

SUPREME COURT OF ARKANSAS

No. 11-770

STARK LIGON, Executive Director,
Supreme Court Committee on Professional
Conduct

APPELLANT

V.

JAMES P. CLOUETTE,
ARK. BAR NO. 74025

APPELLEE

Opinion Delivered January 26, 2012

APPEAL FROM THE SUPREME
COURT COMMITTEE ON
PROFESSIONAL CONDUCT,
NO. CPC-2010-002,

AFFIRMED.**JIM GUNTER, Associate Justice**

Appellant Stark Ligon, the Executive Director of the Office of Professional Conduct, appeals the order of the Supreme Court Committee on Professional Conduct (the Committee) imposing the sanction of a reprimand for appellee James Clouette's violation of Rule 8.4(b) of the Rules of Professional Conduct (the Rules). On appeal, Director Ligon (the Director) argues that the Committee erred in not imposing a suspension of Clouette's license to practice law. Because this appeal involves the discipline of attorneys, and is a second or subsequent appeal following an appeal that was decided by court, we have jurisdiction under Ark. Sup. Ct. R. 1-2(a)(5) and (7). We affirm the Committee's order.

This court explained the facts underlying this case in our previous opinion:

The record reveals that on March 27, 2009, Clouette was charged by felony information with one count of possession of a controlled substance, methamphetamine. This Class C felony charge arose after bank personnel reported finding a small plastic bag, with what was later determined to be methamphetamine, in the bank lobby. Video surveillance from the bank showed Clouette walking across the lobby when a white spot materialized on the floor behind him. This video footage led to Clouette's arrest and the felony charge.

Clouette was tried before the bench and found guilty on November 23, 2009. Pursuant to Arkansas Code Annotated section 5-64-413 (Repl. 2005), the circuit court deferred judgment and placed Clouette on probation for a period of two years. In an order of probation filed on January 5, 2010, the circuit court imposed several conditions of probation, including completion of a drug rehabilitation program, submission to weekly drug screens, participation in this court's Judges and Lawyers Assistance Program (JLAP), and payment of certain fees and costs.

Ligon v. Clouette, 2011 Ark. 68, at 2, ___ S.W.3d ___.

On January 11, 2010, the Director filed a formal complaint against Clouette alleging violations of Rules 8.4(b) and 8.4(d) of the Arkansas Rules of Professional Conduct. Rule 8.4(b) provides that it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. Rule 8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. The complaint alleged that Clouette's crime of possession constituted a "serious crime" as defined by the Procedures Regulating Professional Conduct (the Procedures) and was a criminal act that reflected adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects. The complaint also alleged that felony drug possession by a practicing criminal defense attorney undermined public and client confidence in the criminal justice system, which is prejudicial to the administration of justice.

A hearing was held before the Committee on June 18, 2010. After the presentation of witness testimony and arguments from counsel, the Committee found that a violation of Rule 8.4(b) had been proven, but that a violation of Rule 8.4(d) had not been proven. As a sanction for the violation of Rule 8.4(b), the majority of the Committee voted for a caution, and Clouette was also placed on supervised probation for the same time period and under the same conditions as ordered by the Pulaski County Circuit Court. Clouette was also ordered to pay costs in the amount of \$150. An order to this effect was entered on June 24, 2010, and the Director appealed the ruling to this court.

In an opinion filed February 17, 2011, this court held that it was error for the Committee to impose the sanction of a caution because Clouette's conduct clearly constituted serious misconduct, for which the sanction of a caution was not available. We therefore remanded the case to the Committee for consideration of the appropriate factors set forth in section 19 of the Procedures and imposition of an appropriate sanction. We affirmed, however, the Committee's finding that a violation of Rule 8.4(d) had not been proven.

On remand, a hearing was held before the Committee to determine the appropriate sanction for the violation of Rule 8.4(b). The parties stipulated that the sanctions available to the Committee were either a reprimand or a suspension. The Director asserted that this was not the appropriate fact situation to impose the lesser sanction of a reprimand and that a suspension was necessary to send a message that this sort of conduct would be taken seriously. Clouette, on the other hand, argued that this was precisely the type of situation where a reprimand would be an appropriate sanction. After deliberation, the Committee announced

that it had voted to impose the sanction of a reprimand. The Committee also imposed twenty-four months' supervised probation under the same conditions as previously ordered by the Pulaski County Circuit Court. An order to this effect was filed on April 15, 2011, and the Director filed a notice of appeal on May 9, 2011.

