IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	)	SUPREME COURT CASE NO. 67,309
Complainant,	)	
v.	)	
CARLOS CELSO CRUZ,	)	THE FLORIDA BAR CASE NO. 11H85116
Respondent.	)	

COMPLAINANT'S ANSWER BRIEF TO RESPONDENT'S APPEAL

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INTRODUCTION

The Florida Bar, Complainant, will be referred to as either "The Florida Bar" or "Complainant".

Carlos C. Cruz, Respondent, will be referred to as either, "Respondent", "Carlos C. Cruz" or "Mr. Cruz".

Honorable Bobby W. Gunther, the Referee, will be referred to as the "Referee" or "Judge Gunther".

Transcript of the trial before the referee dated October 18, 1985, will be referred to as "T" followed by a page number.

The report of the referee dated November 27, 1985 will be referred to as "RR" followed by a page number.

STATEMENT OF THE CASE

On June 13, 1983, Carlos C. Cruz, formerly the United States Marshal for the Southern District of Florida, was convicted by a federal court of conspiracy to bribe a United States Government Official, in violation of Title 18, United States Code, Section 371 and bribery of a United States Government Official, in violation of Title 18, United States Code, Section 201(B)(1) and Title 18, United States Code, Section 2. He was sentenced to one year and one day (Bar Exhibits 2 and 3; T 4-6). Because of the felony convictions, Mr. Cruz was suspended from practicing law in Florida, effective August 29, 1983 (Bar Exhibit 4; T 8).

Based upon Mr. Cruz' conviction, The Florida Bar filed a complaint under provisions of Article XI of the Florida Bar Integration Rule and requested the referee to recommend disbarment. On November 27, 1985, the referee submitted a Report of Referee to the Supreme Court, in which she recommmended that Mr. Cruz be disbarred, nunc pro tunc, August 29, 1983 (RR 3). On January 27, 1986, Mr. Cruz submitted a Petition for Review and a brief to the Supreme Court.

STATEMENT OF THE FACTS

Based upon felony convictions, Respondent was suspended from practice on August 29, 1983 and a complaint was filed by the Florida Bar (Bar Exhibit 4; T 8). Respondent was afforded a trial by a referee duly appointed by the Supreme Court of Florida. Respondent was given the opportunity to present evidence and witnesses in mitigation of discipline but not as to whether he was guilty of the conviction entered against him.

Respondent argued that the only issue was whether his character was good enough to allow him to resume the practice of law or warranted disbarment (T 10). Respondent admitted pleading to the federal charges but denied committing the offense of bribery (T 11). The Respondent agreed with the Referee that he had been convicted and sentenced, and that he had served time for the offense. Mr. Cruz also agreed that the Referee could not go behind the conviction to decide whether he was in fact guiltysince the conviction was the determining factor of his guilt (T 12). The Referee then made a finding that Respondent was convicted of two felonies and that this put him in violation of Disciplinary Rules 1-102(A)(3), 1-102(A)(5) and 1-102(A)(6) (T 16, 17; RR 2).

Respondent introduced three witness to testify on his behalf, two of whom participated in the federal trial proceedings: United States District Court Judge Hoeveler, who

was the presiding judge at trial (T 26-46) and who accepted Respondent's guilty plea and George Thompson, who was the probation officer who did the investigation for Respondent's PSI report (T 46-59). The third witness was Bishop Armando Leon, who testified favorably concerning Respondent's character (T 60-87).

Judge Hoeveler and Mr. Thompson testified that Respondent's involvement was due to a gross lack of judgment. Either Respondent was weak under the circumstances or felt he would benefit politically by helping Klosky, an Assistant Secretary for the State of Florida who became a co-defendant of Respondent in the federal indictment (T 35, 40, 51). Both of Respondent's witnesses stated that he knew what Gottlieb was doing and that Respondent told the Warden to go along (T 34, 37, 38, 39, 56). Gottlieb is the father of the prisoner to receive the furlough. Gottlieb was also a co-defendant for purposes of the federal indictment. Respondent essentially was in the position of a go-between with the Warden and Klosky in an effort to secure a furlough for Gottlieb's son (T 32, 33).

