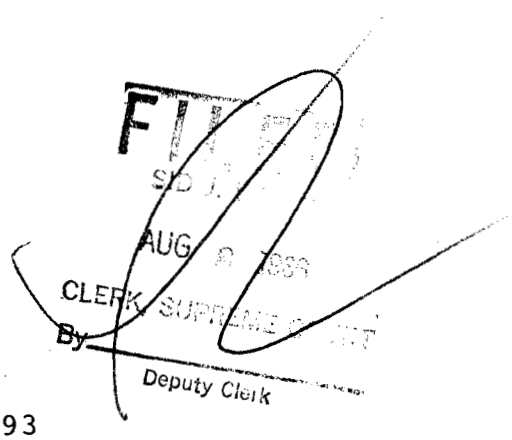
IN THE SUPREME COURT OF FLORIDA



THE FLORIDA BAR,	)	
Complainant,	)	Supreme Court Case No. 67,793
v.	)	
ANDREW PAVLICK,	)	
Respondent.	)	

On Petition for Review of the Referee's Report in a Disciplinary Proceeding.

INITIAL BRIEF OF COMPLAINANT SUPPORTING PETITION FOR REVIEW

PATRICIA S. ETKIN
Bar Counsel
The Florida Bar
Suite 211, Rivergate Plaza
444 Brickell Avenue
Miami, FL 33131
(305) 377-4445

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
Tallahassee, FL 32301-8226
(904) 222-5286

JOHN T. BERRY
Staff Counsel
The Florida Bar
Tallahassee, FL 32301-8226
(904) 222-5286

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INTRODUCTION

In this brief, The Florida Bar will be referred to as either "The Florida Bar", "the Bar", or "Complainant"; Andrew Pavlick will be referred to as the "Respondent" or "Mr. Pavlick"; Louis Merhige will be referred to as "Mr. Merhige", or "Lou Merhige" and proceedings before Horace W. Gilmore on October 26, 1984, in United States of America v. Andrew Pavlick, Case No. 84-20350 will be referred to as "plea proceedings".

Abbreviations utilized in this brief are as follows:

"Tr. A" refers to the Transcript of Proceedings dated November 26, 1985

"Tr." refers to the Transcript of Proceedings dated April 23, 1986

"R.R. Sec." refers to the Report of Referee, identified by Section

"COMPL. EX." refers to Complainant's Exhibits attached to the Transcript of Proceedings dated April 23, 1986

"Rule" refers to article XI, Integration Rule of The Florida Bar

STATEMENT OF THE CASE

On June 19, 1984, Respondent was indicted in the Eastern District of Michigan on two counts: Count 1 charged Respondent with conspiracy to import marijuana, in violation of 21 United States Code, Section 963; Count II charged Respondent with conspiracy to possess with intent to distribute and distribution of marijuana, in violation of Title 21 United States Code, Section 846 (COMPL. EX. 1, R.R. Sec. 2).

On October 26, 1984, Respondent entered into a plea agreement pursuant to Rule 11(e)(1)(c), Federal Rules of Criminal Procedure, wherein Respondent plead guilty to a superseding Information charging him with accessory after the fact, in violation of Title 18, United States Code Section 3, knowing that an offense against the United States had been committed; to wit, misprision of a felony (COMPL. EX. 3).

Respondent's plea was accepted and on January 4, 1985, Respondent was adjudicated guilty of the offense charged in the Information (COMPL. EX. 5). Respondent was sentenced to the maximum term permitted under the plea agreement; to wit imprisonment for one-year to be released as if on parole after serving one-third of term and a $250 fine (COMPL. EX. 5, R.R. Sec. 2).

As a result of his felony conviction, Respondent was suspended from the practice of law by order of the Supreme Court

dated April 24, 1985. Thereafter The Florida Bar initiated this disciplinary action against Respondent seeking disbarment. A complaint was filed pursuant to article XI, Rule 11.05, Integration Rule of The Florida Bar which provides for the filing of a formal complaint in lieu of a finding of probable cause by a grievance committee, where there has been an adjudication of guilt of commission of a felony.

