IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellee,

v.

CLIFFORD B. WENTWORTH,

Respondent-Appellant.

_____/

Supreme Court Case No. 65,415

TFB Case No. 17D82F74

ANSWERING BRIEF ON BEHALF OF THE FLORIDA BAR

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PREFACE

The record on appeal in this proceeding consists, in large measure of the pleadings and correspondence filed with the referee. Reference in this brief, therefore, will be to specific pleadings and dated correspondence. References to the ten page transcript of the final hearing will be referred to as "Record, page."

The accused attorney shall be, in all instances referred to as "appellant."

Appellee shall be referred to as "the bar."

ISSUES INVOLVED

In the bar's view, the issues presented upon this appeal are:

I. Was appellant afforded all rights to which he was entitled under the Florida Bar Integration Rule? Subsidiary to such issue is:

a. Is a convicted felon in a witness protection program entitled to greater or additional rights to those afforded to other respondents in the attorney discipline process?

II. Were any issues presented to defeat appellee's application for judgment on the pleadings?

III. Is disbarment appropriate discipline under the facts and circumstances of this proceeding?

STATEMENT OF CASE AND FACTS

On August 30, 1983, appellant entered a plea of guilty to the first count of a multi-count indictment in case number PCR810040 in United States District Court for the Northern District of Florida, such count alleging violations of Title 18, United States Code, sections 1961, 1962(d) and 1963 and constituting felonies under the laws of the United States of America.

Upon receipt of notice of such felony conviction this Court, by order dated September 26, 1983, suspended appellant from The Florida Bar pursuant to Fla. Bar Integr. Rule, article XI, Rule 11.07(3), such suspension effective as of October 26, 1983.

On November 15, 1983 grievance committee 17D found probable cause that, as a result of his guilty plea and conviction, appellant had violated Fla. Bar Integr. Rule, article XI, Rule 11.02(3).

The bar thereafter filed its complaint and requests for admissions with this Court on June 5, 1983 and the same date served appellant by certified mail with copies of such pleadings addressed to him at his official bar address pursuant to Fla. Bar Integr. Rule, article XI, Rule 11.01(2). Appellant had neglected to comply with Fla. Bar Integr. Rule, article II, Section 6 by failing to advise the bar's executive director of his change of address, with the result that appellant did not receive the complaint and admission requests.

Rather than proceeding upon appellant's default, the bar assigned one of its staff investigators to attempt to establish some contact with

appellant. This produced an address to which copies of all pleadings and the order assigning the referee were sent. The following ensued:

1. By letter dated August 2, 1984 appellant advised the referee that he had received the requests for admissions on July 27, 1984 and requested a sixty (60) day extension within which to respond thereto. He also moved to maintain confidentiality.

2. On August 10, 1984 appellant filed formal application for the relief referred to in his August 2, 1984 letter.

3. The bar opposed both applications (letter in opposition dated August 7, 1984) and by order dated August 23, 1984 the referee denied the application to maintain confidentiality but granted to appellant twenty (20) days within which to respond to the admissions requests.

4. On September 18, 1984 the bar filed and served its application for judgment on the pleadings returnable October 5, 1984.

5. On October 3, 1984 the bar received appellant's responses to the admissions requests. The service certificate refers to a September 14, 1984 mailing date. By his responses, appellant conceded the genuineness of the indictment and judgment of conviction attached to the complaint and admitted to his guilty plea as alleged in the complaint.

6. On October 4, 1984 the bar received papers in opposition to the bar's application for judgment on the pleadings and an application for continuance of the October 5, 1984 hearing.

7. On October 5, 1984 the referee granted to appellant a continuance to October 12, 1984. Notice of such continuance was transmitted to appellant through his attorney by telephone on the same

date and written notification was transmitted to appellant via mailgram the same date.

8. Appellant's attorney notified the referee by mailgram dated October 9, 1984 that he, appellant's attorney, could not guarantee that appellant would receive notification of the continuance in time for the hearing. Neither appellant nor his attorney made further attempt to communicate with the referee and did not appear on the return date.

9. Upon the return date, October 12, 1984, the referee, considering appellant's responses to the requests for admissions and indicating his receipt and review of appellant's affidavit in opposition to the bar's application, determined to grant the bar's motion. The referee then, noting appellant's July 19, 1984 two year suspension ordered by this Court in The Florida Bar v. Wentworth, No. 64,279 (Fla. July 19, 1984) and considering other precedent, determined upon a recommendation of disbarment which was incorporated in his subsequent report.

