3-24

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

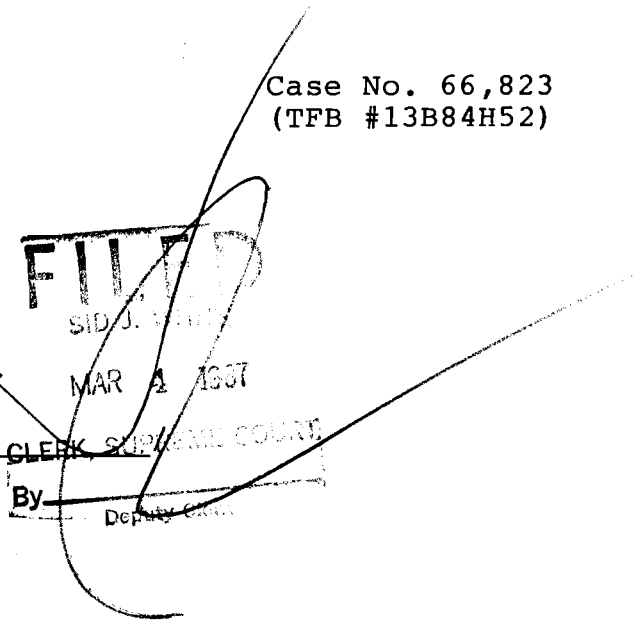
Complainant,

v.

RICHARD LEON,

Respondent.

Case No. 66,823
(TFB #13B84H52)



THE FLORIDA BAR'S OPENING BRIEF

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STATEMENT OF THE CASE AND THE FACTS

On October 20, 1983, this Court removed respondent from judicial office following a determination by the Judicial Qualifications Commission that respondent engaged in ex-parte conversations with Chief Circuit Court Judge Arden Mays Merckle relating to the disposition of a criminal case, over which Judge Merckle presided; improperly secured the alteration of criminal sentences in that case; agreed with Judge Merckle to deny untruthfully the existence of the ex-parte conversations and, later; made false statements under oath to the Judicial Qualifications Commission regarding his involvement in the entire matter. In Re: Inquiry Concerning a Judge, 440 So. 2d 1267 (Fla. 1983). On November 20, 1986, Arden Mays Merckle was disbarred from the practice of law for his misconduct relating to the above facts. The Florida Bar v. Merckle, No. 66,641 (Fla. Nov. 20, 1986).

On July 13, 1983, respondent was indicted in the Circuit Court of Hillsborough County regarding the above conduct on two counts of perjury and one count each of official misconduct, bribery, and unlawful compensation. He was later convicted of two counts of perjury and one count of official misconduct.

In the first perjury count, respondent was found guilty

of making a false statement under oath to the Judicial Qualifications Commission during the Commission's investigation of respondent's conduct, wherein he untruthfully stated that he did not attempt to influence Judge Arden Mays Merckle in his sentencing function in the a criminal case. [Bar Exhibit #1, Indictment, Count I].

In the second perjury charge, respondent was convicted of knowingly making a false statement under oath during the Judicial Qualifications Commission investigation regarding the reason he visited Judge Merckle's chambers on November 19, 1982 concerning the same case. [Bar Exhibit #1, Indictment, Count II].

Following his conviction, respondent was sentenced to five years probation on each count, ordered to pay $1,000 in court costs, and perform 1,000 hours of community service. On January 10, 1983, he was suspended from the practice of law upon petition by the Florida Bar resulting from the felony adjudication. State v. Leon, No. 83-8175 C (Fla. 2nd DCA July 3, 1985).

Respondent appealed; however, the conviction was affirmed on July 3, 1985 by the District Court of Appeal, Second District, with the exception of the conviction for official misconduct, which was set aside on constitutional grounds. Respondent's Motion for Rehearing was denied on

August 30, 1985 and his Petition for Review, filed with the Supreme Court was denied on April 16, 1986. Following the Supreme Court's Order, the judgment was deemed conclusively proved for purposes of disciplinary action pursuant to Integration Rule 11.07(4).

Following a disciplinary hearing on October 3, 1986, regarding the above conviction, the referee found the respondent guilty of perjury and recommended that he be suspended from practice for a period of three years with automatic reinstatement to the practice of law at the end of that period.

