IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JOSEPH L. CARBONARO,

Respondent.

_____/

Supreme Court Case

No. 64,228

FILED
SID J. WHITE
JUL 25 1984
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

RESPONDENT'S ANSWER BRIEF

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PREFACE

For purposes of this brief, The Florida Bar will be referred to as "The Bar" and Joseph L. Carbonaro will be referred to as the "Respondent". Abbreviations utilized in this brief are as follows:

"T."	refers to the Transcript of Final Hearing held on March 16, 1984, to be followed by page numbers.
"D."	refers to the deposition taken on February 21, 1984 by The Bar and admitted into evidence at the Final Hearing, to be followed by page number or Exhibit number.
"R.R."	refers to the Report of Referee dated April 10, 1984, to be followed by paragraph of report.
"C.R."	refers to the Clarification of Report of Referee, dated May 30, 1984, to be followed by paragraph of report.
"C.B."	refers to Complainant's Initial Brief, to be followed by page number.

ISSUE PRESENTED FOR REVIEW

WHETHER THE REFEREE'S RECOMMENDATION OF SUSPENSION RATHER THAN DISBARMENT WAS ERRONEOUS OR UNJUSTIFIED BASED UPON ALL THE FACTS AND CIRCUMSTANCES OF THIS CASE

STATEMENT OF THE CASE

The Respondent accepts the Statement of the Case as presented by The Bar.

STATEMENT OF FACTS

GARLAND DEPOSITION

The Statement of Facts presented by The Bar is essentially a restatement of testimony contained in the deposition of Special Agent Michael Garland, Drug Enforcement Administration (DEA). While The Bar has accurately repeated Agent Garland's statements, the Referee did not make any finding which even remotely resembled the accusations in the deposition, and we submit that the facts are those adduced by live testimony at the hearing.

FACTS ADDUCED AT HEARING

The Respondent was a 1973 graduate of the Cornell School of Law (T.123). He was the type of individual who had a difficult time ever refusing work, and worked seven days a week, morning, noon and night. (T.126-127). He has probably

always been a "workaholic", and to this day probably works twice a normal full time work schedule. (T.119,110). In the opinion of his treating psychiatrist, who has spent over fifty (50) hours in therapy with him, he has suffered from a compulsive, workaholic personality disorder. (T.19-21). However, he is not and has never been a sociopath, nor been neurotic or psychotic. (T. 22).

Respondent worked for a Wall Street law firm, and at one point worked over one hundred days in a row at his excessive pace. (T.24). As a result, Respondent was hospitalized for three weeks. (T.125). Thereafter, Respondent was hired by Eastern, and moved to Florida. (T.125). Even at Eastern Airlines, Respondent found it difficult to refuse to take additional work and continued to work at an excessive pace. (T126-127). At his new job with Eastern, Respondent had an office in New York, an office in Miami, and found himself with transactions which were taking place at the same time in time zones as far apart as London and Hawaii. (T.126). Although Respondent, who was then approximately 29 years of age, had never been involved with drugs before moving to Florida, he started taking stimulants to enable him to work and sedatives to enable him to sleep

and keep up his work schedule. (T.126).

As a result of a civil infraction which occurred when such stimulants and sedatives for personal use were discovered at a routine customs search in Canada, Respondent was asked to resign his position (November 10, 1980) and was virtually unable to find work in his profession. (T.133). After years of being able to pick from a multitude of job offers, he was now constantly rejected by potential employers. (T.131-132). He lost his self-esteem and became distraught and depressed. (T.178).

During his seven years of legal practice, he had earned between $20,000 to $50,000 per year and had been able to accumulate approximately $100,000 in assets. (T.133-134). During the 16 month period prior to his arrest, his living expenses were in the moderate range of $1200 to $1400 per month. (T.164). He supported himself from income generated by his assets, unemployment compensation, an occasional legal fee and his accumulated savings. (T.164).

Although Respondent never in his life purchased cocaine (T.127), he was asked by a friend whom he had known for four years if he knew someone who could obtain cocaine.

(T.136). Respondent put his friend in touch with someone whom he thought might be able to do what his friend requested. (T.136). The friend then sought to purchase more cocaine and Respondent remained involved and aware of what was going on. (T.136-138).

The Respondent knew that the activity was a crime (T.138), but as simplistic as it sounds, he saw himself as doing a favor for a friend. (T.141-142). He knew the difference between right and wrong, but his emotional state was such that his judgment was impaired (T.41) and his thought processes were affected and distorted (T.42).

