IN THE SUPREME COURT OF FLORIDA

IN RE: CHRISTOPHER DeBOCK, Petitioner,	)	
vs.	)	CASE NO. 67,207
STATE OF FLORIDA, Respondent.	)	(Style in Fourth District Court of Appeal: State of Florida v. Richard F. Rendina; Case No. 84-2632)

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Respondent, the State of Florida, was the petitioner in the Fourth District Court of Appeal, and is the prosecution in the Circuit Court of Broward County in the case of State of Florida v. Richard F. Rendina. Petitioner, Christopher DeBock, is a witness granted use immunity in the case against Rendina.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "A" will be used to refer to Respondent's appendix.

All emphasis has been added by respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Richard F. Rendina was charged by information, on or about June 21, 1984, with unlawful compensation or reward for official behavior (Exhibit 1). On November 7, 1984, Christopher DeBock was served with a subpoena to appear at a deposition on the same date (Exhibit 2). During the deposition, Mr. DeBock asserted his Fifth Amendment right against self-incrimination (Exhibit 3, page 6). The State filed a Petition for Order to Show Cause why Christopher DeBock should not be held in indirect criminal contempt on November 7, 1984 (Exhibit 4). The trial court issued an Order to Show Cause the same day (Exhibit 5).

Christopher DeBock's attorney filed a Motion to Quash Subpoena on November 9, 1984 (Exhibit 6). He also filed a Motion to Dismiss Order to Show Cause (Exhibit 7). A hearing on all the motions was held on November 13, 1984 (Exhibit 8). On November 14, 1984, the trial court entered the order which is the subject of this petition, finding that Mr. DeBock was entitled to assert his Fifth Amendment rights despite the fact that he was given immunity pursuant to §914.04 Fla. Stat. (1983) (Exhibit 9).

The State filed a Motion to Amend and Clarify Order on November 19, 1984 (Exhibit 10). The State also filed a Motion to Extend Speedy Trial (Exhibit 11). A hearing was held on the motions on November 21, 1984 (Exhibit 12). The trial court granted the Motion to extend Speedy Trial, and

entered an order (Exhibit 13). The Motion to Amend and Clarify Order was only granted to the extent that on page two (2) of the order (Exhibit 9) the word "testimony" was stricken and the word "record" substituted. DeBock's statement to the Florida Department of Law Enforcement is included in the appendix as Exhibit 14.

The State of Florida filed a Petition for Writ of Common Law Certiorari in the Fourth District Court of Appeal, which was granted on March 27, 1985. State v. Rendina, 467 So.2d 734 (Fla. 4th DCA 1985). (Exhibit 15). Petitioner sought discretionary review in this Court, and this proceeding follows.

POINTS INVOLVED

POINT I

WHETHER THE FOURTH DISTRICT COURT OF APPEAL WAS CORRECT IN ITS HOLDING THAT BAR DISCIPLINARY PROCEEDINGS ARE NOT PUNITIVE IN NATURE?

POINT II

WHETHER THE WITNESS WHO DESIRES DISCIPLINARY IMMUNITY HAS THE BURDEN OF SEEKING IT FROM THIS COURT?

POINT III

WHETHER SECTION 914.04 SHOULD BE READ AS EXTENDING IMMUNITY FROM BAR DISCIPLINARY PROCEEDINGS?

SUMMARY OF THE ARGUMENT

I. Florida Bar disciplinary proceedings are not penal in nature, and §914.04, Fla. Stat. (1983) does not confer immunity from disciplinary proceedings. Only this Court has the power to grant immunity from disciplinary proceedings.

II. It is the attorney/witness who must apply to this Court for disciplinary immunity. An assistant state attorney is under no obligation to make an application on behalf of the witness.

III. There is no reason to recede from this Court's earlier opinion in Ciravolo, and it is clear that §914.04, Fla. Stat. (1983) does not confer immunity from disciplinary proceedings.

ARGUMENT

POINT I

THE FOURTH DISTRICT COURT OF APPEAL WAS CORRECT IN ITS HOLDING THAT BAR DISCIPLINARY PROCEEDINGS ARE NOT PUNITVE IN NATURE.

Petitioner alleges that the Fourth District Court of Appeal was in error in holding that Bar discipline proceedings are remedial in nature. The State maintains that the Fourth District Court of Appeal's opinion was correct.

The Fourth District Court of Appeal held that disciplinary proceedings are not penal in nature. State v. Rendina, 467 So.2d 734, 737 (Fla. 4th DCA 1985). This is correct. Attorneys subject to Bar disciplinary proceedings face at the worst the loss of their privilege of practicing law. They do not face any criminal sanctions such as incarceration or fines. Disciplinary proceedings are merely administrative proceedings. Petitioner's contention that by holding that the proceedings are remedial, the Fourth District Court of Appeal has "rewritten" the law is totally inaccurate. The law has always been so.

