

FILED
SEP 8 1985
CLERK, SUPREME COURT
By *[Signature]*
Chief/Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,) The Supreme Court Case No.
66,146

In Re: ALAN SILVERSTEIN) The Florida Bar File No.
(Petition for Reinstatement) MRE85001

COMPLAINANT'S INITIAL BRIEF

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INTRODUCTION

THE FLORIDA BAR, Respondent in the lower proceedings, will be referred to as "The Florida Bar".

ALAN SILVERSTEIN, Petitioner in the lower proceedings, will be referred to as "Alan Silverstein" or "Mr. Silverstein".

THE BOARD OF GOVERNORS OF THE FLORIDA BAR will be referred to as the "Board of Governors".

The following symbols will be used in this Brief:

- "T" - Transcript of the Reinstatement Hearing held on April 25, 1985.
- "RR" - Report of Referee.

POINTS ON APPEAL

I.

WHETHER PUBLIC POLICY SHOULD BE CONSIDERED A BAR TO THE REINSTATEMENT OF A SUSPENDED ATTORNEY WHERE THE GROUNDS FOR THE ORIGINAL SUSPENSION WERE THE ATTORNEY'S CRIMINAL CONVICTION FOR SALE AND DELIVERY OF COCAINE, A CONTROLLED SUBSTANCE.

II.

WHETHER A PETITIONING ATTORNEY'S FINANCIAL INSTABILITY, AS REFLECTED BY OUTSTANDING LIENS AND JUDGMENTS, SHOULD BE CONSIDERED A NEGATIVE FACTOR IN DETERMINING HIS REINSTATEMENT.

III.

WHETHER, IN APPLYING A CASE BY CASE STANDARD, PETITIONING ATTORNEY ALAN SILVERSTEIN SHOULD BE REQUIRED TO TAKE THE FLORIDA BAR EXAMINATION.

STATEMENT OF CASE AND FACTS

On February 26, 1980, Alan Silverstein was adjudged guilty of sale or delivery of a controlled substance (approximately one ounce of cocaine) and was sentenced to confinement for a term of eighteen (18) months in the State Penitentiary by Eleventh Judicial Circuit Court Judge Richard S. Fuller. After serving approximately two and one-half (2 1/2) months of the state prison time, Judge Fuller mitigated the sentence to time served and ordered Mr. Silverstein released to the Concept House Drug Program.

Mr. Silverstein was suspended from the practice of law on March 14, 1980 by reason of said felony conviction pursuant to article XI, Rule 11.07 of the Integration Rule of The Florida Bar.

On October 4, 1984, Mr. Silverstein filed a Petition for Reinstatement. Prior to formulating a position with respect to Mr. Silverstein's reinstatement, The Florida Bar conducted an investigation into Petitioner's fitness to resume the practice of law.

Thereafter, Bar Counsel polled the seven local members of the Board of Governors for the Eleventh Judicial Circuit to determine The Florida Bar's position with respect to the reinstatement. No local member of the Board of Governors opposed the reinstatement although some of the local members questioned Mr. Silverstein's financial condition as reflected by various judgments and liens against him and one local member questioned the reinstatement procedure itself. (T. 123).

On April 25, 1985, a reinstatement hearing was held before Referee Eugene S. Garrett, Circuit Court Judge for the Seventeenth Judicial Circuit. At the hearing, Bar Counsel presented The Florida Bar's position that it neither supported nor opposed Silverstein's reinstatement (T. 5). Bar Counsel, however, pointed out to the Referee that The Florida Bar was concerned over Silverstein's financial condition as reflected by various judgments and liens against him (T. 6,123). Silverstein presented the testimony of several witnesses in favor of his reinstatement.

On May 29, 1985, Referee Garrett issued a Report of Referee recommending that Silverstein's Petition for Reinstatement be approved with the condition that Respondent forfeit his right to legally attack or avoid directly or collaterally, in any state or federal court, the judgments, and liens obtained against him before the reinstatement hearing (R.R. 3-4).

