

**SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT**

Matter of Smitten

2020 NY Slip Op 01176 (App. Div. 2020) · No. 2019-10040 · Decided February 19, 2020

SUMMARY

The Appellate Division, Second Department held that John A. Smitten's Florida conviction for first-degree grand theft was essentially similar to New York's felony of second-degree grand larceny. Applying Judiciary Law § 90(4), the court recognized his automatic disbarment effective on the date of his felony conviction and granted the motion to strike his name from the roll of attorneys.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Per Curiam; Alan D. Scheinkman, P.J.; William F. Mastro, J.; Reinaldo E. Rivera, J.; Mark C. Dillon, J.; Betsy Barros, J.
JURISDICTION	New York
DECIDED	February 19, 2020
DOCKET	2019-10040
DISPOSITION	other
PROCEDURAL POSTURE	The Grievance Committee moved to strike the respondent's name from the roll of attorneys and counselors-at-law under Judiciary Law § 90(4), based on his conviction of a felony in Florida.
PRECEDENTIAL VALUE	Published opinion
PARTIES	Grievance Committee for the Tenth Judicial District v. John A. Smitten, admitted as John Arthur Smitten

TOPICS

statutory interpretation appellate procedure

PRACTICE AREAS

Attorney discipline Legal ethics Appellate procedure Statutory interpretation

QUESTIONS PRESENTED

1. Whether Smitten's Florida conviction for first-degree grand theft was essentially similar to a New York felony for purposes of automatic disbarment under Judiciary Law § 90(4).
2. Whether the Grievance Committee's motion to strike Smitten's name from the New York roll of attorneys should be granted.

HOLDINGS

1. A conviction for first-degree grand theft under Florida Statutes Annotated § 812.014(2)(a)(1) is essentially similar to New York grand larceny in the second degree under Penal Law § 155.40(1).
2. By virtue of the Florida felony conviction, Smitten was automatically disbarred and ceased to be an attorney under Judiciary Law § 90(4)(a), effective August 14, 2017.

KEY QUOTATIONS

“The Judiciary Law provides for automatic disbarment when an attorney is convicted of a felony. Under this section, an offense committed in any other State, district or territory of the United States where it is classified as a felony is determined to be a felony when it would constitute a felony in this state.” ([*1])

“For purposes of this determination, the felony in the other jurisdiction need not be a mirror image of the New York felony, precisely corresponding in every detail, but it must have essential similarity.” ([*1])

“By virtue of his felony conviction, the respondent was automatically disbarred and ceased to be an attorney pursuant to Judiciary Law § 90(4)(a).” ([*2])

FACTUAL BACKGROUND

On August 14, 2017, John A. Smitten pleaded guilty in Florida to first-degree grand theft under Florida Statutes Annotated § 812.014(2)(a)(1), involving property valued at \$100,000 or more. He received a sentence including 180 days of incarceration, five years of probation, and \$131,500 in restitution. The Supreme Court of Florida disbarred him on September 14, 2017. He had been admitted to the New York bar in the Second Department in 1997.

PROCEDURAL HISTORY

Smitten pleaded guilty in Florida to first-degree grand theft, a felony, on August 14, 2017, and was subsequently disbarred by the Supreme Court of Florida. The New York Grievance Committee moved in the Appellate Division, Second Department, to strike his name from the New York roll of attorneys on the ground that the Florida offense was essentially similar to a New York felony. Smitten was served with the motion but submitted no response and did not request additional time. The court granted the motion and made the automatic disbarment effective as of the date of the Florida felony conviction.

DISPOSITION

other

CASES CITED

- Matter of Margiotta, 60 NY2d 147, 150
- Matter of Lenich, 157 AD3d 201
- Matter of Woghin, 64 AD3d 5
- Matter of Port, 57 AD3d 139
- Matter of Ashley, 263 AD2d 70
- Matter of Fury, 145 AD2d 259
- Matter of Barisic, 110 AD3d 84
- Matter of Pelle, 106 AD2d 1

OPINION

PER CURIAM.

Matter of Smitten (2020 NY Slip Op 01176) Matter of Smitten 2020 NY Slip Op 01176 Decided on February 19, 2020 Appellate Division, Second Department Per Curiam. Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided on February 19, 2020 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department ALAN D. SCHEINKMAN, P.J. WILLIAM F. MASTRO REINALDO E. RIVERA MARK C. DILLON BETSY BARROS, JJ. 2019-10040 [*1]In the Matter of John A. Smitten, admitted as John Arthur Smitten, an attorney and counselor-at-law.

Grievance Committee for the Tenth Judicial District, petitioner; John A. Smitten, respondent. (Attorney Registration No. 2772432) MOTION by the Grievance Committee for the Tenth Judicial District to strike the respondent's name from the roll of attorneys and counselors-at-law, pursuant to Judiciary Law § 90(4), upon his conviction of a felony.