For federal constitutional purposes, to protect a person's right against self-incrimination, it is only necessary that use immunity be given when testimony is compelled. State v. Harris, 425 So.2d 118 (Fla. 3d DCA 1982). 914.04, Fla. Stat. (1983) provides all the immunity

necessary to compel testimony from a witness. State v. Richards, 457 So.2d 1124 (Fla. 3d DCA 1984). Since Petitioner was given use immunity, he must testify in the Circuit Court.

The immunity statute also provides immunity from proceedings by State licensing agencies. Lurie v. Florida State Board of Dentistry, 288 So.2d 223, 226 (Fla. 1973). The source of this immunity from actions by State licensing agencies is purely statutory and is not derived from the Fifth Amendment to the Constitution of the United States. The statute does not provide for immunity from disciplinary proceedings since the State of Florida Constitution vests exclusive jurisdiction over the admission of discipline of attorneys in the Supreme Court of Florida. Article V, Section 15, Florida Constitution; Ciravolo v. The Florida Bar, 361 So.2d 121, 125 (Fla. 1978). Thus, only the Supreme Court of Florida can immunize an attorney, or prospective attorney, from professional discipline. Id; Rendina, supra; State v. Brodski, 369 So.2d 366 (Fla. 3d DCA 1979). This situation is distinguishable from other professions regulated by the executive branch of the government.

This Court has previously noted that it is important to bear in mind that the very purpose for the enactment of §914.04, Fla. Stat. was to aid the state in its prosecution of crimes. Tsavaris v. Scruggs, 360 So. 2d 745, 749 (Fla. 1977); State v. Schell, 222 So.2d 757, 758 (Fla. 2d DCA 1969). The statute must be liberally construed to accomplish the purpose of aiding the prosecution. Id;

Tsavaris, supra. The statute must be construed so as to avoid an unreasonable or absurd result. Schell, supra, 222 So.2d at 759.

In the instant case, the state attorney did all he could to protect Petitioner from incriminating himself by granting him use immunity under §914.04, Fla. Stat. (1983). He was required to do nothing else to compel Petitioner's testimony, and Petitioner must testify. Menut v. State, 446 So.2d 718, 719 (Fla. 4th DCA 1984).

The opinion of the Fourth District Court of Appeal was correct, and must be affirmed by this Honorable Court.

POINT II

THE WITNESS WHO DESIRES DISCIPLINARY IMMUNITY HAS THE BURDEN OF SEEKING IT FROM THIS COURT.

Respondent maintains that it is the witness who desires disciplinary immunity who must seek the immunity from this Court. The only immunity which the state attorney can confer is pursuant to §914.04, Fla. Stat. (1983). See e.g., State v. Richards, supra. This statute does not include immunity from disciplinary action by The Florida Bar. Ciravolo v. The Florida Bar, supra; State v. Brodski, supra; The Florida Bar v. Doe, 384 So.2d 30 (Fla. 1980).

Implicit in this Court's opinion in Ciravolo is the assumption that it is the witness given use immunity from disciplinary proceedings by The Florida Bar who must seek such immunity from the Supreme Court of Florida. It is clear that only this Court, and not the executive branch of government, has the power to confer disciplinary immunity to attorneys. Ciravolo v. The Florida Bar, supra; Article V, Section 23, Florida Constitution, (1885); Article II, Section 3, Florida Constitution (1885).

This Court has stated in Ciravolo;

> Is there any way in which an attorney may be granted immunity from disciplinary proceedings? Yes, by application to and order of this court. Where it appears that the greater good to society will be served by granting immunity from disciplinary action to an attorney, we will do so. But, we will not

> allow officials of other branches to tread on the constitutional power vested in this court by the people of this state.
>
> 361 So.2d at 125

In the same breath, Ciravolo says that "an attorney may be granted immunity . . . by application to and order of this court." Id. The opinion does not state that a prosecuting attorney should make such application; to the contrary, it states "we will not allow officials of other branches to tread on the constitutional power vested in this court . . ." Id. Thus, the plain reading of Ciravolo is that an attorney may seek immunity by application to this Court. This was the interpretation given the language by the Third District Court of Appeal in State v. Brodski, supra.

Petitioner's argument that it is the assistant state attorney who must make application to this Court for immunity on behalf of an attorney/witness fails to take into account the case law which holds that it is sufficient to compel testimony by a witness if an assistant state attorney confers use and derivative use immunity pursuant to §914.04, Fla. Stat. (1983). Hope v. State, 449 So.2d 1315 (Fla. 2d DCA 1984); State v. Brodski, supra; State v. Richards, supra.