Respondent did not handle any negotiations for the transaction. (T.193-194). Respondent's conduct was not for any vile or evil motive or for financial gain. (T.149-150); (R.R.V4). Although Respondent had never met the seller before the date of his arrest (T.182), Respondent was admittedly present at the drug transaction. From the beginning, he told his lawyer that he intended to plead guilty and did in fact enter into an open plea of guilty in Federal Court. (T.145-147).

Expert psychiatric testimony confirms that this was an "isolated incident", that the Respondent does not have a

criminal personality and that there is absolutely no repetitiveness or recidivism involved. (T.31,47). Today, Respondent understands and controls his compulsive needs. (T.31). Respondent is a role model for attorneys (T.83), is ethical (T.93), reliable and trustworthy (T.111), has an excellent legal mind (T.112) and is absolutely the type of person who should practice law again and can be readily rehabilitated if he is not already so. (T.68-69,84-85,112-113).

Immediately upon recovering from the shock of his March 2, 1982 arrest (T.140), Respondent cooperated with The Florida Bar, including suspending himself and waiving a grievance committee hearing . (T.150,165). In the course of his plea negotiations with the Federal government, Respondent gave the federal prosecutors his income tax records for the last five years and consent forms to investigate all of his bank accounts. (T.134-135). Respondent offered the same information to The Bar. On June 22, 1982, Respondent entered an open plea of guilty in the criminal case and Agent Cox was present in Court and advised the Federal Judge of the Respondent's role in the case. (T.79). At the sentencing hearing on August 13, 1982, the Federal Court after being

fully advised, placed the Respondent on probation. (R.R.II,1). Since then, Respondent has worked for Legal Services of Greater Miami. (T. 108). Although he still works probably twice full time and puts in some of the longest hours of any other full time employee, he now does so in a controlled fashion, as many attorneys do. (T.110, 119).

ARGUMENT

THE REFEREE DID NOT ERR IN RECOMMENDING A THREE YEAR SUSPENSION

The sole matter for this Court's consideration is The Bar's insistence that the discipline recommended by the Referee of a three year suspension commencing August 13, 1983 is erroneous in view of the facts and circumstances reflected by the record. As the party petitioning for review, the burden is upon The Bar to demonstrate that the Referee's recommendation is erroneous, unlawful or unjustified. Fla. Bar Integr. Rule, art. XI, Rule 11.09(3)(e). The Respondent respectfully submits that The Bar has not met this burden and urges this Court to approve the findings and recommendation of the Referee.

Although the ultimate judgment in disciplinary proceedings remains with the Court, the initial fact finding responsibility rests with the referee. State v. Bass, 106 So.2d 77 (Fla.1958); The Florida Bar v. McCain, 361 So.2d 700 (Fla.1978). A referee's findings of fact should be accorded substantial weight and should not be overturned unless clearly erroneous or lacking in evidentiary support.

The Florida Bar v. Wagner, 212 So.2d 770 (Fla.1968); The Florida Bar v. Baron, 392 So.2d 1318 (Fla.1981).

In this case, after considering all the evidence the Referee recommended that Respondent not be disbarred (R.R.IV) but be suspended for three years, effective August 13, 1983, and thereafter until he shall prove rehabilitation and found (R.R.V) as follows:

1. At the time Respondent committed the crime for which he is being disciplined, he suffered from a personality disorder for which he has sought and received psychiatric treatment. The criminal act is regarded as an "isolated incident" by his treating psychiatrist who reports that Respondent has made significant progress. (Tr. p.29-33).

2. Respondent is a young man (35 years old) who shows great remorse for his criminal act and who has the ability to contribute exceptional legal talent to the community.

3. The criminal acts for which Respondent was convicted were unrelated to his practice of law and did not involve the violation of his clients' trust.

4. Although the Respondent committed a serious crime involving the sale of a large quantity of cocaine, it appears that he was not acting out of a corrupt, vile or base motive, but rather out of an ingenuous and misguided desire to "help" his friends.

5. Respondent has suffered personal hardship, embarrassment, humiliation, publicity, and the attendant financial hardships which accompany lack of employment opportunities for a suspended lawyer on federal probation.

6. The Respondent has evidenced a genuine commitment to initiate a course of both public service and commitment to work with legal services for the poor and to rehabilitate himself for a return to the practice of law.