The respondent was admitted to the Bar at a term of the Appellate Division of the Supreme Court in the Second Judicial Department on March 12, 1997, under the name John Arthur Smitten. Catherine A. Sheridan, Hauppauge, NY (Ann Marie Modica-Schaffer of counsel), for petitioner. PER CURIAM. OPINION & ORDER On August 14, 2017, in the Circuit Court for the Sixth Judicial Circuit, Pinellas County, Florida, the respondent pleaded guilty to grand theft in the first degree, a felony, in violation of Florida Statutes Annotated § 812.014(2)(a)(1).

He was sentenced, inter alia, to a term of incarceration of 180 days, followed by a 5-year period of probation. In addition, he was directed to make restitution in the amount of \$131,500. By order of the Supreme Court of Florida dated September 14, 2017, the respondent was disbarred.

As stated by the Court of Appeals in Matter of Margiotta (60 NY2d 147, 150): "The Judiciary Law provides for automatic disbarment when an attorney is convicted of a felony. Under this section,

an offense committed in any other State, district or territory of the United States where it is classified as a felony is determined to be a felony when it would constitute a felony in this state.

(Judiciary Law § 90, subd 4, par e.) For purposes of this determination, the felony in the other jurisdiction need not be a mirror image of the New York felony, precisely corresponding in every detail, but it must have essential similarity."

In determining whether a foreign felony is essentially similar to a New York felony, this Court may consider, among other things, the plea allocution and/or trial record (see *Matter of Lenich*, 157 AD3d 201; *Matter of Woghin*, 64 AD3d 5; *Matter of Port*, 57 AD3d 139; *Matter of Ashley*, 263 AD2d 70; *Matter of Fury*, 145 AD2d 259).

The Grievance Committee for the Tenth Judicial District now moves to strike the respondent's name from the roll of attorneys and counselors-at-law, pursuant to Judiciary Law § 90(4), based on his conviction of a felony.

The Grievance Committee contends that grand theft in [*2]the first degree, in violation of Florida Statutes Annotated § 812.014 (2)(a)(1), is essentially similar to the New York felony of grand larceny in the second degree, in violation of Penal Law § 155.40(1), a class C felony, and that the respondent, as a consequence, was automatically disbarred under Judiciary Law § 90(4)(a).

Florida Statutes Annotated § 812.014(1)(a) provides that "[a] person commits theft if he or she knowingly obtains or uses, or endeavors to [use] or [obtain], the property of another with intent to, either temporarily or permanently... [d]eprive the other person of a right to the property or a benefit from the property." A person commits grand theft in the first degree if the "property stolen is valued at \$100,000 or more" (Fla Stat Ann § 812.014[2][a][1]).

Although served with a copy of the motion on August 22, 2019, the respondent has neither submitted a response nor requested additional time in which to do so. We find that the respondent's conviction of grand theft in the first degree is essentially similar to the New York felony of grand larceny in the second degree (see *Matter of Barisic*, 110 AD3d 84; *Matter of Pelle*, 106 AD2d 1).

By virtue of his felony conviction, the respondent was automatically disbarred and ceased to be an attorney pursuant to Judiciary Law § 90(4)(a). Accordingly, the Grievance Committee's motion to strike the respondent's name from the roll of attorneys and counselors-at-law, pursuant to Judiciary Law § 90(4)(b), is granted to reflect the respondent's automatic disbarment on August 14, 2017.

SCHEINKMAN, P.J., MASTRO, RIVERA, DILLON and BARROS, JJ., concur. ORDERED that the Grievance Committee's motion is granted. ORDERED that pursuant to Judiciary Law § 90(4)(a), the respondent, John A. Smitten, admitted as John Arthur Smitten, is disbarred, effective August 14, 2017, and his name is stricken from the roll of attorneys and counselors-at-law; and it is further, ORDERED that the respondent, John A. Smitten, admitted as John Arthur Smitten, shall

comply with the rules governing the conduct of disbarred or suspended attorneys (see 22 NYCRR 1240.15); and it is further, ORDERED that pursuant to Judiciary Law § 90, the respondent, John A. Smitten, admitted as John Arthur Smitten, is commanded to desist and refrain from (1) practicing law in any form, either as principal or as agent, clerk or employee of another, (2) appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law; and it is further, ORDERED that if the respondent, John A. Smitten, admitted as John Arthur Smitten, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith to the issuing agency and the respondent shall certify to the same in his affidavit of compliance pursuant to 22 NYCRR 1240.15(f).

ENTER: Aprilanne Agostino Clerk of the Court