ARGUMENT

I. APPELLANT WAS AFFORDED ALL RIGHTS TO WHICH HE WAS ENTITLED UNDER THE FLORIDA BAR INTEGRATION RULE.

The distillate of appellant's argument is that he was not afforded sufficient notice and time to enable him to present evidence to the referee.

Appellee's view is that appellant was given reasonable notice and opportunity to defend himself; that what appellant seeks are rights greater than provided to other accuseds facing bar complaints.

As is apparent from appellant's brief, his whereabouts were unknown to the bar upon the commencement of this proceeding. Having failed to inform the bar of his whereabouts as mandated by Fla. Bar Integr. Rule, article II, Section 6, the bar served the complaint and requests for admissions by certified mail addressed to appellant's last record bar address under Rule 11.01(2).

Despite appellant's default, the bar, anticipating severe discipline in light of appellant's racketeering conviction and his two (2) year suspension ordered by this court in The Florida Bar v. Wentworth, No. 64,279 (Fla. July 19, 1984) in a neglect case, made a last ditch effort to contact appellant. Remarkably, the bar's staff investigators developed a mailing address and appellant received notice.

Having been invited into the arena, appellant determined to dictate the rules of the encounter.

In his August 2, 1984 letter to the referee, appellant requested

sixty (60) days within which to respond to the requests for admissions. When the referee granted a twenty (20) day extension for such filing in his August 23, 1984 order, appellant was (adding five (5) days for mailing) given until September 17, 1984 within which to serve his responses. Having concededly received the requests on July 27, 1984 appellant thereupon had 52 days within which to respond.

According to appellant, he received the bar's application for judgment on the pleadings (returnable October 5, 1984) on September 27, 1984. His application for continuance, setting forth such assertion, was received by both the referee and the bar one (1) day prior to the return date. The referee, sua sponte, granted a continuance to October 12, 1984.

As a result of the extension and continuance referred to hereinabove, appellant was afforded two and one half months within which to prepare for the hearing. By notice dated August 20, 1984, appellant informed the bar of his representation by Attorney Gary Southworth, a member of The Florida Bar, to whom copies of all pleadings and correspondence were served. The referee's decision to grant a continuance to October 12, 1984 was transmitted to Attorney Southworth, by telephone, on October 5, 1984. Confirmation was also forwarded by mailgram. Appellant's sole response, through his attorney, was to, in turn, address a mailgram to the referee and the bar advising them that there was no certainty that appellant would receive notice of the continuance. Neither appellant nor his attorney made any inquiry of the court or bar concerning whether or not appellant's application for

continuance of the proceedings scheduled for October 5, 1984 had been granted or denied. Neither made any inquiry as to whether or not the October 12 hearing was to proceed as scheduled.

It is respectfully submitted that the bar's complaint could not have been stated more simply. The misconduct complained of consisted of a record plea of guilty to a drug importation felony. The indictment and judgment of conviction are attached to the complaint. The plea and the genuineness of the indictment and judgment of conviction were unchallenged in appellant's response to the bar's requests for admissions. Thus, the issues to be presented at the final hearing were narrowly defined.

With two and one half months to prepare, appellant should not now be heard to complain that he was deprived of adequate notice and/or opportunity to be heard. It is respectfully submitted that to extend extra considerations or special protections and immunities to a convicted felon who may be participating in some type of witness protection program is to pander to those members of the bar who deserve it the least.

II. THERE WERE NO ISSUES PRESENTED TO THE REFEREE TO DEFEAT APPELLEE'S APPLICATION FOR JUDGMENT ON THE PLEADINGS.

In considering appellee's application for judgment on the pleadings the referee expressly noted appellant's response to the bar's requests for admissions, reading such response into the record (record, pages 2

and 3). In addition, the referee expressly noted his receipt and examination of appellant's affidavit in opposition to the application for judgment on the pleadings. (Record, page 5). The referee nonetheless granted the bar's application. It is respectfully submitted that the referee acted appropriately.

