IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,183

DAVID CERF,

Appellant,

vs.

STATE OF FLORIDA at the direction of Jon I. Gordon, Circuit Judge, pursuant to Integration Rule 11.14,

Appellee.

INITIAL BRIEF OF APPELLANT

APPEAL FROM THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CASE NO. 83-4768 (Retired Circuit Judge Harold Vann)

THIS IS AN APPEAL FROM A RECOMMENDATION IN A RULE 11.14 PROCEEDING FOR PUBLIC REPRIMAND

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ORIGINAL

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STATEMENT OF THE CASE

The Respondent has prepared an Appendix to Brief of Appellant which includes copies of all of the pertinent documents in the lower court concerning the statement of the case. This had to be done because the clerk of the lower court sent a record of proceedings to this Court without any index for same before the time for appeal had been reached. The symbol "A" will be used to indicate any reference to matters in the Appendix. The parties will be referred to as they were in the lower court.

This action was commenced in the lower court when the Dade County State Attorney's office filed a Motion to Discipline Attorney in the lower court. (A 1-5). The Respondent filed an answer. (A-6). The Respondent filed a motion to dismiss. (A 7-9). The Respondent filed a motion to strike. (A 10-17). The Respondent filed a motion for summary judgment. (A 18-21).

The Respondent filed a demand for discovery. (A 22-24). The Respondent filed notice of taking depositions. (A-25). The Respondent filed a motion for sanctions for failure to make discovery. (A 26-29). The lower court denied the motion for sanctions. (A-30). The lower court denied all of Respondent's motions and held a hearing. (Transcript "T" 1-517). Thereafter the lower court filed a report recommending a public reprimand (A 31-36) and this appeal was filed. (A-37).

STATEMENT OF THE FACTS

The Respondent will not submit a statement of the facts in this section because of the nature of the argument in this brief and the fact that the record consists of a dissolution trial, a mandamus action concerning that trial and a disciplinary action concerning the mandamus action. A combined statement of facts would only be confusing and lengthy. The facts will therefore be set forth in the argument section of the brief for clarity and brevity.

The symbol "A" will be used to refer to the Appendix to Brief which will be filed separately. The symbol "T" will be used to refer to the transcript of testimony which the clerk of the lower court has been directed to send to this Court and the exhibits will be referred to using the symbol "E".

ARGUMENT ONE

THE LOWER COURT ERRED IN DENYING THE RESPONDENT'S PRE-TRIAL MOTIONS

This action was commenced with the filing of a five (5) page unsworn Motion to Discipline Attorney Under Rule 11.14. (A 1-5). The Respondent filed several pre-trial motions which the lower court denied. The Respondent will discuss these motions separately in the following sections of this argument.

MOTION TO DISMISS

The Respondent's Motion to Dismiss is found at A 7-9. In it, the Respondent raised several arguments which will be discussed in a different order than they appear in the motion.

The Respondent is mainly offended by the fact that Florida Bar Intergration Rule 11. 14 provides that a judge of the District Court of Appeal or a Circuit Judge may direct the State Attorney to file a motion to discipline an attorney and Circuit Judge Jon Gordon , through his appellate attorney and through his own ex-parte letter to the District Court, asked the District Court to discipline the Respondent, the District Court did not discipline the Respondent and disgruntled Judge Gordon then tried to have a Circuit Judge do what the District Court would not do.

Judge Jon Gordon's "McCain" like ex-parte letter is found at A-14. Judge Gordon stated that he was afraid to file his own motion to strike the Respondent's appellate pleadings and to have the District Court discipline the Respondent because he was afraid of the adverse reaction if his own motion was denied. Judge Gordon, therefore suggested that the District Court strike the Respondent's appellate pleadings and discipline the Respondent on the District Court's own motion. The District Court did strike two paragraphs out of about one hundred filed by the Respondent but did not discipline the Respondent in any way for what he said about Judge Gordon.

This was also testified to by Judge Gordon on T-107:

> "...I wrote it to the Chief Judge to bring it to his attention, a disciplinary matter."