The Report of Referee was submitted to the full Board of Governors at their next meeting held July 31 to August 2, 1985, pursuant to article XI, Rule 11.09(3)(a) of the Integration Rule of The Florida Bar. The full Board of Governors voted to petition for review of the Report of Referee in order to challenge the reinstatement of Silverstein in its entirety for reasons set forth in this brief.

ARGUMENTS

I.

PUBLIC POLICY SHOULD BE CONSIDERED A BAR TO THE REINSTATEMENT OF A SUSPENDED ATTORNEY WHERE THE GROUNDS FOR THE ORIGINAL SUSPENSION WERE THE ATTORNEY'S CRIMINAL CONVICTION FOR SALE AND DELIVERY OF COCAINE, A CONTROLLED SUBSTANCE.

Generally, the elements to be considered in regard to reinstatement of an attorney are (1) strict compliance with disciplinary order, (2) evidence of unimpeachable character, (3) clear evidence of good reputation for professional ability, (4) evidence of lack of malice and ill feeling toward those involved in bringing disciplinary proceedings, (5) personal assurances of sense of repentance and desire to conduct practice in exemplary fashion in future, and (6) restitution of funds. In Re Petition of Timson, 301 So.2d 448, 449 (Fla. 1974). Also, clearly, the Supreme Court may consider the underlying or prior disciplinary proceeding which gave rise to the discipline. In Re Petition of Rubin, 323 So.2d 257 (Fla. 1975); In Re Petition of Wolf, 257 So.2d 547 (Fla. 1972).

In the Wolf case, the reinstatement of the petitioner was denied because of the nature of the disciplinary offense and the felony conviction arising therefrom. The Wolf Court stated that if the concept of discipline and the protection of the public, as well as the image of The Florida Bar, are to have any meaning at all, such cases must be "viewed in the cold light of objectivity and without regard to personal sympathy". Wolf, supra, at 550.

This is the main contention of The Board of Governors of The Florida Bar and reason for this Petition for Review. The Board of Governors recognizes, as this Court recognized in the Wolf case, that "the Integration Rule at every turn places emphasis upon the protection of the public and the image and integrity of The Florida Bar as a whole". Wolf, supra, at 548. The Board of Governors contests Mr. Silverstein's reinstatement in order to promote this aim of the Integration Rule.

The Board of Governors has thus taken the position that attorneys suspended or disbarred for criminal convictions related to activities involving controlled substances should be placed under the strictest scrutiny before they are allowed to resume the practice of law. Although the Board of Governors in 1980 (the year of Mr. Silverstein's felony conviction) were aware of the serious impact of such offenses committed by attorneys, it was only recently that the Board of Governors felt compelled to take the above-stated position.

The Board of Governors has taken this position for many reasons. First, there is a near epidemic proportion of Florida attorneys who are becoming illicitly involved with the drug trade. The Florida Bar v. Beasley, 351 So.2d 959 (Fla. 1977) (conviction for delivery of marijuana warrants disbarment); The Florida Bar v. Schram, 355 So.2d 788 (Fla. 1978) (admitted guilt of possession of felony quantity of marijuana warrants suspension where adjudication was withheld); The Florida Bar v. Ryan, 394 So.2d 996 (Fla. 1981)

(indictment on felony charges for intent to sell marijuana warrants disbarment after attorney failed to appear); The Florida Bar v. Penrose, 413 So.2d 15 (Fla. 1982) (involvement in conspiracy to purchase and distribute marijuana warrants disbarment); The Florida Bar v. Travelstead, 435 So.2d 827 (Fla. 1983) (conspiring to import marijuana warrants disbarment); The Florida Bar v. Wilson, 425 So.2d 2 (Fla. 1983) (conviction for solicitation to traffic cocaine warrants disbarment); The Florida Bar v. Levenstein, 446 So.2d 87 (Fla. 1984) (involvement with drug-smuggling conspiracy warrants granting of leave to resign without leave to apply for readmission); The Florida Bar v. Sherry, 445 So.2d 1021 (Fla. 1984) (pleading guilty to conspiracy to traffic controlled substances warrants approval of petition for leave to resign without leave to reapply). Further, according to recent statistics formulated by The Florida Bar, from July 1983 to July 1985, there were 28 cases in which Florida attorneys were disciplined for involvement with drugs.

