

PUBLIC MATTER

FILED

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JAN 29 2019

STATE BAR COURT OF CALIFORNIA STATE BAR COURT CLERK'S OFFICE
SAN FRANCISCO
HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of)
R. SCOTT DERVAES, JR.,)
A Member of the State Bar, No. 202133.)
_____)
Case No.: 17-C-06638-MC
DECISION AND ORDER OF
INVOLUNTARY INACTIVE
ENROLLMENT

Respondent R. Scott Dervaes, Jr. was convicted in San Francisco County Superior Court for a felony violation of Penal Code section 236 (false imprisonment) with a special allegation of violating Penal Code section 12022(b)(1) (use of a deadly weapon). Respondent did not appeal his conviction. Upon finality of the conviction, the Review Department issued an order referring this matter to the Hearing Department for a hearing and decision as to whether the facts and circumstances surrounding Respondent's conviction involved moral turpitude or other misconduct warranting discipline. Respondent failed to file a response to the Notice of Hearing on Conviction (NHC) and his default was entered. The Office of Chief Trial Counsel of the State Bar of California (OCTC) filed a petition for disbarment under rule 5.85 of the Rules of Procedure of the State Bar.¹

Rule 5.85 provides the procedure to follow when an attorney fails to participate in a disciplinary proceeding after receiving adequate notice and opportunity. The rule provides that if

¹ Unless otherwise indicated, all references to rules are to this source. Rule 5.345(C) makes the default procedures in rules 5.80-5.86, with certain exceptions, applicable in conviction proceedings.



an attorney's default is entered for failing to respond to the notice of hearing on conviction, and the attorney fails to have the default set aside or vacated within 90 days, OCTC will file a petition requesting the court recommend the attorney's disbarment.²

The court concludes that the requirements of rule 5.85 have been satisfied, and therefore, grants the petition and recommends that Respondent be disbarred from the practice of law.

FINDINGS AND CONCLUSIONS

Jurisdiction

Respondent was admitted to practice law in this state on June 26, 1999, and has since been a member.

Procedural Requirements Have Been Satisfied

On or about December 21, 2017, Respondent pled guilty to a felony violation of Penal Code section 236 (false imprisonment), with a special allegation of violating Penal Code section 12022(b)(1) (use of a deadly weapon).

On April 26, 2018, OCTC transmitted records and evidence of Respondent's conviction to the Review Department, classifying Respondent's crime as a felony involving moral turpitude. In a May 18 order, Respondent was suspended from the practice of law effective July 11, 2018, pursuant to Business and Professions Code section 6102. Respondent was further ordered to comply with the acts specified in California Rules of Court, rule 9.20, subdivisions (a) and (c). The court asserted that a violation of Penal Code section 236, a divisible statute, could be classified as either a felony involving moral turpitude or a felony that may or may not involve

² If the court determines that any due process requirements are not satisfied, including adequate notice to the attorney, it must deny the petition for disbarment and take other appropriate action to ensure that the matter is promptly resolved. (Rule 5.85(F)(2).)

moral turpitude depending on the how the crime was effected.³ On May 23, OCTC transmitted evidence of finality in Respondent's criminal matter and amended the classification of Respondent's crime to one that may or may not involve moral turpitude. To determine proper classification of Respondent's crime based on whether Respondent's conviction was effected by violence, menace, fraud, and/or deceit, a second court order filed on June 14 ordered OCTC to submit further records regarding the conviction.⁴

On July 11, 2018, the Review Department referred the matter to the Hearing Department for a hearing and decision as to whether the facts and circumstances surrounding the violation involved moral turpitude or other misconduct warranting discipline, and, if so found, the discipline to be imposed. On July 12, the State Bar Court filed the NHC. That same day, the NHC was properly served on Respondent by certified mail, return receipt requested, at his membership records address. The NHC notified Respondent that his failure to timely file a written answer to the notice would result in a disbarment recommendation. (Rule 5.345.)