Respondent testified that he was offered Disney World tickets and a position with the State of Florida as Director of Department of Law Enforcement when he left the Federal Government but contends that these offers were unrelated to the bribe at issue (T 68, 90). Respondent testified that he introduced Klosky to Warden Putnam for the purpose of securing

a furlough for Mr. Gottlieb's son (T 68). That Warden Putnam came to Respondent and asked him if he should take the cruise tickets to which Respondent recounted that he told the Warden the tickets were complimentary and that Klosky could give them to anyone (T 70). When the Warden asked Respondent if Klosky could get them the jobs offered, Respondent replied that Klosky was influential and could deliver the jobs (T 88, 89). Respondent further testified that Klosky made these job offers at the first meeting where Respondent introduced Klosky to Warden Putnam for the purpose of obtaining a furlough for Mr. Gottlieb's son (T 90). Respondent also admits that he introduced Klosky to Putnam because it would further his political career (T 91). Respondent stated that he had no idea that Klosky's requests would escalate beyond the furlough request (T 73) stated that he did not feel that he did anything wrong in requesting the furlough so that the boy could get out of jail for the Jewish holidays and that he would do the same today (T 73, 82).

At the end of the trial the Referee stated that she would listen to all the tapes in their original condition because she thought it was the only fair thing to do (T 96). The Referee did not listen to the tapes as promised at trial and stated her reason for not doing so in the Report of Referee signed November 27, 1985:

> After reading The Florida Bar v. Vernell, 374 So.2d 473, supra, it is apparant

> that this referee cannot 'go behind the convictions'. Therefore, no useful purpose would be served by listening to the tapes. (RR 2)

SUMMARY OF ARGUMENTS

1. Referee was not required to listen to sixty (60) hours of FBI tapes to afford Respondent a fair trial.

2. The Referee's recommendation of disbarment is an appropriate form of discipline in this case considering all the facts and circumstances.

ARGUMENT

I. REFEREE'S REFUSAL TO LISTEN TO FBI TAPE RECORDINGS DID NOT DENY RESPONDENT A FAIR TRIAL.

Respondent's argument is that unless the referee listens to the FBI tapes then he will not be afforded a fair trial because he will not have been permitted to show the mitigating factors involved in his bribery convictions.

The Florida Bar and the Referee at trial (RR 2) rely on The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979) for authority that a referee is not permitted to go behind a standing conviction and that Respondent is not entitled to a

trial de novo for the purpose of showing that his conviction was erroneous.

The Florida Bar recognizes that Respondent has a due process right to notice and to be given an opportunity to be heard in person and through witnesses to explain circumstances of the alleged offense and to offer testimony in excuse or in mitigation of any penalty to be imposed as discipline. The Florida Bar v. Fussell, 179 So.2d 852 (Fla.1965). The Respondent is under the obligation to show cause why an appropriate disciplinary judgment should not be entered against him. At a minimum an attorney subject to discipline is entitled to procedural due process, including notice and an opprtunity to be heard. In Re Ruffalo, 390 U.S. 544, 550, 88 S.Ct. 1222, 1225, 20 L.Ed.2d 117 (1968); The Standing Committee on Discipline of the United States District Court for the Southern District of California v. Ross, 735 F.2d 1168, 1170 (9th Cir. 1984) (due process satisfied where attorney received proper notice of disciplinary proceeding, court granted more than three months to prepare defense, two lengthy hearings were conducted and attorney permitted to present evidence and testify.)

Here, although the Referee did not review the tapes she listened to the testimony of Respondent and his witnesses. One of Respondent's witnesses was the presiding judge at Resondent's trial, who had accepted Respondent's guilty plea (T 25-46). Another was the probation officer assigned to

conduct a PSI investigation pursuant to Respondent's sentencing (T 46-49). Both of these witnesses testified that Respondent had a motive of political ambition for introducing co-defendant Klosky to Warden Putnam to obtain the furlough for co-defendant Gottlieb's son. Although the subsequent conversations between Warden Putnam and Respondent were initiated by Warden Putnam, Respondent did not discourage Warden Putnam from accepting gifts from Klosky. Also, Respondent did not discontinue contact with Warden Putnam or report him to authorities when knowledge of the escalation had been brought to his attention. Instead, he told Warden Putnam to go ahead and accept the cruise tickets and told Warden Putnam that co-defendant Klosky was an influential and wealthy man and could deliver on the state jobs offered. It would seem that the Referee was more than fair to Respondent in allowing Respondent to testify to the particular facts of the federal trial and in allowing Respondent to present his own witnesses to testify as to the facts of the case, to wit: Judge Hoeveler (T 25-46), George Thompson (T 46-59) and Bishop Armando Leon (T 59-64).