7. In light of all the circumstances in this case, the Referee believes that the stigma of disbarment is a burden on Respondent which is not necessary to encourage reformation or rehabilitation of Respondent, and would not result in any greater protection of the public than would a three year suspension.

Although The Bar is seeking review of the Referee's recommendation as to discipline, it has not directly challenged any of the mitigating findings of fact expressed in the Referee's Report. Instead, The Bar has attempted to re-argue before this Court as "aggravating factors" allegations based upon Agent Garland's deposition testimony that Respondent was in charge of the drug transaction and had a pecuniary motive for his involvement.

The Respondent timely objected to the admissibility of the deposition of Agent Garland in its entirety, and submitted a written memorandum in support of his objection.

(T.8). Essentially Respondent argued that the alleged "knowledge" of Agent Garland was almost entirely hearsay and was contradicted by written reports of Special Agent Elena Cox, DEA. For example, with respect to the disputed issue of the alleged negotiations between Agent Cox and Respondent at a Wendy's restaurant, Agent Garland testified under oath he observed Agent Cox and Respondent meeting inside Wendy's, (D.32), that Agent Cox was seated next to Respondent (D.19) and that at that meeting Respondent negotiated with Agent Cox (D.18-19). Agent Cox's own reports submitted to the Referee by The Bar, however, show that Agent Cox was not present at that meeting in the restuarant and therefore none of these statements could possibly be true. (T.194). Other examples of inaccuracies in Agent Garland's deposition were noted to the Referee by counsel (T.49-56), and by Respondent in response to the Referee's direct questioning. (T.192-195).

The Bar's misperception of the Respondent's role in the drug conspiracy is belied by the factual presentation made by the government to the Federal District Court Judge prior to Respondent entering an open plea of guilty and that Judge's decision to place Respondent on probation, as well as the specific findings of the Referee.

All the allegedly "aggravating factors" posited by The Bar in its brief were raised and litigated before the Referee. The Bar acknowledged at the hearing that much of Agent Garland's testimony was hearsay (T.57) and that the Referee would have to decide how much probative value to afford it. (T.57).

As this Court's fact-finder, the Referee was responsible for properly resolving any conflicts in the testimony. The rationale for according a referee's factual findings a presumption of correctness is that the trier of the facts is able to observe the demeanor of witnesses and is in a better position than an appellate court to determine issues of credibility and the weight to be afforded testimony and resolve factual issues and conflicts. The Referee could not have chosen a term more appropriate than "ingenuous" (R.R.V,4) to characterize the Respondent. From her Report it is clear that although the Referee found Respondent guilty of serious misconduct, she was impressed and influenced by his contrition, honesty and commitment to rehabilitation.

To sustain disbarment, not only a wrong, but a corrupt motive must be proved by a preponderence of the evidence. The Florida Bar v. Thomson, 271 So.2d 758

(Fla.1972); Gould v. State, 127 So. 309 (Fla.1930). The Respondent respectfully submits that the finding of the Referee below that Respondent did not act out of a corrupt, vile or base motive (R.R.V,4; C.R. 11-12) is supported by substantial evidence and the Referee's conclusion that Respondent not be disbarred was not erroneous.

The Respondent agrees with The Bar's statements of the criteria established by this Court for determining a proper disciplinary sanction and the circumstances under which a disciplinary judgment of disbarment is justified. (C.B.7) There has never been any dispute as to the standards to be applied in this case, nor in light of the Referee's findings and the presumptions afforded them, can there now be any genuine dispute as to any material fact.

This Court's promulgation of rules providing that an attorney convicted of a felony not be automatically disbarred, but rather suspended for three years and indefinitely thereafter until he proves his rehabilitation, demonstrates this Court's recognition that not every case of felonious misconduct warrants disbarment. Fla. Bar Integr. Rule, art. XI, Rule 11.07(4). If The Bar thereafter initiates a disciplinary action against a convicted attorney,

it becomes necessary for a referee to make a thorough and detailed examination of the facts and circumstances surrounding the attorney's misconduct and make a report of findings and a recommendation as to appropriate discipline. Florida Bar Integr. Rule, art. XI, Rule 11.06.

The Respondent never argued that he should not be disciplined for his misconduct, but asked only that the Referee consider the mitigating facts of this case and this Court's statement that

> [d]isbarment is an extreme penalty and should only be imposed in those rare cases where rehabilitation is highly improbable. The Florida Bar v. Davis, 361 So.2d 159, 161 (Fla.1978). See also The Florida Bar v. Felder, 425 So.2d 528, 530 (Fla.1982).