The Petitioner in this Petition for Review is The Florida Bar and the respondent is Richard E. Leon. In this Opening Brief, each party will be referred to as they appeared before the referee. Record references in this Opening Brief are to portions of the trial transcript with exhibits and pleadings as they appear in the record.

The Bar petitions this Court for a review of the referee's recommendation of discipline.

SUMMARY OF THE ARGUMENT

Respondent, while serving as a circuit court judge, provided false statements under oath to the Judicial Qualifications Commission regarding an investigation into his attempts to tamper with another court's sentencing function. As a result, he was removed from judicial office and convicted of two counts of perjury.

The referee's recommendation that respondent receive a three (3) year suspension is an insufficient disciplinary sanction for his misconduct. A suspension in the instant case is neither consistent with recent case law, nor does it comply with The Standards for Imposing Lawyer Sanctions, Black Letter Rules, (1986).

Additionally, the Report of Referee is technically in error in that the referee's recommendation that respondent be automatically reinstated at the end of a three year suspension is impermissible under the Integration Rule 11.10(4).

Further, the referee's finding of a violation of "perjury" is not in conformity with Rule 11.06(9)(a) and the charges in Paragraph twenty-five (25) of the Bar's Complaint.

In this Petition for Review the Florida Bar asks that the referee's recommendation of discipline be disapproved and that disbarment be ordered, as it is the only appropriate sanction for his misconduct.

ARGUMENT I

A three year suspension is an insufficient sanction for a felony conviction for perjury committed by a circuit court judge in a Judicial Qualifications Commission investigation regarding his attempt to influence the sentencing function of a court.

Respondent's conduct in the instant case clearly warrants disbarment under prior case law and The Standards for Imposing Lawyer Sanctions, Black Letter Rules, (1986) (hereinafter called Sanctions). First, disbarment is the only sufficient discipline under several of the Standards enumerated in the Sanctions.

It is undisputed that respondent was convicted of two counts of perjury committed as a circuit court judge, both of which are felony offenses. Under the general heading Failure to Maintain Personal Integrity, Standard 5.11 sets out disciplinary sanctions directly applicable to cases involving the commission of a criminal act. Subsection (a) clearly specifies that the appropriate sanction for the conviction of a felony is disbarment. Standard 5.11, Subsection (b) provides that "disbarment is appropriate when a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing,....". Respondent attempted to impede an investigation by the Judicial

Qualifications Commission on two separate occasions, by making false statements under oath regarding his attempt to influence the sentencing function of a court. Therefore, respondent's misconduct is an offense that clearly merits disbarment under both Subsections (a) and (b) of Standard 5.11.

Additionally, Standard 5.2, generally titled Failure to Maintain the Public Trust, applies to public officials who engage in conduct that is prejudicial to the administration of justice. Standard 5.21, under that heading, provides that "disbarment is appropriate when a lawyer, as a public official, knowingly misuses the position or advantage for himself or another, or with intent to cause serious or potentially serious injury to a party or to the integrity of the legal process". Respondent's untruthful sworn statements made in the course of an investigation concerning judicial misconduct, involving his attempt to tamper with another court's decision, is conduct clearly prejudicial to the administration of justice and, just as clearly, warrants disbarment under Standard 5.21.

With respect to prior case law, fortunately, few Florida cases exist involving judicial misconduct. Therefore, it is not surprising that the instant case, involving a judge who commits perjury regarding his attempt to tamper with another court's decision, is rare. However,

in The Florida Bar v. Merckle, No. 66,641 (Fla. Nov. 26, 1986), in what could be called a "companion case", former Chief Circuit Court Judge Arden Mays Merckle was disbarred for his participation in the facts in the instant case, which involved his alteration of a sentence (at this respondent's request) and, like respondent, his subsequent untruthful statements made to the Judicial Qualifications Commission. (Mr. Merckle was granted immunity from prosecution in return for his testimony in State v. Leon, supra, p. 2.)

Inherent in respondent's perjury conviction, is the fact that respondent did attempt to influence Judge Merckle in his sentencing function, about which fact he later lied. Like respondent, former Justice David Lucius McCain also attempted to influence the decision of a lower court and to tamper with the results of a motion pending before another court, while he held judicial office. He was disbarred by this court for his misconduct. The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978).