The Supreme Court of South Carolina in an opinion, In the Matter of Rish, 256 S.E.2d 540 (S.C. 1979), held that a conviction is not so conclusive as to bar all evidence and testimony concerning it, however the scope of evidence should be limited so as not to infringe upon the integrity of the conviction or plea. Such evidence could not include an

assertion of innocence by the attorney of the crime for which he has been convicted. Rish, supra at 542. The court refused to consider assertions that a plea was entered for health reasons since it would require the court to assess the integrity of the criminal conviction itself.

Here, Respondent requested the court to consider the fact that he tried to withdraw his guilty plea and the reasons he attempted to withdraw the plea (T 29-31); contended that he was not guilty of the bribery for which he was convicted (T 11, 12); and requested the Referee to review tape recordings which were the basis of the indictment entered against him. Mr. Cruz contended that the Referee should listen to the tapes to see the way the conversations really were (T 94-99). Rish held that the attorney should not be allowed to present evidence inconsistent with the essential elements of the crime for which he has been convicted. Risk, supra at 542. Even though the tapes themselves would not be inconsistent with the conviction, the purpose for which they were presented was, since it was to re-evaluate the guilt of Respondent, which would certainly undermine the conviction.

Therefore the Referee's decision not to review the tapes did not deny Respondent a fair trial but instead was in compliance with Vernell, supra as stated in the Referee's Findings.

Although the Respondent had the tapes (T 96), he apparently did not have them in his possession at the hearing, as

he never attempted to introduce them into evidence. The Respondent is under the responsibility to present his own defense. The Referee is not required to sift through sixty (60) hours of tape recordings (T 95) to find any mitigating factors that might exist. The Respondent was afforded the opportunity to present evidence and witnesses but failed to introduce the tapes and transcripts at trial. Respondent could have called Warden Putnam, since he taped the conversations, to testify as an adverse witness and if necessary, could have used the tapes to impeach the Warden. The Referee did not prevent the Respondent from introducing into evidence those portions of the tapes that might have been beneficial to him.

The Florida Bar contends it was not necessary for the Referee to review sixty (60) hours of taped conversations in order for her to look for mitigating factors. We respectfully submit that it was Mr. Cruz' responsibility to screen the tapes and to attempt to introduce those portions that might be helpful to him. Accordingly, it was not improper for the Referee to refuse to listen to the tapes.

II. THE REFEREE'S FINDINGS AND RECOMMENDATIONS SHOULD BE SUSTAINED.

Findings of fact shall enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding. Florida Bar Integration Rule, art. XI, Rule

11.06(9)(a), The Florida Bar v. Stillman, 401 So.2d 1306 (Fla. 1981).

Florida Bar Integration Rule, art. XI, Rule 11.09(3)(e) states:

> Burden. Upon review, the burden shall be upon the party seeking review to demonstrate that a report of a referee sought to be reviewed is erroneous, unlawful or unjustified.

This Court stated in The Florida Bar v. Wagner, 212 So.2d 770, 772 (Fla. 1968), "In disciplinary matters, the ultimate judgment remains with this Court. However, the initial fact-finding responsibility is imposed upon the Referee. His findings of fact should be accorded substantial weight. They should not be overturned unless clearly erroneous or lacking in evidentiary support."

In The Florida Bar v. Hirsch, 359 So.2d 856, 857 (Fla. 1978), this Court stated:

> It is our responsibility to review the determination of guilt made by the Referee upon the facts of record, and if the charges be true, to impose an appropriate penalty for violation of the Code of Professional Responsibility. Fact-finding responsibility in disciplinary proceedings is imposed on the Referee. His findings should be upheld unless clearly erroneous or without support in the evidence.

The Respondent has failed to make the required showing that the findings of the Referee are clearly erroneous or lacking in evidentiary support. Therefore, the findings of guilty by the Referee should be approved.

III. THE REFEREE'S RECOMMENDATION FOR DISBARMENT IS APPROPRIATE IN THIS CASE.

The issue of discipline is determined upon the charge and any mitigating factors to the charge. Here the Referee found no mitigating factors which would suggest that the evidence against Respondent was not sufficient to sustain the conviction of bribery and conspiracy to bribe. See, The Florida Bar v. Levenson , 252 So.2d 794, 795 (Fla. 1971).