Each disciplinary case is unique and must be assessed individually. The Florida Bar v. Breed 378 So.2d 783 (Fla.1980). In some cases it is appropriate for this Court to disbar an attorney for felonious misconduct while in other cases a less severe discipline is warranted. As this Court has often stated, it is not merely appropriate, but expected, that a referee in determining discipline take into consideration all the facts and circumstances surrounding an attorney's misconduct. The Florida Bar v. Pincket, 398 So.2d

802 (Fla.1981); The Florida Bar v. Lord, 433 So.2d 983 (Fla.1983); The Florida Bar v. Perri, 435 So.2d 827 (1983). It is therefore helpful to review other disciplinary cases to determine whether the presence and absence of factors considered by the Referee in formulating her disciplinary recommendation were appropriate.

In its brief The Bar cites six cases wherein an attorney who was convicted of a felony was disbarred. (C.B. 12-14). In two of those cases, disbarment resulted when the accused attorney failed to file any response to the petition of The Bar. The Florida Bar v. Jackman, 145 So.2d 482 (Fla.1962); The Florida Bar v. Cobourn, 368 So.2d 47 (Fla.1979). In two others, the respondents were found guilty of composite and gross misconduct. The Florida Bar v. Penrose, 413 So.2d 15 (Fla.1982); The Florida Bar v. Whiting, 157 So.2d 77 (Fla.1963). In other cases, the accused attorneys were found guilty of forsaking their clients interests for their own personal gain. The Florida Bar v. Wilson, 425 So.2d 2 (Fla.1983), The Florida Bar v. Beasley, 351 So.2d 959 (Fla.1977).

But even in Wilson, a case wherein an attorney convicted of two felonies was disbarred for pressuring a

client, in jail, to arrange a cocaine deal, the Court stated:

> If substantial and convincing evidence of mitigating circumstances had been presented, the complexion of this case may well have been different. But no evidence in mitigation has been proffered by respondent. His claims of innocence and lack of knowledge are belied by the jury verdict and the specific finding of the trial judge...The Florida Bar v. Wilson, supra, at 3.

In the case at bar the Referee found numerous mitigating factors and noted the Respondent's conduct was "unrelated to his practice of law and did not involve the violation of his clients' trust." (R.R.V,3). In other cases where an attorney was guilty of a felony or other serious misconduct, this Court has found it proper to give consideration to various mitigating factors, including psychological and emotional difficulties, early admission of guilt, cooperation with The Bar's investigation, lack of harm sustained by any client, lack of a vile, base or corrupt motive, personal hardships, age, subsequent exemplary conduct, service to the community, restitution and rehabilitation potential and efforts. The Florida Bar v. Blessing, 440 So.2d 1275 (Fla.1983); The Florida Bar v. Kennedy, 439 So.2d 215 (Fla.1983); The Florida Bar v. Perri,

435 So.2d 827 (Fla.1983); The Florida Bar v. Lord, 433 So.2d 983 (Fla.1983); The Florida Bar v. Felder, 425 So.2d 528 (Fla.1983); The Florida Bar v. Pettie, 424 So.2d 734 (Fla.1983); The Florida Bar v. Pincket, 398 So.2d 802 (Fla.1981); The Florida Bar v. Seidler, 375 So.2d 849 (Fla.1979); The Florida Bar v. Brady, 373 So.2d 359 (Fla.1979); The Florida Bar v. Davis, 361 So.2d 159 (Fla.1978); The Florida Bar v. Thomson, 271 So.2d 758 (Fla.1973); The Florida Bar v. Pahules, 233 So.2d 130 (Fla.1970); State v. Ruskin, 126 So.2d 142 (Fla.1961); State v. Evans, 94 So.2d 730 (Fla.1957).

The Respondent respectfully submits that all of the factors the Referee stated in her Report as reasons supporting her recommendation to suspend rather than disbar the Respondent have been held to be relevant, mitigating factors justifying the imposition of this less severe form of discipline.

Although The Bar posits that Respondent's misconduct was financially motivated, there is absolutely no valid evidence in the record to show that Respondent had ever been involved in drug dealings for any financial or otherwise vile or criminal motive. The evidence is to the contrary and

shows that Respondent had lived for about a year and a half from legitimate income and savings accumulated during seven years of practicing law. (T.132-134). The Federal Government had access to five years of Respondent's income tax returns as well as all bank statements and the same were offered to the Referee below (T.134-135). The Referee, aware of these matters, did not find that money was the motivating factor in this offense. The specific written finding of the Referee that Respondent was not acting out of a corrupt, vile or base motive (R.R.V,4); (C.R.10) has not and cannot be shown to be erroneous.