The Fourth District Court of Appeal, in its opinion in the case below, held that it was Petitioner that must make application for disciplinary immunity to this Court. Respondent maintains that the Fourth District Court of Appeal was correct. That court stated:

> One of the issues here is: who should shoulder the responsibility for seeking such immunity from the supreme court? We hold that a witness in DeBock's position must apply therefor because, when the statutory immunity provided by section 914.04 has been granted by a state attorney, the witness is immunized from criminal prosecution and must testify. The witness cannot, under the Fifth Amendment, refuse to do so because of the potentially adverse use of his testimony in Bar disciplinary proceedings. The reason for this rule is that Bar disciplinary proceedings are remedial, not punitive; they are designed to determine the lawyer's fitness to practice so as to protect the public, not to punish the lawyer in question. (citations omitted)
>
> 467 So.2d at 736.

* * *

and:

> A lawyer, just as any other person called as a witness in any proceeding, may properly invoke the Fifth Amendment privilege against self-incrimination if the answer to a question put to him has the tendency to incriminate him, i.e., to subject him to a criminal prosecution. However, a lawyer may not properly invoke the Fifth Amendment privilege against self-incrimination if the answer to a question put to him may result in a Bar disciplinary proceeding but does not have a tendency to incriminate him.
>
> 467 So.2d at 737.

Petitioner alleges that the State of Florida "was willing to forego its power to prosecute Petitioner in exchange for his testimony in one proceeding - State v. Rendina, Case No. 84-6521-CF-10 - while coyly reserving its power to pursue Petitioner's punishment in another" (Petitioner's brief at p. 19). This is an inaccurate reflection of the

position taken by the assistant state attorney at a motion hearing held on November 13, 1984. At that hearing, Mr. Russell stated:

> We have an obligation under the ethical rules to report what we feel are ethical violations and that's about as far as it goes.
>
> After that, it's up to the Bar. When we say we are seeking instituting (sic) bar proceedings, we have no jurisdiction to institute them other than make the initial report. (Exhibit 8, p. 21).

What the assistant state attorney stated was a correct assessment of an attorney's duty to report ethical violations under the Code of Professional Responsibility, and the independent nature of the Florida Bar disciplinary proceedings under The Florida Bar Integration Rule and Bylaws. See Disciplinary Rule 1-103 and Article XI, Integration Rule and Bylaws. Only the Florida Bar has the power to prosecute an attorney for alleged disciplinary violations; the position of an assistant state attorney assigned to a related criminal case is irrelevant.

Petitioner further argues, at pages 21 and 22 of his brief, that Justice Overton has noted that it is the state attorney who must seek immunity. In support of this argument, Petitioner cites Justice Overton's dissenting opinion in Petition of Supreme Court Special Committee, Etc., 373 So.2d 1, 38 (Fla. 1979). Respondent asserts that the meaning of

Justice Overton's remark in his dissenting opinion, "for the aid of the state attorneys of this state", is not that it is the state attorney who must seek discipliniary immunity on behalf of an attorney/witness, but merely that a codification of the case law would simplify procedures in instances where an attorney is compelled to testify. Id. A standard procedure would "aid . . . state attorneys." This reading of Justice Overton's dissent is supported by the proposed Rule 11.12(6)(c) which reads:

> Immunity From Grievance Prosecution. Attorneys may be granted immunity from disciplinary prosecution only by a member of the Florida Supreme Court.
> Id., 373 So.2d at 3, n. 5.

The proposed rule said no more than Ciravolo did; it did not say that it is a state attorney who must seek immunity on behalf of a witness. In fact, the Integration Rule and Bylaws provide for no action on behalf of assistant state attorneys; prosecuting grievance cases is within The Florida Bar's staff attorneys' sole jurisdiction. Only an attorney himself can seek disciplinary immunity from this Court.

The Fourth District Court of Appeal's opinion below was correct in holding that Petitioner must seek his own immunity.

POINT III

SECTION 914.04 SHOULD NOT BE READ AS EXTENDING IMMUNITY FROM BAR DISCIPLINARY PROCEEDINGS.

Petitioner is asking this Court to recede from its opinions in Ciravolo, and its progeny, and hold that §914.04, Fla. Stat. (1983) confers immunity from disciplinary proceedings by The Florida Bar. Respondent asserts that Petitioner has stated no valid arguments on which this Court could base such a departure from precedent. Petitioner analogizes prosecution by The Florida bar to prosecution by a foreign jurisdiction. Such an analogy is inaccurate. Disciplinary proceedings are not penal in nature. State v. Rendina, supra, and The Florida Bar is not a foreign jurisdiction.

Ciravolo was correct in holding that §914.04, Fla. Stat. (1983) does not confer immunity from disciplinary proceedings. There is no reason to recede from such a holding here.

CONCLUSION

THEREFORE, based upon the foregoing reasons and authorities cited herein, Respondent respectfully requests that this Honorable Court AFFIRM the opinion of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief by Respondent on the Merits has been furnished, by United States Mail, to DAVID R. DAMORE, ESQUIRE, Florida Bar #172844, Post Office Box 39312, Fort Lauderdale, Florida this 10th day of December, 1985.

Joan Fowler Rossin
Of Counsel