Judge Gordon also testified that the District Court of Appeal told him that he was "too sensitive" on T-118:

> "...The question was, was I aware this letter had been circulated to other judges in the Third District. I want to share with the Court that I did receive a communication from Judge Jorgenson. He felt that I was being too sensitive..."

Judge Gordon did not accept the wisdom of the District Court of Appeal and sought a friendlier forum from another Circuit Judge. His fellow trial court judge was more sympathetic and did what the District Court would not do. This is simply not permissible under the wording of Rule 11.14.

Rule 11.14 provides that a judge of the District Court or a Circuit Judge may direct the State Attorney to file a motion to discipline an attorney. The use of the work "or" in a statute or rule means that there is a choice between alternatives. See Vol. 30 Fla. Jur. Statutes §100.

Judge Gordon chose to pursue the Respondent in the District Court of Appeal and he should have honored what the District Court did. The District Court is also the best judge of what is or what is not punishable before the court of appeal. It is also familiar with the record of the appellate attorney's actions in other appeals and the trial court's actions in other appeals.

This Court should not put its stamp of approval on this personal vendetta by a trial court judge against an attorney skilled enough to obtain a mandamus Order to Show Cause against his abuse of judicial power. All of Judge Gordon's complaints against the Respondent arose after he was served with the Order to Show Cause. (A 15-16).

The Respondent's Motion to Dismiss also raised the issue as to the failure of the State Attorney to allege that a judge had directed the filing of the motion to discipline as required by Rule 11.14. The motion to discipline was also styled State of Florida ex rel. without naming the complaining judge. This was just some more of Judge Gordon's wanting to keep his name out of any attempt to discipline the Respondent so he would not be embarrassed if he failed. He was and is the only judge that complained about the Respondent. (T 28-29).

The motion to dismiss also raised the issue that the motion to discipline did not allege any specific charge against the Respondent or any charge that was related to the alleged misbehavior. The Respondent was charged with and found guilty of a violation of EC 1-5 and DR 1-102 (5). These are "garbage can" sections of the Code and only concern minor infractions of the law such as failure to file income tax returns, spitting on the sidewalk, etc. The Respondent was not charged with any "minor violation" of the law. He was charged with criticizing a judge. This is covered by EC 8-6 and DR 8-102 but the Respondent was not charged with violating them.

It would serve no useful purpose to reiterate the 2 plus 2 equals 4 argument about procedural due process and equal protection of the law so the Respondent will adopt and incorporate these arguments as set forth in his motion on pages A 7-9 into this brief.

FOR these reasons the Respondent submits that the lower court erred in denying his motion to dismiss and this Court should reverse the lower court and direct it to grant the motion to dismiss or such other relief as this Court deems appropriate under the circumstances.

MOTION TO STRIKE

The Respondent's Motion to Strike is found at A 10-17. This was a verified motion to strike as sham pleading pursuant to Civil Procedure Rule 1.150. The purpose of this motion is to try to avoid the expense of an unnecessary hearing such as was held in this action.

The State Attorney did not traverse or oppose the motion to strike in the lower court except to state that since Rule 11.14 did not expressly provide for motions that none were allowed. (T-10). The Respondent suggest that the motion to strike is allowed in civil and criminal proceedings and should also be permitted in disciplinary proceedings. See Integration Rule 11.06(3) applying the rules of civil procedure and discovery to trials before a referee. There should be a way to prevent a disgruntled judge from dragging an attorney through court on a baseless or meritless charge.

FOR these reasons, the lower court erred in denying the motion to strike and this Court should reverse the lower court and direct it to grant the motion to strike or such other relief as is appropriate.

MOTION FOR SUMMARY JUDGMENT

The Respondent's Motion for Summary Judgment is found at A 18-21. The motion was supported by an affidavit and noticed for hearing at least 20 days before the final hearing. (A-21). The State Attorney did not file any counter-affidavits and the lower court should have granted the motion.

FOR these reasons the lower court erred in denying the motion for summary judgment and this Court should reverse the lower court and direct it to grant the summary judgment or such other relief as is appropriate.