Both the Transmittal and Supplemental Transmittal of Records of Conviction were returned to the State Bar, marked as undeliverable and unable to forward. Respondent did not appear for the August 6, 2018 status conference. On August 13, the assigned deputy trial counsel (DTC) unsuccessfully attempted to reach Respondent at his membership records telephone number. She also sent Respondent an e-mail, at his membership records e-mail address, informing him that his answer was due and that she would file a default motion if she

³ OCTC's classification of Respondent's crime as one involving moral turpitude, based solely on the language of the complaint to which Respondent pled guilty, did not establish that the crime was committed by fraud such that it should be classified as a moral turpitude offense.

⁴ OCTC's Response filed on June 19, 2018, attached the transcript of Respondent's plea, indicating that the incident report in the matter provided the factual basis for his plea. Though this incident report was not provided, OCTC asserted that it discussed facts, some supporting a conviction based on acts of violence, and others supporting a conviction based on fraud and deceit.

did not hear from him. She received an error message that there was a problem with the e-mail and the addressee was unknown.

Respondent failed to file a response to the NHC. On August 21, 2018, OCTC timely filed and properly served a motion for entry of Respondent's default. The motion complied with all the requirements for a default,⁵ including a supporting declaration of reasonable diligence by the assigned DTC declaring the additional steps taken to provide notice to Respondent. (Rule 5.80.) The motion notified Respondent that, if he did not timely move to set aside his default, the court would recommend his disbarment. This motion was sent by certified mail, return receipt requested, and by regular first-class mail, addressed to Respondent at his membership records address.

Respondent did not file a response to the motion and his default was entered on September 6, 2018. The court also ordered Respondent's involuntary inactive enrollment as a member of the State Bar pursuant to Business and Professions Code section 6007, subdivision (e), effective three days after service of the order. Respondent has since remained inactively enrolled. The order entering the default and enrolling Respondent inactive was served by certified mail, return receipt requested, addressed to Respondent at his membership records address.

Respondent did not seek to have his default set aside or vacated. (Rule 5.83(C)(1) [attorney has 90 days to file motion to set aside default].) On December 13, 2018, OCTC properly filed and served a petition for disbarment. As required by rule 5.85(A), OCTC reported in the petition that: (1) Respondent has not contacted OCTC since the entry of his default; (2) there is one other investigation or disciplinary matter pending against Respondent; (3) Respondent has a record of two prior disciplines; and (4) the Client Security Fund has not paid

⁵ The statement of facts and circumstances surrounding the conviction contains the incorrect case number, an apparent typographical error.

out any claims as a result of Respondent's conduct. Respondent did not respond to the petition for disbarment or move to set aside or vacate the default. The case was submitted for decision on January 8, 2019.

Prior Record of Discipline

Respondent has two prior records of discipline. Pursuant to Supreme Court order filed on May 16, 2002, in Supreme Court matter S104922 (State Bar Court numbers 00-O-13331; 00-O-14988; 00-O-14999 Cons.), Respondent was suspended from the practice of law for three years, execution of which was stayed, and he was placed on probation for five years, including a two-year period of actual suspension and until he proved his rehabilitation. In this matter, Respondent stipulated that he repeatedly failed to perform legal services with competence, improperly withdrew from employment, and failed to refund unearned client fees in willful violation of the California Rules of Professional Conduct, rules 3-110(A) (two counts), and 3-700, subdivisions (A)(1), (A)(2) (two counts), and (D)(2) (two counts). Respondent further admitted to engaging in acts of moral turpitude, failing to obey a court order, failing to support the Constitution and laws of the U.S. and of this state, failing to cooperate in OCTC's disciplinary investigation, failing to maintain his State Bar official membership records, and failing to respond promptly to the reasonable status inquiries of his clients in willfully violation of Business and Professions Code sections 6106 (two counts), 6103, and 6068, subdivisions (a), (i), (j), and (m) (two counts).