The Bar attempts to distinguish this case from The Florida Bar v. Pettie, 424 So.2d 734 (Fla.1983) wherein the Court held that it is appropriate in determining discipline to take into consideration circumstances surrounding the misconduct, including cooperation and restitution. The Bar implies that the Respondent failed to cooperate. We respectfully submit that there is no factual basis for this allegation. The Referee made no such finding. To the contrary, the Respondent was cooperative with The Bar, suspending himself and waiving a grievance committee hearing. (T.65, 150). Further the Respondent gave his financial

records to prosecutors (T. 134-135), entered an open plea of guilty and was sentenced before anyone else entered any plea (T. 147), and no evidence was adduced of any allegedly "uncooperative" conduct. Additionally, as stated by Respondent's former defense counsel, the Respondent had no other "cooperation" to provide because of his minimal role in that case and because the government knew Respondent was otherwise not involved in the drug scene. (T. 64).

The Referee also properly considered and found favorably for Respondent as to his potential for rehabilitation, a factual issue relevant to her determination to suspend rather than disbar Respondent. In The Florida Bar v. Lord, 433 So.2d 983 (Fla.1983), the Court held that rehabilitation was one of ten factors upon which the referee properly based a disciplinary recommendation.

In the instant case, the Referee's finding that Respondent's misconduct was an "isolated incident" unlikely to reoccur (R.R.V,1) was amply supported by the uncontroverted testimony of a prominent and extraordinarily experienced psychiatrist. (T.31-32). Further, there was undisputed testimony from Respondent's former and current co-employees and employer to support the Referee's findings that

Respondent has exceptional legal talent to contribute to the community (R.R.V,2), and he has demonstrated his commitment to a course of both public service and working with legal services for the poor and to rehabilitate himself for a return to the practice of law. (R.R.V,6). Although The Bar argues that disbarment is not permanent and would impose a more appropriate process for readmission and cites The Florida Bar v. Mattingly, 342 So.2d 508 (Fla.1977), this Court has distinguished its holding in Mattingly, stating that:

> to follow it when there is an expectation of rehabilitation would needlessly blur the distinction between suspension and disbarment. The Florida Bar v. Blessing, 440 So.2d 1275, 1277 (Fla.1983).

The Court then went on to state that the better view is one which it has often expressed in various formulations, including The Florida Bar v. Davis, 361 So.2d 159 (Fla.1978); The Florida Bar v. Moore, 194 So.2d 264 (Fla.1966); and State v. Ruskin, 126 So.2d 142 (Fla.1961), and stated:

> [D]isbarment is the extreme measure of discipline that can be imposed on any lawyer. It should be resorted to only in cases where the person charged has demonstrated an attitude or course of conduct that is wholly inconsistent with approved professional standards. To sustain

> disbarment there must be a showing that the person charged should never be at the bar. It should never be decreed where punishment less severe, such as reprimand, temporary suspension or a fine will accomplish the desired purpose." The Florida Bar v. Blessing, 440 So.2d 1275, 1277 (Fla.1983)

The Referee below found that the stigma of disbarment would be a burden on the Respondent which is not necessary in this case to encourage reformation or rehabilitation nor would it result in any greater protection of the public than would a three year suspension. (R.R.V,7). The Respondent respectfully submits that based upon the evidence and the Referee's findings of mitigating factors and the Respondent's demonstrated potential for rehabilitation, a discipline not more severe than a three year suspension is proper and will accomplish the purposes of discipline.

CONCLUSION

For the foregoing reasons, the Respondent respectfully submits that it is clear from the Referee's Report that although Respondent's misconduct is serious, there are an abundance of mitigating factors in this case which warrant her conclusion that the appropriate discipline is a three year suspension, not disbarment.

Accordingly, the Respondent respectfully requests this Honorable Court enter an Order approving the Referee's findings and impose a discipline not more severe than the three year suspension, effective August 13, 1983, recommended by the Referee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief was sent by United States mail to: Richard B. Liss, Bar Counsel, The Florida Bar, Suite 602, 915 Middle River Drive, Fort Lauderdale, Florida 33304, this 23rd day of July, 1984.

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By 
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