Second, aside from the actual statistics and involvement, the image of the Florida attorney has been greatly distorted in the eyes of the public not only in Florida, but, throughout the world. The Florida lawyer is becoming increasingly associated with the drug trade. This association is not one of providing the constitutionally guaranteed right to counsel, but one of providing help to, becoming involved with, deriving profit from, and actually aiding and abetting the drug trade. The Board of Governors believes that this image will not be

corrected until notice is given that drug-related offenses by Florida attorneys will not be easily forgiven. The Board of Governors do not want the criminal behavior of an objectionable few to continue to ruin the image and integrity of The Florida Bar and its approximately 36,000 attorneys.

The underlying facts of this case weigh against Silverstein's reinstatement. Respondent was convicted for sale and delivery of approximately one ounce of cocaine to an undercover officer for fifteen hundred dollars. The Florida Bar Integration Rule, article XI, Rule 11.02(3)(a) states, in part:

The commission by a lawyer of any act contrary to honesty, justice or good morals, whether the act is committed in the course of his relations as an attorney or otherwise, whether committed within or outside the State of Florida, and whether or not the act is a felony or misdemeanor, constitutes a cause for discipline.

Mr. Silverstein's actions were clearly contrary to honesty, justice and good morals. His genuine addiction to cocaine (T.15) adversely reflected on his fitness to practice law.

Damage to the integrity and image of The Florida Bar clearly would result from Mr. Silverstein's reinstatement after such a short length of time since this drug deal occurred. Mr. Silverstein was convicted in February 1980, suspended by The Florida Bar in March 1980, was in prison for 2 1/2 months in 1980 and in a drug treatment facility for approximately 16 months in 1980-1981. Mr. Silverstein's civil

rights were not restored until June 29, 1984, less than one year from the date of the reinstatement hearing held April 25, 1985.

This is a case where Mr. Silverstein's actions, although committed outside his role as an attorney, have done much harm to society and to the image of The Florida Bar. To allow Mr. Silverstein's reinstatement at this time could only cause further harm to the image and integrity of The Florida Bar.

II.

A PETITIONING ATTORNEY'S FINANCIAL INSTABILITY, AS REFLECTED BY OUTSTANDING LIENS AND JUDGMENTS, SHOULD BE CONSIDERED A NEGATIVE FACTOR IN DETERMINING HIS REINSTATEMENT.

In reviewing this matter, the Board of Governors found great financial instability on the part of Mr. Silverstein. This financial instability is reflected by outstanding liens and judgments against Mr. Silverstein. Mr. Silverstein has in some instances attempted to come to grips with these outstanding liens and judgments. However, in some instances Mr. Silverstein has not attempted to deal with them. Further, his attempts at paying off most of these financial obligations have come recently and clearly with an eye toward seeking a favorable position towards reinstatement to The Florida Bar. This was a major area of concern presented to the Referee by Bar Counsel (T.6). The majority of local Board of Governors members polled by Bar Counsel also expressed concern over Mr.

Silverstein's financial instability (T. 123). The Referee eventually held that Mr. Silverstein should be reinstated with the condition that he "forfeit his right to legally attack or avoid directly or collaterally in this state or federal court, including obviously bankruptcy court, these judgments, which are set forth in The Florida Bar Report of Investigation, that was made part of these proceedings . . ." (T. 132).

Based upon Mr. Silverstein's poor record with regard to these debts, the Board of Governors have taken the position that failure to come to terms with these financial obligations reflects negatively on his reinstatement. This is consistent with the case law involving reinstatements. In Re Petition of Rubin, 323 So.2d 257 (Fla. 1975) (unsatisfied judgments, and a failure to acknowledge liens in a personal financial statement filed for the purpose of demonstrating reinstatement, are antithetical to an affirmative showing of rehabilitation); In the Matter of Hodges, 229 So.2d 257 (Fla. 1969) (reinstatement of disbarred attorney was conditioned on his payment of outstanding debts arising from disbarment proceeding).

The Board of Governors urge that Mr. Silverstein's financial instability, as reflected by outstanding liens and judgments, should speak against his fitness to practice law and accordingly should prevent his reinstatement at this time.