In State Bar case number 05-PM-03997, Respondent was charged with failing to comply with certain conditions attached to his disciplinary probation and the court revoked Respondent's probation. By Supreme Court order filed on January 27, 2006, the previously ordered stay of execution of suspension was lifted and Respondent was actually suspended from the practice of law for three years and until he proved his rehabilitation. Credit toward the period of actual

suspension was given for Respondent's period of involuntary inactive enrollment commencing on October 22, 2005.

The Admitted Factual Allegations Warrant the Imposition of Discipline

Upon entry of a respondent's default, the factual allegations set forth in respondent's conviction matter are deemed admitted and no further proof is required to establish the truth of such facts. (Rule 5.82(2).) Here, factual allegations in Respondent's conviction matter support the conclusion that Respondent violated a statute, rule, or court order that would warrant the imposition of discipline. (Rule 5.85(F)(1)(d).)

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On or about December 21, 2017, Respondent was convicted of a felony violation of Penal Code section 236 (false imprisonment), with a special allegation of violating Penal Code section 12022(b)(1) (use of a deadly weapon). Specifically, Respondent willfully and unlawfully violated the personal liberty of a victim using a knife.⁶ Respondent was placed on probation for three years with credit given for time served in county jail. Respondent was ordered to comply with the conditions of a rehabilitation plan (including drug testing and counseling), pay restitution, and stay away from the victim.

Disbarment is Recommended

Based on the above, the court concludes that the requirements of rule 5.85(F) have been satisfied and Respondent's disbarment is recommended. In particular:

- (1) the NHC was properly served on Respondent;
- (2) reasonable diligence was used to notify Respondent of the proceedings prior to the entry of his default;

⁶ OCTC asserted in its default motion that the facts and circumstances surrounding the conviction did not involve moral turpitude but did involve other misconduct warranting discipline.

(3) the default was properly entered under rule 5.80; and

(4) the factual allegations in Respondent's conviction matter deemed admitted by the entry of the default support a finding that Respondent violated a statute, rule, or court order that would warrant the imposition of discipline.

Despite adequate notice and opportunity, Respondent failed to participate in this disciplinary proceeding. As set forth in the Rules of Procedure of the State Bar, the court recommends disbarment.

RECOMMENDATIONS

Disbarment

It is recommended that R. Scott Dervaes, Jr., State Bar Number 202133, be disbarred from the practice of law in California and that his name be stricken from the roll of attorneys.

California Rules of Court, Rule 9.20

It is further recommended that Respondent be ordered to comply with the requirements of California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order imposing discipline in this proceeding.⁷ Failure to do so may result in disbarment or suspension.

⁷ For purposes of compliance with rule 9.20(a), 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, not any later "effective" date of the order. (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45.) Further, Respondent is required to file a rule 9.20(c) affidavit even if Respondent has no clients to notify on the date the Supreme Court filed 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).)

Costs

It is further recommended 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. Unless the time for payment of discipline costs is extended pursuant to subdivision (c) of section 6086.10, costs assessed against a member who is actually suspended or disbarred must be paid as a condition of reinstatement or return to active status.

ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

In accordance with Business and Professions Code section 6007, subdivision (c)(4), the court orders that R. Scott Dervaes, Jr., State Bar number 202133, be involuntarily enrolled as an inactive member of the State Bar of California, effective three calendar days after the service of this decision and order. (Rule 5.111(D).)

Dated: January 29, 2019


MANJARI CHAWLA
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Court Specialist of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on January 29, 2019, I deposited a true copy of the following document(s):

DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

in a sealed envelope for collection and mailing on that date as follows:

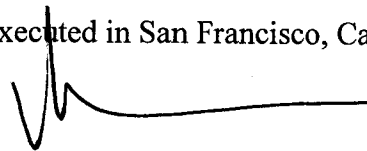
- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

R. SCOTT DERVAES, JR
SIXTH FLOOR
140 2ND ST
SAN FRANCISCO, CA 94105 - 3727

- by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

Melissa G. Murphy, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on January 29, 2019.



Vincent Au
Court Specialist
State Bar Court