Our standard of review when reviewing decisions of the Arkansas Committee on Professional Conduct is de novo review on the record, and we affirm the Committee's actions and findings unless they are clearly erroneous. *Gillespie v. Ligon*, 357 Ark. 50, 160 S.W.3d 332 (2004). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Ligon v. Stewart*, 369 Ark. 380, 255 S.W.3d 435 (2007). Due deference is given to the Committee's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Stilley v. Supreme Court Comm. on Prof'l Conduct*, 370 Ark. 294, 259 S.W.3d 395 (2007).

On appeal, the Director asserts that the Committee erred in imposing the sanction of a reprimand for appellee's misconduct, as the misconduct in this case was a "serious crime" as defined by the Procedures, and Section 17(B)(6) provides that a "serious crime" is the type of serious misconduct that requires, at the least, a suspension of a lawyer's license to practice law. The Committee's authority for issuing the reprimand is found in Section 17(E)(4) of the Procedures, which provides that

in certain very limited circumstances, a panel of the Committee may find that a reprimand is appropriate for conduct otherwise falling within the definition of "serious misconduct" when application of the aforementioned factors substantially demonstrates

clear and compelling grounds for sanctions less severe than restriction of the privilege to practice law.

The factors referred to in Section 17(E)(4) are found in Section 19 and are as follows:

- A. The nature and degree of the misconduct for which the lawyer is being sanctioned.
- B. The seriousness and circumstances surrounding the misconduct.
- C. The loss or damage to clients.
- D. The damage to the profession.
- E. The assurance that those who seek legal services in the future will be protected from the type of misconduct found.
- F. The profit to the lawyer.
- G. The avoidance of repetition.
- H. Whether the misconduct was deliberate, intentional or negligent.
- I. The deterrent effect on others.
- J. The maintenance of respect for the legal profession.
- K. The conduct of the lawyer during the course of the Committee action.
- L. The lawyer's prior disciplinary record, to include warnings.
- M. Matters offered by the lawyer in mitigation or extenuation except that a claim of disability or impairment resulting from the use of alcohol or drugs may not be considered unless the lawyer demonstrates that he or she is successfully pursuing in good faith a program of recovery.¹

The Director acknowledges that Section 17(E)(4) of the Procedures allows a reprimand as a sanction for serious misconduct but argues that this case does not fit within this limited exception. The Director also notes that the Committee's order fails to identify clear and compelling grounds for imposing a sanction less severe than suspension. Referring to the factors in Section 19, the Director contends that the nature of a drug possession felony is inherently severe and that the public confidence in both the legal profession and the justice system could be damaged if appellee does not receive a harsher sanction.

¹Although the Director refers to the amended version of Section 19 in his brief, that version did not come into effect until May 26, 2011, which was after the hearing and order in the instant case. Therefore, this court cites to the version that was in place at the time the Committee issued its order.

In response, Clouette argues that Section 17(B) defines “serious misconduct” as that conduct that “would warrant” terminating or restricting a lawyer’s license to practice law, but it does not state that such sanctions are required. Section 17(E)(4) explicitly provides the Committee the option of a reprimand under limited circumstances, and Clouette asserts that this case is one that falls within those limited circumstances, as a consideration of the Section 19 factors weighs in his favor. Clouette also notes, in response to the lack of findings in the Committee’s order, that under Section 4(C)(3), the findings of the Committee are prepared “with the administrative assistance of the Office of Professional Conduct,” so the Director can only blame his own office for any shortcomings in the written order.

Upon a de novo review of the record, the evidence shows that the conduct underlying this sanction involved a single incident of possession; that Clouette has been drug-tested weekly since May 2009 and has never tested positive; that he has complied with the terms of his probation and the requirements of the JLAP program; and that he has no prior disciplinary record to speak of. There was also no evidence presented of any instance in which Clouette’s misconduct negatively impacted his representation of a client. Thus, we hold that the Committee did not clearly err in finding that a reprimand and probation was warranted in the instant case. We also note that the Director’s complaint of a lack of findings to support a reprimand under Section 17(E)(4) is of no moment, as this court has held that there is no requirement that written findings be made as to each factor in Section 19. *Ligon v. Dunklin*, 368 Ark. 443, 247 S.W.3d 498 (2007). Finally, the Director’s concern as to any possible damage to the public’s confidence in the legal profession is misplaced, as this court has already

affirmed the Committee's earlier finding that no violation of Rule 8.4(d) occurred. For these reasons, we affirm the Committee's order.

Affirmed.