

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,)
Complainant,)
v.)
J. MARSHALL GIFFORD,)
Respondent.)

Supreme Court Case
No. 66,038

FILED
SID J. WHITE
JUN 26 1985
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS: Pursuant to the undersigned being duly appointed as Referee for the Supreme Court of Florida to conduct disciplinary proceedings as provided for by article XI, Rule 11.06 of the Integration Rule of The Florida Bar, a final hearing was held on May 24, 1985 in Key West, Florida. All of the pleadings, notices, motions, orders, transcripts and exhibits are forwarded with this report and the foregoing constitutes the record of this case.

*called the judge
8-29-85
His office has
sent everything.*

Louis Thaler appeared as Counsel for The Florida Bar and Respondent appeared without counsel.

On August 24, 1982, Respondent, J. MARSHALL GIFFORD, was held in direct criminal contempt by Circuit Court Judge Richard G. Payne of the Sixteenth Judicial Circuit. The contempt holding was based upon Respondent's conduct during the criminal trial of State v. Todd Diamond, Sixteenth Judicial Circuit Case No. 82-785-CF-A-31, occurring August 3, 1982 in Key West, Florida. At said trial, Respondent represented the defendant, Todd Diamond. Respondent appealed the contempt holding to the Third District Court of Appeal, and, in turn, to the Supreme Court of Florida. The result can be found in Gifford v. Payne, 432 So.2d 38 (Fla. 1983) in which the Court upheld the holding of direct criminal

contempt but amended that portion of the contempt holding which required Respondent to appear with co-counsel. The details of the Court's decision are not relevant here except for the upholding of the direct criminal contempt.

II. FINDINGS OF FACT: Respondent appeared without counsel at the Final Hearing. Respondent testified but did not present any witnesses. The Florida Bar presented the testimony of two witnesses: Judge Richard G. Payne, (the presiding Judge in the State v. Diamond case and the sentencing Judge in the contempt matter) and Judge Allison J. DeFoor, (the assistant state attorney in the State v. Diamond case).

Based upon an witness testimony and evidence presented, I find that:

1. That Respondent, J. MARSHALL GIFFORD, is and at all times hereinafter mentioned was, a member of The Florida Bar subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

2. That on or about May 15, 1982, Todd Diamond (hereinafter referred to as "Diamond") and Daniel Hengst (hereinafter referred to as "Hengst") were arrested by Florida State Troopers in Monroe County, Florida for possession of a controlled substance.

3. That Diamond and Hengst were charged by information with possession of a controlled substance.

4. That criminal proceedings were instituted against Diamond and Hengst in the Circuit Court of the Sixteenth Judicial Circuit in and for Monroe County, Florida, Case No. 82-785-CF-A-31.

5. That on or about May 16, 1982, Respondent undertook the representation of Diamond in the above-mentioned criminal proceedings.

6. That on or about May 17, 1982, co-defendant Hengst made a statement to the State Attorney's Office which exculpated Diamond and inculpated Hengst.

7. That co-defendant Hengst was represented by the Monroe County Public Defenders Office.

8. That on or about August 3, 1982, Assistant State Attorney J. Allison DeFoor II (hereinafter referred to as "assistant state attorney") filed a Motion in Limine which requested that defense counsel "make no reference in opening argument or in trial to a statement allegedly made by the co-defendant Hengst to the Office of the State Attorney on May 17, 1982."

9. That on or about August 3, 1982, the criminal case against Diamond proceeded to trial before The Honorable Richard G. Payne at the Monroe County Courthouse, Key West, Florida, (hereinafter referred to as "trial").

10. That during opening argument at trial Respondent made reference to co-defendant Hengst's statement, referred to in paragraphs 6 and 8.

11. That on the basis of the assistant state attorney's objection, Judge Payne conducted a side-bar conference and then adjourned the jury to complete the conference in chambers.

12. That in chambers, Judge Payne gave Respondent an opportunity to proffer the evidence.

13. That Judge Payne granted the State's Motion in Limine and directed Respondent not to mention statements made by the co-defendant Hengst.

