994); *State Bar of Texas v. Heard,* 603 S.W.2d 829, 835 (Tex. 1980).

Crimes of moral turpitude involve dishonesty, fraud, deceit, misrepresentation, or deliberate violence, or reflect adversely on a lawyer's honesty, trustworthiness, or fitness as an attorney. *Lock,* 54 S.W.3d at 308*; In the Matter of Humphreys,* 880 S.W.2d 402, 408 (Tex. 1994). Delivery of a controlled substance does not require proof of dishonesty, fraud, deceit, misrepresentation or deliberate violence. Filippov therefore asserts that, under the *Lock* analysis, because delivery of a controlled substance also does not necessarily implicate his honesty or trustworthiness, a factual assessment of his particular circumstances is necessary to determine whether the conviction adversely affects his fitness to practice law, fitness to practice being the only remaining category of felonies involving moral turpitude. As a result, Filippov argues, compulsory discipline is inappropriate because it is necessary to investigate the underlying facts to determine whether his "conduct reveals 'a persistent

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[4] Filippov does not dispute that one essential element of the offense of manufacturing or delivering a controlled substance is knowledge or intent.

[5] We consider the nature or essence of the offense as it bears on the attorney's moral fitness to continue in the practice of law. *Duncan v. Board of Disciplinary Appeals,* 898 S.W.2d 759, 761 (Tex. 1995); *In the Matter of Thacker*, 881 S.W.2d 307, 309 (Tex. 1994). Nothing in the Rules "prohibits proof of the necessary elements in such Disciplinary Action by competent evidence in any other manner permitted by law." Rule 8.04.

inability to discharge . . . significant obligations.' "[6] *Lock,* 54 S.W.3d at 309. In other words, Filippov contends that "fitness" crimes must always be handled through the standard grievance system.

Filippov misreads *Lock*. There, the Supreme Court expressly distinguished delivery of a controlled substance from simple possession and limited its holding accordingly: "simple possession of a controlled substance, *without the intent to distribute or sell*, must reflect adversely on a lawyer's fitness generally [to be considered a crime involving moral turpitude]." *Lock,* 54 S.W.3d at 308 (emphasis added). The Court's exclusion of possession with the intent to distribute or sell from the "fitness" implications of simple possession acknowledges that mere possession of a controlled substance, without the intent to involve another person, is materially different from and less egregious than possession with an intent to provide a controlled substance to another person. An even greater gap separates mere possession of a controlled substance from the actual delivery of that substance to another person.

The Supreme Court's differentiation between the two types of possession – with and without intent to deliver or sell – underscores the generally accepted view that drug trafficking – an activity that includes the manufacture, sale and delivery of drugs – is a major crime. *See, e. g., Jenkins v. State,* 912 S.W.2d 793, 819 (Tex. Crim. App. 1999) (court may take judicial notice that drug trafficking is major crime problem, citing *State v. Cole,* 743 S.W.2d 204, 206 (Tenn. Cr. App. 1987)). At its simplest, the difference between possession and delivery is this: one who delivers, distributes or

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[6] The Preamble to the Rules defines "Fitness" as

> [T]hose qualities of physical, mental and psychological health that enable a person to discharge a lawyer's responsibilities to clients in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations.

otherwise deals in illegal drugs directly injures others in addition to himself. The delivery of illegal drugs contributes to the corruption of others and expands the web of drug abuse and illegal distribution that numerous law enforcement agencies spend significant quantities of time and money trying to shut down. Recognizing that greater deterrents are warranted for drug trafficking than for mere drug possession, state and federal criminal codes typically separate the offenses and impose harsher penalties for providing drugs to others.