MOTION FOR SANCTIONS

The Respondents demand for discovery, notice of taking depositions and motion for sanctions for failure to make discovery are found at A 22-29. The Defendant sought discovery to prepare for the final hearing. The State Attorney contended that Rule 11.14 was silent about discovery so there was none. (T 10-12). The Respondent would adopt and incorporate by reference its argument in the Court below that discovery is permitted in a disciplinary proceeding. The result of not having discovery in a Rule 11.14 is to turn it into a Star Chamber proceeding where a disgruntled judge can attack an attorney like shooting fish in a barrel. See The Florida Bar v. Hollingsworth 376 So.2d 394 (Fla. 1979); 7 Am. Jur. 2d Attorneys at Law §93; Anno. 94 A.L.R.2d 1328; Brotsky v. State Bar of California, 368 P.2d 697; Intergration Rule 11.06(3).

FOR these reasons the Respondent submits that the lower court erred in denying his motions for sanctions for failure to make discovery and this Court should reverse the lower court and direct that the motion be granted or such other relief as is appropriate.

JURY TRIAL

The Respondent demanded jury trial in this action. (A-6). The lower court denied the demand. (T 338-339). It is fundamental that an accused is entitled to a jury of his peers. Here the accuser got a jury of his peers. This is not fair or just.

ARGUMENT TWO

THE LOWER COURT'S JUDGMENT WAS ERRONEOUS, UNLAWFUL, UNJUSTIFIED AND UNFAIR

The lower court's Judgment and Report of Disciplinary Matter is found at A 31-36. The Integration Rules suggest a standard of review as to whether or not the lower court's judgment is erroneous, unlawful and unjustified. Rule 11.09(3)(e).

The Respondent would first discuss the form and language of the lower court's judgment and report. The report totally fails to state that the Respondent obtained a mandamus order to show cause directed against Judge Jon Gordon on October 19, 1982. (A 15-16). All of Judge Gordon's complaints come after the order to show cause was served on him. The first complaint against the Respondent is on date November 4, 1982. (T-75). The report totally fails to state that Judge Jon Gordon threatened the Respondent with contempt if he did not drop his mandamus action, that the Respondent refused to be intimidated and Judge Gordon later recused himself. (A-17). The report totally fails to state that Judge Jon Gordon's appellate attorney then filed a copy of his recusal in the appellate court and stated that no writ of mandamus could be issued against him because he was no longer the judge. (A-40 ¶8).

The report does state on pages 2 and 5 of same (A 32 and 35) that the Respondent uses Mandamus to "force" Judge Gordon and other trial court judges to rule as the Respondent desires. This is not

true and cannot be true. The Respondent does not make the law and can't force any judge to rule as he desires the law to be. The law is fixed and the only way that Mandamus will issue is if the trial court judge does not follow the law. Mandamus is an ancient extra-ordinary remedy to cure a failure of justice. This Court and other appellate courts well know that a trial judge must really do something clearly wrong before mandamus will issue. The lower court's statements that the Respondent "forces" trial judges to rule his way shows that the lower court erred in his interpertation of what Mandamus is and what the Respondent was trying to accomplish with it. The only thing that the Respondent could do is ask the court of appeal to make Judge Jon Gordon obey the law. This is exactly what he did and if he is to be punished for this then any trial court tyrant can prevent any interference with his judicial despotism.

The lower court judge also ignored the testimony presented by Mrs. Pat Place who is the wife of the Reverend Ted Place of the Faith Bible Church in Miami, Florida. (T 186-202). Pat Place testified that she was there when Judge Jon Gordon first took the child away from its mother and Judge Gordon told her that the child would be returned to its mother when she got out of the hospital and her doctor said it was o.k. for her to have the child back. (T-194). She also testified that the one hundred persons in her church prayer group did not understand why Judge Gordon did not "follow through on what he said he would do". (T 199-200).