Firstly, the response to the bar's requests for admissions recited admissions to each of the allegations of the complaint and conceded the genuineness of the underlying indictment and judgment of conviction. The affidavit in opposition to the application for judgment on the pleadings presents nothing to dilute the effect of appellant's admissions. While it makes reference to certain factors that appellant would regard as mitigating it makes no reference to any factor that would, in any way, change the fact that upon appellant's plea of guilt he was convicted of violations constituting felonies under the laws of the United States of America.

It is respectfully submitted that nothing submitted by appellant to the referee raised any factual issue to prevent the granting of the bar's application for judgment on the pleadings.

III. DISBARMENT IS APPROPRIATE DISCIPLINE UNDER THE FACTS AND CIRCUMSTANCES OF THIS PROCEEDING.

In addition to his automatic suspension under Fla. Bar Integr. Rule, article XI, Rule 11.07(3) the referee noted in this report appellant's two (2) year suspension ordered by this Court on July 19, 1984 in a neglect case. (The Florida Bar v. Wentworth, No. 64,279, (Fla. July 19, 1984). Coupled with the severe nature of appellant's

admitted violations of Title 18, United States Code, Sections 1961, 1962 (d) and 1963, it is respectfully submitted that disbarment is an appropriate discipline.

In his report the referee enumerated some of the overt acts set forth in the underlying indictment as follows:

i. On or about November 24, 1978, at Savannah, Georgia, respondent together with others, did import into the United States and possessed with intent to distribute approximately 40,000 pounds of marijuana aboard the fishing vessel Seastar.

ii. On or about December 14, 1978, respondent and others used Douglas D.C.-3C Aircraft N4996E to transport a multi-ton load of marijuana from Columbia, South America to Belle Glade, Florida, which aircraft crashed while landing and was subsequently seized by federal authorities.

iii. On or about January 14, 1979, Respondent and others caused two persons to travel in foreign commerce from Fort Lauderdale, Florida to Columbia, South America on board Douglas D.C.-3 Aircraft N90830 to pick up and import into the United States a multi-ton quantity of marijuana.

iv. On or about January 20, 1979, in Miami, Florida, respondent had a telephone conversation with another individual concerning arrangements for importing a load of marijuana into the United States and several other matters impacting upon their marijuana smuggling business.

v. On or about February 2, 1979, in Golden Beach, Florida, respondent had a telephone conversation with another individual

concerning large sum of money in excess of one million dollars that one Patrick C. Waldrop had delivered as part payment on a portion of the incoming shipment of marijuana being imported by aircraft.

In The Florida Bar v. Wilson, 425 So.2d 2 (Fla. 1983) this Court addressed an attorney's conviction for illegal drug trafficking and ordered a disbarment characterizing the violation as "a troublesome and serious crime." (Page 4).

This court has not hesitated to order disbarments in drug related proceedings. The Florida Bar v. Beasley, 351 So.2d 959 (Fla. 1977); The Florida Bar v. Penrose, 413 So.2d 15 (Fla. 1982); The Florida Bar v. Travelstead, 435 So.2d 832 (Fla. 1983).

The referee appropriately noted apppellant's July 19, 1984 two year suspension ordered by this Court. It has been repeatedly held that prior discipline is relevant and that cumulative misconduct is dealt with more severely than isolated misconduct. The Florida Bar v. Solomon, 338 So.2d 818 Fla. 1976); The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979); The Florida Bar v. Greenspahn, 386 So.2d 523 (Fla. 1980); The Florida Bar v. Greenspahn, 396 So.2d 182 (Fla. 1981).

CONCLUSION

Appellant, a convicted felon upon his plea of guilt, complains that he was not afforded an opportunity to defend himself despite the bar's extraordinary efforts to put appellant on notice of the proceeding and the referee's decisions thereafter resulting in affording to appellant two and one half months within which to address his defense. The bar

regards appellant's circumstances as self imposed and not a basis for special treatment. When appellant's discipline record is examined it is respectfully submitted that the discipline recommended is the minimum appropriate in the circumstances.

It is therefore respectfully requested that the referee's report be in all respects, affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answering Brief on Behalf of The Florida Bar was sent to Clifford B. Wentworth, Respondent-Appellant, Post Office Box 888-02754, Sandstone, MN 55072, by regular mail, on this 17th day of January, 1985.

David M. Barnovitz

DAVID M. BARNOVITZ