III

IN APPLYING A CASE BY CASE STANDARD, PETITIONING ATTORNEY ALAN SILVERSTEIN SHOULD BE REQUIRED TO TAKE THE FLORIDA BAR EXAMINATION.

The Board of Governors of The Florida Bar are of the position that Mr. Silverstein should be required to take the bar examination to prove his fitness to resume the practice of law.

Whether it is proper to require a successful passing of the bar examination as a condition for reinstatement is considered on a case by case basis. The Florida Bar In Re Barket, 424 So.2d 751 (Fla. 1982). In Barket, the petitioning attorney had been out of practice for over six years and the bar examination was recommended by the Referee and ordered by the Court.

Although the taking of the bar examination was not recommended by the Referee in the instant case, this Court has ordered that the bar examination be taken in the absence of a Referee's recommendation. The Florida Bar In Re Warren, 408 So.2d 223 (Fla. 1981). In Warren, a suspended attorney who had been an active legal intern in Alabama was required to take the Florida and ethics parts of the bar examination even though the Referee did not recommend it.

This Court has stated that the requirement of taking the bar examination as a condition of reinstatement, where the attorney has been suspended and out of practice for over three

years, is largely a judgment call. Barket, supra, at 751. The purpose of a bar examination is to test one's minimal competency to practice law. Given that purpose, the Board of Governors note that Mr. Silverstein's abilities and duties as a law clerk (T. 20) do not sufficiently test his competency to practice law. Mr. Silverstein has been out of the practice of law for over five years. Further, during the period in which he was licensed to practice law, he was having troubles with the law and an addiction to cocaine. Mr. Silverstein has admitted that (in response to a question about a phone call he allegedly received in 1979):

"Quite frankly, in November and December and January of 1979, if somebody called me up on the telephone, in the state of mind that I was in, I could have quite easily hung up on them, I could have hung up on my father as easily as this lady here." (T.120)

The Board of Governors further contends that since Mr. Silverstein's addiction to cocaine was legitimate (T.15-16), there was no way he could have been competently practicing law. Therefore, the period of possible incompetence extends far before his conviction in 1980.

Accordingly, due to the length of his suspension and his admitted past addiction to cocaine during the time period preceeding the suspension, the Board of Governors believes that Mr. Silverstein should be required to successfully complete the Florida Bar Examination as a condition to his reinstatement to The Florida Bar.

CONCLUSION

The Board of Governors of The Florida Bar filed this Petition for Review in order to protect the public and the image and integrity of The Florida Bar. Because of the near-epidemic proportion of Florida attorneys becoming illicitly involved with the drug trade, the reinstatement of Mr. Silverstein would adversely reflect on the image and integrity of The Florida Bar. Mr. Silverstein's actions were clearly contrary to honesty, justice and good morals. The Board of Governors find it repugnant that Mr. Silverstein would be allowed to be reinstated as a member in good standing to The Florida Bar only one year after his civil rights were restored and only five years since he sold one ounce of cocaine to an undercover police officer.

Further, aside from Mr. Silverstein's criminal background, the Board of Governors feel that Mr. Silverstein's financial instability, as reflected by outstanding liens and judgments against him, should be considered a negative factor in determining his fitness to be reinstated as a member in good standing of The Florida Bar. This negative factor should by itself preclude Mr. Silverstein from reinstatement at this time.

Finally, upon the approval of this or any future Petition for Reinstatement by Mr. Silverstein, Mr. Silverstein should

be required to successfully pass the Florida Bar Examination. Mr. Silverstein has not practiced for the past five years while under suspension. Also, based upon his admitted drug addiction, his ability to practice law, during the years preceeding his felony conviction in 1980, is questionable.

The Board of Governors of The Florida Bar respectfully urge that the recommendation to approve Mr. Silverstein's Petition for Reinstatement, as contained in Report of Referee, be considered in the light of the arguments set forth herein and that Mr. Silverstein's reinstatement be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Complainant's Initial Brief were sent to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301, and a true and correct copy was sent to Alan Silverstein c/o Mallory H. Horton, Suite 410 Concord Building, 66 West Flagler Street, Miami, Florida 33130, on this 28th day of August, 1985.



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