The lower court judge also turned a deaf ear to the testimony of Reverend Thedford Johnson except to state that he was a black minister who thought all politicians were crooked. (A-36). This is certainly not what Reverend Johnson stated. The record before this Court reveals that Reverend Johnson's testimony was that black people suspect something is wrong when they learn money is being paid and that the hypothetical concerning Judge Gordon put to the Reverend by Judge Vann would indicate something was irregular. (T-209). Reverend Johnson stated that he had been a minister in the Overtown Riot area for 41 years and that the Respondent was one of the few white people trusted by the blacks and that knew how they thought about things.

In other words, Judge Vann ignored everything bad about Judge Gordon and everything good about the Respondent. This is the only way that the could reach a conclusion that would help his fellow trial court judge. He also prevented any discovery as to the truth.

The Respondent could go on and on about the record in this case but he has previously argued it to the Third District Court of Appeal and as a result of their review of the record he was not disciplined by the court of appeal in any way. See A 44-80.

The Respondent would point out that it was not he who raised the issue of Judge Gordon's appointment of a Guardian ad Litem in the court of appeal. The court appointed $1,000.00 in advance G.A.L. filed a motion to intervene in the mandamus proceedings to raise the issue as to whether or not Judge Gordon acted properly. (A 44-45).

The entire argument of the Respondent in the court of appeal is to be found at pages 47-80 of the Appendix. The only way that any of this argument can be found to be offensive is for parts of it to be taken out of context as it was done in the motion to discipline attorney and the lower court's judgment and report to support the public reprimand.

The entire record shows that the Respondent was more than fair with Judge Gordon. It should be kept in mind that this entire record was created byJudge Gordon, who:

1. Told Pat Place that he would return the child to its mother when she was released from the hospital.
2. Did not return the child to its mother but did give her a legal services burden of at least $1,000.00 up front for the services of a Guardian ad Litem from Homestead, Florida where the judge had received $1,000.00 in political contributions. (Respondent's Exhibit "P".
3. Refused to let the Respondent take the Guardian ad Litem's deposition.
4. Denied routine motions that would have reduced the amount of money that the mother would have to pay to the Guardian ad Litem such as motion to refer the case to H.R.S. for a home study, motion to refer the parites to conciliation, motion to refer the parties to the General Master and motion to transfer the case to the Juvenile Court so a pro bono Guardian ad Litem could be appointed.

5. Recused himself after the Respondent filed a motion for the Guardian ad Litem to produce records of any political contributions and other court appointments.

6. Recused himself after the Respondent was not intimidated by his threat of contempt if the Mandamus action was not dropped.

This is also the same Judge Gordon who bullied the Mayor of the City of South Miami, Florida for not filing a written motion for a continuance of an uncontested divorce when he had to be out of town on City business. (A 83-85). Thereafter this same judge held his own criminal contempt hearing for Mayor Block and put him in jail for his crime. (A 86-88). Thereafter, Mayor Block would, of course, have this judge recuse himself from any case that he was counsel in. (A 89,91). In the meantime this judge would try to buy off Mayor Block and try to regain his favor by appointing Mayor Block as Guardian Ad Litem in several cases! (A 90,92).

It should be noted that Mayor Block's opposing counsel in the criminal contempt fiasco was Sandor Genet who was counsel of record for the mother in this case until shortly after Mayor Block was put in jail. (Respondent's Exhibit "I").

The Respondent is not proud of the fact that he stood up to this judicial bully but he is also not ashamed of what he did or wrote about this particular judge. Hopefully this will permit Judge Gordon to see the Fourth Man in the Fire. Daniel 3:25.

CONCLUSION

For the foregoing reasons and citation of authorities the Respondent submits that the beloved and learned Retired Judge Harold Vann erred in finding the Respondent guilty of any unethical behavior and recommending a public reprimand. This Court should reverse Judge Vann, quash his ruling or whatever is proper under the circumstances.

CERTIFICATE OF SERVICE

I certify that a copy of this brief was served by mail or hand delivery on IRA N. LOEWY, Esquire, Deputy Chief Assistant State Attorney, 9th Floor, Metropolitan Justice Building, 1351 N.W. 12th Street, Miami, Florida 33125 on November 7, 1983.

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