12-7-86

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

GEORGE L. ONETT,

Respondent.
_____/

CONFIDENTIAL

CASE NO. 67,622

ANSWER BRIEF OF THE FLORIDA BAR

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STATEMENT OF THE CASE

This cause is predicated upon a Petition to Review filed by Respondent relating to the Referee's Report filed August 20, 1986. The recommended discipline by the referee was disbarment of the Respondent.

The complaint filed by The Florida Bar was based upon the conviction of Respondent in 1982 of six (6) felonies under federal law.

The final hearing of the complaint was held July 9, 1986 before the appointed referee, Judge Stephan P. Mickle.

Respondent has included an Appendix to his brief and references to the Appendix will be made by use of the symbol "A" with the appropriate page number. References to the transcript of the hearing before the Referee will be made by use of the symbol "T" with the appropriate page number.

STATEMENT OF FACTS

On July 30, 1981, an indictment was filed against Respondent in the Middle District, United States District Court, charging Respondent with the commission of certain felony charges under federal statutes.

Count 1 of the indictment charged Respondent with Mail Fraud Conspiracy. Count 2 of the indictment charged Respondent with Conspiracy to obstruct Interstate Commerce by Extortion. Count 4 charged Respondent with Obstruction and Attempted Obstruction of Interstate Commerce by Extortion. Count 9 charged Respondent with Mail Fraud. Counts 18 and 19 charged Respondent with perjury.

On July 2, 1982, Respondent was convicted of the above six (6) counts of the indictment under Title 18, U.S.C., Sections 371, 1341, 1623, 1951 and 1952.

Based upon the convictions of the felonies, Respondent was charged in a formal complaint filed by The Florida Bar of violating Disciplinary Rules 1-102(A)(1) (a lawyer shall not violate a disciplinary rule); 1-102(A)(3) (a lawyer shall not engage in illegal conduct involving moral turpitude); 1-102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); 1-102(A)(5) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice); 1-102(A)(6) (a lawyer shall not engage in any other conduct that adversely reflects

on his fitness to practice law) and Article 11, Rule 11.02(3)(b) of the Integration Rule of The Florida Bar (the commission by a lawyer of any act contrary to honesty, justice, or good morals . . . constitutes a cause for discipline).

Upon a formal hearing before a duly appointed referee in this matter, the Respondent was found guilty of the charged disciplinary violations. The recommended discipline by the Referee was disbarment of the Respondent.

Respondent filed a timely Petition for Review of the Report of the Referee.

SUMMARY OF ARGUMENT

I

Respondent's request for subpoenas was outside the jurisdiction of the referee and not a due process right.

II

The complained of refusal of compulsory process was for improper purposes and therefore not harmful error.

III

The introduction of the indictment was for informational purposes, not to prove any allegation, and was not harmful error.

IV

The felony convictions are conclusive proof of wrong doing and were not rebutted by Respondent.

ARGUMENT

I. IT WAS NOT A DENIAL OF DUE PROCESS FOR THE REFEREE TO REFUSE RESPONDENT'S APPLICATION FOR SUBPOENAS.

Respondent argues that the findings and Report of the Referee herein violated certain fundamental rights of compulsory process and presentation of witnesses which necessitate reversal in and of itself.

Respondent had requested of the Referee that subpoenas be issued for the Honorable John H. Moore, the presiding judge in Respondent's federal trial; the Honorable John R. Rawl, general counsel of the Judicial Qualifications Commission;, and for certain attendant documents. Respondent's purpose for these subpoenas, as argued to the Referee, was that the presiding trial judge, Judge Moore, had some previous pre-trial contact with the investigation of Respondent's conduct and should have recused himself from hearing Respondent's case.

While it cannot be denied that Respondent has a right to due process at the referee level of disciplinary proceeding, it is necessary to look at the purpose of such a hearing.

This Court has held that the presence of a felony conviction is conclusive proof of guilt of the offense charged for disciplinary purposes. The Florida Bar v. Heller, 473 So.2d 1250 (Fla. 1985). In Heller, this Court held that such a presumption of conclusive proof is necessary for the prevention of suspension hearings from

becoming factual retrials and that the legal correctness of the judgment of conviction is ordinarily beyond the scope of the Court's consideration. Supra., at 1251.

In State ex rel. Florida Bar v. Evans, 94 So.2d 730 (Fla. 1957), this Court held that due process in matters covering criminal convictions allows the Respondent an opportunity to offer testimony in excuse or in mitigation of the penalty.

In The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979) this Court held that a referee is not empowered to go behind a conviction and that respondent is entitled to present mitigating circumstances to show why he should not be disciplined. As recently as June 26, 1986, in The Florida Bar v. Cruz, No. 67,309, this Court has cited Vernell, supra., in supporting its holding that a referee cannot go behind a conviction.