As this Court declared in McCain:

> The conduct engaged in by McCain while a Justice of the highest court of this state cuts to the very heart of the judicial system, a system carefully established to insure that equal justice under law prevails in this country for the rich and the poor, the powerful and the powerless.

> McCain's conduct has done much to erode the public's confidence in the integrity and impartiality of the judiciary and the bar, thus undermining the entire judicial process.

The Florida Bar v. McCain, 361 So.2d at 707. The Court further stated that McCain's blatant disregard for the integrity of the truth finding process, essential to our notion of equal justice, directly bears on his present fitness to practice law. Id. at 707. Accordingly, this Court disapproved the referee's recommendation of a discipline of a public reprimand and suspension and McCain was disbarred from the practice of law.

Like McCain, respondent improperly attempted to influence a court's decision, to wit: Arden Mays Merckle's sentencing function. Unlike McCain, he then made perjurious statements to the Judicial Qualification Commission regarding his attempt. Respondent's conduct in the instant case is clearly even more egregious then McCain's and, thus, disbarment can be the only sanction.

"Lawyers are disbarred only in cases where they commit extreme violations involving moral turpitude corruption, defalcations, theft, larceny or other serious or reprehensible offenses. Judges should be held to even stricter ethical standards because in the nature of things even more rectitude and up rightness is expected of them." In Re LaMotte, 341 So.2d 513 (Fla. 1977)(quoting Cincinnati Bar Association v. Heitzler, 32 Ohio St.2d 214, 291 N.E.2d 477, 482 (1972)).

Respondent committed a crime of moral turpitude involving his attempts to influence a court's decision. At the time of his misconduct, he was not only a lawyer, but a lawyer who held a high position of public trust as a circuit court judge. The serious injury caused to the integrity of the legal process by respondent's conduct and the public's knowledge of that conduct, is immeasurable.

ARGUMENT II

The referee's recommendation should be disapproved as it fails to conform to Integration Rule article XI, Rule 11.06.

The basic thrust of this Petition for Review is the Bar's request that this Court disapprove the referee's recommendation and that the Court order that respondent be disbarred from practice.

The Bar also points out that the referee's recommendation for a three year suspension with automatic reinstatement is technically in error, as it does not conform to Integration Rule 11.10(4). Rule 11.10(4) requires mandatory proof of rehabilitation at the end of three year period of suspension and, thus, the referee's recommendation of automatic reinstatement is in error. Additionally, the referee's automatic reinstatement is finding that respondent is guilty of "perjury" is inaccurate, as he fails to cite any of the Disciplinary Rules alleged by the Bar, as violations of the Code of Professional Responsibility, applicable to respondent's misconduct, to wit:

1) Disciplinary Rule 1-102(A)(3) by engaging in conduct involving moral turpitude;

2) Disciplinary Rule 1-102(A)(4) by engaging in

conduct involving dishonesty, fraud, deceit or misrepresentation;

3) Disciplinary Rule 1-102(A)(5) by engaging in conduct that is prejudicial to the administration of justice;

4) Disciplinary Rule 1-102(A)(6) by engaging in conduct that adversely reflects on fitness to practice law;

5) Disciplinary Rule 8-101(A)(2) by using a public office to influence or attempt to influence a tribunal to act in favor of himself or a client.

Thus, the Bar asks that this Court disapprove the referee's recommendation, find respondent in violation of the Disciplinary Rules as listed in the Bar's Complaint, and that this Court order that respondent be disbarred from the practice of law.

CONCLUSION

Respondent's conduct, committed while he held judicial office, a high position of public trust, has had a resounding and devastating impact on the integrity of our judicial system, as well as the entire Bar.

In the words of the referee in Merckle, adopted by this Court: "As both lawyer and judge, the respondent was expected to conduct himself in the highest ethical manner...(He) showed no concern for the ethical standards and the administration of justice both of which he swore to uphold".

WHEREFORE, The Florida Bar respectfully requests that this Honorable Court disapprove the referee's recommendation and that the Court disbar respondent Richard E. Leon from the practice of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to B. ANDERSON MITCHAM, Counsel for respondent, 1509 East Eighth Avenue in Tampa, FL 33605 and JOHN T. BERRY, Staff Counsel, The Florida Bar, Tallahassee, Florida, 32301, by regular U. S. Mail on this 23rd day of February, 1987.

DIANE V. KUENZEL