The first Texas court to decide whether a drug crime involved moral turpitude in an attorney discipline proceeding found that conspiracy to possess a controlled substance with the intent to distribute was a felony involving moral turpitude. *Muniz v. State,* 575 S.W.2d 408, 411 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).[7] The court based its holding, in part, on the fact that a lawyer, rather than a layperson, committed the crime. 575 S.W.2d at 411 ("An attorney must be held to a more strict standard than the layman because of the position of public trust which he enjoys.") and 413 ("All citizens, of course, are charged with the responsibility of abiding by the laws of the respective states and of the United States. An attorney, however, has an additional moral and legal responsibility associated with his position of trust as an officer of the court."). The court also took into account that Muniz's illegal drug activities resulted in a direct negative impact on the community. At least one other jurisdiction has consistently held that delivery of a controlled substance is a felony involving moral turpitude as a matter of law for purposes of attorney discipline. *In re Dechowitz,* 741 A.2d 1061 (D.C. Cir. 1999); and *In the Matter of Campbell,* 572 A.2d 1059 (D.C. Cir. 1990) (expressly

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[7] The attorney in *Muniz* had been convicted of conspiracy to import a controlled substance, conspiracy to possess a controlled substance with intent to distribute, and jumping bond. The sentence imposed was five years' imprisonment on each count, to run concurrently, and an additional ten years' parole for the conspiracy to import. 575 S.W.2d at 409-10.

rejecting attorney's argument that there are circumstances under which intent to distribute controlled substance would not involve moral turpitude).

Based on the nature of the offense only and without considering any facts unique to Filippov, we therefore hold that the crime of felony delivery of a controlled substance involves moral turpitude as a matter of law and is, therefore, both a "Serious Crime" and an "Intentional Crime," such that the Bar appropriately sought Filippov's disbarment by the compulsory discipline procedure.

Sanction

Filippov next contends that, even if we conclude that delivery of a controlled substance is an Intentional Crime, we must suspend, rather than disbar him, because his criminal sentence was fully probated. In support of this contention, Filippov relies on Rule 8.06, which provides that "[i]f an attorney's sentence upon conviction of an [sic] Serious Crime is fully probated, or if an attorney receives probation through deferred adjudication in connection with a Serious Crime, the attorney's license to practice law shall be suspended during the term of probation." Rule 8.06. Rule 8.06, however, cannot be read in isolation, and Filippov's argument ignores the interplay between Rules 8.06 and 8.05. When read together, the rules require that we reject his contention.

Rule 8.05 makes available the sanction of suspension in certain cases in addition to disbarment. Rule 8.05 expressly provides that the Board "shall" disbar an attorney convicted of an intentional crime, "with or without an adjudication of guilt," ***unless*** the Board suspends the attorney's license pursuant to Rule 8.06. Rule 8.05. Filippov reads Rule 8.06 in a manner that ignores the discretion afforded us by Rule 8.05.

To interpret a statute or rule, one does not read words, phrases or clauses in isolation; rather, one examines the entire act, each part of which is presumed to be effective. *Meritor Automotive Inc. v. Ruan Leasing Co.,* 44 S.W.3d 86, 89 (Tex. 2001) (if statute is unambiguous, the court will adopt

interpretation supported by plain meaning of terms); *O'Quinn v. State Bar of Texas*, 763 S.W.2d 397, 399 (Tex. 1988) (the disciplinary rules have the force and effect of statutes). Rule 8.05 acknowledges our discretion to suspend ***or*** disbar an attorney who has received probation with or without an adjudication of guilt; Filippov's reading of Rule 8.06 to remove that discretion would result in a necessarily distorted reading of Rule 8.05 that does not give all of the words of that rule their plain meaning. Giving the words of both rules their plain meaning makes disbarment an available sanction in all compulsory cases. A respondent attorney who has received probation with or without an adjudication of guilt and is, therefore, eligible for suspension, may attempt to mitigate disbarment.

Filippov's interpretation of Rule 8.06 is also inconsistent with the reinstatement provisions of the Rules. Rule 11.01 expressly applies to an attorney seeking reinstatement who has been "disbarred or resigned in lieu of discipline by reason of conviction of or *having been placed on probation without an adjudication of guilt for an Intentional Crime* . . . ." (emphasis added). Rule 11.01. The term "Intentional Crime" is used only in conjunction with compulsory discipline matters.