Bribery and conspiracy to bribe are the crimes for which Respondent has been convicted. The Florida Bar agrees with the findings of the Referee that:

> The offense of bribery is extremely serious, especially when committed by a United States Marshal, who is also an attorney and an officer of the court. In the case of The Florida Bar v. Riccardi, 264 So.2d 5 (Fla. 1972), the Supreme Court of Florida stated, 'it was not inclined to leniency in bribery matters...' Also, the court said, 'bribery was a particularly noxious ethical failure...' and 'such conduct strikes at the very heart of the attorney's responsibility to the public and the profession.' furthermore, in The Florida Bar v. Craig, 238 So.2d 78 (Fla. 1970), the Supreme Court stated, 'there are few offenses which a lawyer could commit which would more dramatically shake the public confidence in the profession.' (RR-3)

Because Respondent is now remorseful of his conduct and would not now pursue power at the expense of his public duties does not tell us what would have happened if Respondent's transgression had gone unchecked (T 69, 91). It is only after

Respondent was indicted and convicted that Respondent admittedly lost his lust for power (T 80, 81).

The New Jersey Supreme Court issued an opinion In the Matter of John E. Hughes, Jr., 446 A.2d 1208 (N.J. 1982) in which it explained at length why disbarment was the only appropriate discipline for the crime of bribery of a public official. Hughes, like Respondent, pled guilty to federal criminal charges of bribing a public official under 18 U.S.C. § 201. Hughes, like Respondent, received no immediate benefit from his actions. Hughes committed the crimes in an attempt to save his mother from the humiliation of learning about his father's tax evasion. The tax evasion resulted in liens against his mother's house. Although Hughes was not liable for the debts, he chose to pay them for his mother's sake. Hughes did not have the money to pay both the tax lien and the estate tax so he sought to arrange with the IRS for either settlement or a schedule of payment, both of which were denied. Hughes subsequently forged the Federal Tax Lien Releases and later attempted to bribe an IRS agent to ignore the forgery.

The court in Hughes held that:

> Bribery of a public official and forgery of public documents are among the most serious offenses an attorney can commit. They strike at the heart of the attorney's honesty and trust worthiness as an officer of the court. Without more, these acts demonstrate unfitness to practice law....even where it may be evident that an attorney will not

> repeat the transgression certain acts by attorneys so impugn the integrity of the legal system that disbarment is the only appropriate means to restore public confidence in it. Bribery of a public official is purely one of those cases. It has devastating consequences to the bar, the bench, and the public, and especially the public's confidence in the legal system. No sanction short of disbarment will suffice to repair the damage. Hughes, supra at 1210, 1211.

The court held that there were no mitigating circumstances, even though the crime was not committed for personal gain and Hughes did not have an obligation to repay the back taxes. The court reasoned that a person willing to resort to such means to accomplish his goals, no matter how beneficient the goals may be, is a danger to the legal system. Hughes, supra at 1211-1212.

In the case at hand, Respondent may have been motiviated by possible future political gains (T 69) or he may have had a misguided motive of helping a young man in prison (T 72). The result is the same. Respondent pled guilty to bribery, he testified at the trial before the Referee that he contacted the Warden for the purpose of obtaining certain favors for an individual in prison (T 68). He also encouraged the Warden to accept gifts offered to him by the man requesting the favors (T 70).

Although The Florida Bar has compassion for Mr. Cruz and his family, it must consider that "The primary purpose of discipline of attorneys is the protection of the public, and

the administration of justice, as well as protection of the legal profession through the discipline of members of the Bar. It is the responsibility of this court to purge the Bar of those unworthy to practice law in the state...". Florida Bar Integration Rule, Article XI, Rule 11.02.

CONCLUSIONS

Therefore, The Florida Bar recommends this Court approve the Referee's Findings of Fact, Conclusions of Law and Recommendation of Discipline.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Complainant's Answer Brief to Respondent's Appeal has been furnished by mail to Carlos Celos Cruz, Respondent, 3611 S.W. 126th Avenue, Miami, Florida 33175 on this 15 day of February, 1986.

Paul A. Gross

PAUL A. GROSS, BAR COUNSEL