14. That the jury was then called in and Respondent continued his opening argument.

15. That during the continuation of his opening argument, Respondent again referred to statements made by the co-defendant Hengst.

16. That Respondent's reference to the statements made by co-defendant Hengst was in disregard of Judge Payne's ruling on the State's Motion in Limine.

17. That upon the assistant state attorney's objection and motion for mistrial, Judge Payne declared a mistrial and released the jury from its obligation to sit in that case.

18. That on or about August 4, 1982, Judge Payne directed an Order to Show Cause to Respondent for direct criminal contempt for his conduct in connection with the Diamond case.

19. That the Order to Show Cause alleged that Respondent did knowingly and willfully violate the Court's Order granting the State's Motion in Limine which thereby necessitated the declaration of a mistrial.

20. That on or about August 24, 1982, a hearing was held before Judge Payne to consider the Order to Show Cause.

21. That Respondent appeared, with counsel, at the hearing and gave testimony regarding the Order to Show Cause.

22. That at the conclusion of the hearing on or about August 24, 1982, Judge Payne held Respondent in direct criminal contempt of Court.

23. That Judge Payne made a finding that Respondent's conduct was willful, deliberate and calculated to obstruct the Court in the administration of justice.

24. That Judge Payne further ordered Respondent to pay \$300 to the Clerk of Courts for the costs of assembling the jury; to pay \$300 to the Office of the State Attorney for costs of summoning witnesses; to satisfactorily complete 20 hours of Continuing Legal Education courses in the areas of criminal law and/or general trial practice within the ensuing 18 months; to not appear in the courts of the Sixteenth Judicial Circuit unless accompanied by co-counsel; and to read relevant case law and literature as cited by the Court.

25. That Respondent appealed the Contempt Order to the Supreme Court of Florida. The Supreme Court vacated that portion of the Contempt Order which placed a restriction on Respondent's ability to practice law (by requiring him to associate co-counsel before undertaking representation in criminal cases). The Supreme Court of Florida upheld the remainder of the Contempt Order and specifically stated that

its action in vacating a portion of the Contempt Order would not affect the institution of appropriate grievance or judicial disciplinary proceedings against Respondent in the appropriate forum.

III. RECOMMENDATION AS TO FINDING OF GUILT: Based upon the foregoing, I recommend that Respondent be found guilty of violating Disciplinary Rule 1-102(A) (5) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice); Disciplinary Rule 7-106(A) (a lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling); and Disciplinary Rule 7-106(C) (7) (in appearing in his professional capacity before a tribunal, a lawyer shall not intentionally or habitually violate any established rule of procedure or of evidence) of the Code of Professional Responsibility.

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE IMPOSED: Respondent has urged that he be found not guilty and that there be no discipline imposed. Bar Counsel presented the official position of The Florida Bar that Respondent receive a Public Reprimand to be published in the Southern Reporter. I recommend that Respondent receive a Public Reprimand to be published in the Southern Reporter.

V. RECOMMENDATION AS TO COSTS: I find that the following costs were reasonably incurred by The Florida Bar and recommend that they should be assessed against Respondent.

Grievance Committee Transcript September 26, 1983	\$ 201.62
Grievance Committee Transcript October 21, 1983	169.25
Administrative Cost Grievance Committee Level ...	150.00

Administrative Cost Referee Level	150.00
Witness Transportation and Costs J. Allison DeFoor	148.57
Bar Counsel Transportation and Costs Louis Thaler	189.26
Final Hearing Transcript May 24, 1985	<u>191.80</u>
TOTAL	<u>\$ 1,200.50</u> =====

I further recommend that Respondent should be allowed to retire said costs with a payment plan mutually agreed upon between Respondent and the Director of Lawyer Regulation of The Florida Bar.

Respectfully submitted this 24TH day of June, 1985



 PHILLIP W. KNIGHT
 Referee
 305-375-5368