In the instant matter, Respondent has requested certain process for service on witnesses whose testimony goes to having the referee go behind a conviction. The effect of Respondent's request and argument is to have the referee overturn Respondent's conviction in federal court on a procedural argument that begs the factual basis of the convictions.

Respondent's proffer of testimony (T-36, A-40) concerning the two requested witnesses clearly demonstrates that their testimony would be used to support an argument that the referee, in effect,

reversed the federal convictions and not consider them as proof of misconduct contrary to the holdings in Vernell and Cruz.

A review of The Bar's exhibit number 3, a copy of 725 F.2d 1561, the affirmance of Respondent's conviction by the U.S. Eleventh Circuit Court of Appeals, will show that Respondent has already had a review of his argument and the convictions were affirmed.

While The Bar will not argue that Respondent has certain due process rights at the referee level, he does not have a right to retry his felony charges before the referee or ask that the referee go behind the conviction in an attempt to disallow the appropriate discipline.

Since the request of the Respondent was for a purpose unattainable by the Respondent and beyond the referee's jurisdiction, any denial for such purposes does not infringe upon Respondent's due process rights; therefore, there is no basis for a reversal of the Referee's Report.

II. THE REFUSAL OF THE REFEREE OF THE REQUESTED COMPULSORY PROCESS WAS NOT HARMFUL ERROR.

As addressed in the preceding argument under Point I, the proffer was shown to be directed toward testimony to support a collateral attack on Respondent' conviction.

The proffered testimony was aimed at having the effect of the convictions nullified by the referee. This is based upon the argument by Respondent that such evidence would show that the convictions should be reversed upon errors by the trial judge.

As argued above, the referee cannot go behind the conviction in a disciplinary proceeding. Since there is no argument made by Respondent that he was denied compulsory process for evidence of a nature allowed by the Court, the actions of the referee herein were proper and were not harmful error.

The arguments wished to be made by Respondent were properly made to appellate court and the convictions were affirmed.

III. IT WAS NOT HARMFUL ERROR TO INTRODUCE A COPY OF THE INDICTMENT.

In the matter before the Court, Respondent was convicted of six felonies under various federal criminal statutes.

As held in The Florida Bar v. Heller, 473 So.2d 1250 (Fla. 1985), judgment of conviction is conclusive proof of commission of felony. In The Florida Bar v. Prior, 330 So.2d 697 (Fla. 1976), this Court stated a trial level determination is "conclusive proof" of the underlying facts.

In this instance, the indictment was introduced after the introduction of the certified federal judgment and sentence document evidencing Respondent's convictions of six (6) federal felonies.

The indictment is permissible as a recorded public document and merely for informational purposes. Since the convictions are conclusive proof of the underlying facts in such disciplinary matters, the introduction of the indictment should be allowed in order to shed light on these facts and the nature of the felonious conduct.

Respondent fails to demonstrate how the indictment was used as evidentiary material to support, by itself, any of the findings of guilt by the referee.

While jury instructions are specific that an indictment cannot be considered as evidence, the juries do have access to such documents in their determination of guilt or innocence.

Since the judgment and sentence convicting Respondent was in evidence and was sufficient upon which to base to referee's determinations, the introduction of the indictment was not harmful error.

IV. THE RECORD SUPPORTS THE RESPONDENT WAS GUILTY OF WRONG DOING.

As previously cited, this Court has repeatedly held that the conviction of a felony constitutes conclusive proof of the underlying facts and is conclusive proof of guilt of the offense.

Respondent presented testimony from a single witness, Charles Nuzum, and based upon the contents of that testimony and that of Respondent, states there is no basis for the convictions attributed to Respondent.

Not only is Respondent asking for something not available to him, i.e. a trial denovo, but he also desires this Court to believe that based upon the testimony of a convicted felon and a single witness whose testimony did not address all the charged convictions, there is no showing of wrong doing.

Since this Court cannot retry the case after conviction or act as an appellate forum to reverse the effect of such convictions, the affirmed convictions establish a prima facie basis for disciplinary action and offer conclusive proof of wrong doing on the part of Respondent.

CONCLUSION

Within the guidelines of this Court, Respondent was afforded all the procedural dues process rights available to him. The complained of denials were for materials that could not be considered by either the Referee or the Court.

The convictions stand as conclusive proof of the underlying factual basis of each conviction and present a prima facie evidence for discipline.

Since there are no arguments regarding the Referee's finding or recommended discipline, those aspects must stand as set forth in the Referee's Report.

Respondent has not shown any reason for the rejection of the Referee's Report; therefore, its findings and recommendations should be affirmed and Respondent disbarred.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was sent certified mail # P675195040 to Mr. Shalle Stephen Fine, Attorney for Petitioner/Respondent 46 Southwest First Street, Suite 201, Miami, Florida 33130 on this 13th day of November, 1986.

James N. Watson Jr.
JAMES N. WATSON, JR.