Similarly, none of the cases on which Filippov relies support his contention that suspension is the maximum sanction we may impose. For example, in *Lock*, the Supreme Court was called on to decide whether possession of a controlled substance was an Intentional Crime for purposes of compulsory discipline. *Lock,* 54 S.W.3d 305, 307 (Tex. 2001).[8] The nature of the sanction that we could impose was not at issue. Although the Supreme Court discussed permissible sanctions in compulsory discipline matters to contrast them with standard grievance matters, in which the full range of discipline is available, it did not address the issue that Filippov now raises. Similarly, *Humphreys* required the Court to determine whether tax evasion was an Intentional Crime; the case did not involve

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[8] We had suspended Ms. Lock for the entire term of her criminal probation.

any issue about the range of sanctions available for imposition on the attorney.[9] Finally, the issue in *Ament* was whether we had the discretion to suspend an attorney for a period greater than the term of his criminal probation.[10] None of these cases support Filippov's contention that the Rules prevent us from disbarring him.

Moreover, the Supreme Court of Texas has consistently affirmed our decisions in compulsory cases to disbar attorneys who have received criminal sentences of probation, with or without adjudications of guilt.[11] If we read Rule 8.06 to preclude us from disbarring attorneys who receive sentences involving probation only, with or without adjudications of guilt, an attorney like Filippov could simply ignore the Bar's compulsory action, knowing that the harshest possible sanction he could receive would be a suspension of his law license for the period of his probation.

Finally, although we cannot examine the underlying facts or circumstances of the criminal conviction to assess anew an attorney's guilt or innocence or to determine whether the crime is one involving moral turpitude *per se*, we may consider evidence in mitigation or aggravation of the sanction to be imposed when both suspension and disbarment are available to us. We consider such factors as whether the crime was directly related to the attorney's practice of law, the conduct of the

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[9] Mr. Humphreys was not eligible for suspension, as his criminal sentence included a period of incarceration. *Humphreys*, 880 S.W.2d at 403.

[10] The criminal judge had placed Mr. Ament on probation for five minutes, which he successfully completed. We then suspended Mr. Ament's license for one year.

[11] The following decisions were affirmed without opinion: *In the Matter of Goldberg* (Case No. 02-0853, affirmed 03/06/03; BODA Case No. 25747) (Goldberg's sentence for aggregate theft probated); *In the Matter of Raynor* (Case No. 02-0435, affirmed 09/26/02; BODA Case No. 25458) (Raynor placed on deferred adjudication for misapplication of fiduciary property); *In the Matter of Hartley* (Case No. 95-0511, affirmed 10/27/95; BODA Case No. 06052) (Hartley's sentence for bribery probated).

attorney during the compulsory proceeding, whether the attorney has complied with the terms and conditions of his probation, the attorney's efforts at rehabilitation, if applicable, the attorney's credibility under oath, whether the attorney accepts responsibility for his past actions, and any prior discipline imposed on the attorney. Filippov offered no evidence during the compulsory hearing to persuade us that suspension, rather than disbarment, was the appropriate sanction, relying instead on his legal arguments that delivery of a controlled substance was not an Intentional Crime and that we could impose no sanction more severe than suspension. As a result, given the nature of the crime of which Filippov stands convicted, and the balance of the considerations set out above, we conclude that disbarment is the appropriate sanction.

Conclusion

We conclude that a first degree felony conviction for delivery of a controlled substance is a felony involving moral turpitude as a matter of law, such that it is both a "Serious Crime" and an "Intentional Crime" under the Rules of Disciplinary Procedure. Therefore, it is appropriate for the Bar to seek disbarment of an attorney convicted of that offense using the procedures for compulsory attorney discipline. We further conclude that this respondent, Dimitri Andrei Filippov, should be disbarred. Therefore, we render judgment this day disbarring him.

IT IS SO ORDERED.

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S. Jack Balagia, Jr., Chairman

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James S. Frost, Vice Chairman

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Kathy J. Owen

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William D. Greenhill

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Robert Flowers

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Karen L. Watkins

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Paul D. Clote

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Yolanda de León

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Clement H. Osimetha

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Jose I. Gonzalez-Falla

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Thomas E. Pitts

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Carol E. Prater

OPINION DELIVERED: January 22, 2004