A pre-trial hearing was held before the referee on November 26, 1985. Final hearing was held April 23, 1986.

On June 6, 1986, the referee filed a Report of Referee wherein the referee found Respondent "guilty of article XI, Rules 11.02(3)(a) and (b), Integration Rule of The Florida Bar" based upon Respondent's having pled guilty to a felony (R.R. Sec. III). As to discipline, the referee recommended that Respondent be suspended from the practice of law for a period of two years from the date of conviction, with automatic reinstatement at the end of the suspension period (R.R. Sec. IV).

The Florida Bar contests the referee's findings and conclusions as well as recommendation as to discipline.

STATEMENT OF THE FACTS

The following facts are derived from the April 23, 1986, final hearing before the referee.

The Florida Bar introduced the Judgment and Commitment Order to conclusively establish Respondent's conviction (COMP. EX. 5, Tr. 12), together with Respondent's plea agreement (COMP. EX. 4, Tr. 8) and the transcript of the plea proceedings (COMP. EX. 4, Tr. 9) to establish the factual basis of the criminal proceedings. Respondent's plea, tendered pursuant to Rule 11 (e)(1)(c) of The Federal Rules of Criminal Procedure, was an "Alford" plea[1]. Respondent therein pled guilty to an Information charging him with misprision of a felony as an accessory after the fact. A portion of the proceedings, wherein the Honorable Horace W. Gilmore accepted the plea, is summarized as follows:

> Respondent was retained by persons involved in a conspiracy to import marijuana to represent three clients who were arrested in New Orleans, Louisiana. Respondent retained Louisiana attorney, Louis Merhige, to assist as co-counsel in the defense.
>
> The clients were convicted. Following their conviction, a grand jury obtained a compulsion order to have the clients testify as to the source of the marijuana.
>
> During October 1979 Respondent and Mr. Merhige met with the clients in Tallahassee, Florida, to discuss appellate issues, the distribution of bond proceeds by Respondent and disclosure of the source of the marijuana which by agreement among the conspirators was not to be disclosed.

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[1] North Carolina v. Alford, 400 U.S. 25 (1970)

> During the meeting a fabricated story as to the source of the marijuana was discussed. Respondent subsequently mailed to Mr. Merhige a death notice of a notorious marijuana smuggler, for use in the fabricated story (COMP. EX. 6, Copy attached hereto as Appendix B.) The clients subsequently testified falsely before the grand jury.
>
> In addition, one of the clients was subpoenaed to testify before the grand jury in Michigan but, as a result of Respondent's intervention, did not appear.

The Respondent testified on his own behalf at the final hearing. He was permitted over the Bar's strenuous objection, to address the substance of the charges which lead to his guilty plea (Tr. 37-38). He denied participation in the fabrication of a story, and specifically denied attending the location wherein the fabrication of the story was discussed (Tr. 59, 72, 94). Such testimony was admitted by the referee as "evidence of mitigation" (Tr. 37, 38). The Bar, however, was not permitted an opportunity to present witnesses and evidence to rebut the respondent's testimony regarding the facts underlying the guilty plea, although a proffer was made (Complainant's Proferred Exhibits A and B) (Tr. 149-150).

Respondent additionally presented George Slattery, a polygraph expert, to corroborate that Respondent was truthful (Tr. 5). Respondent's wife testified regarding his family and community activities (Tr. 50-54). The Bar did not present any witnesses.

The referee found Respondent guilty of having pled guilty to a felony. The referee's report, however, does not reflect an acceptance of the factual basis upon which the plea and

Respondent's conviction were based. Accordingly, while the referee has recommended discipline as a result of Respondent's having plead guilty (R.R. Sec. IV), there is no finding by the referee of any wrongdoing as a result of Respondent's felony conviction.

SUMMARY OF ARGUMENT

Article XI, Rule 11.07(4) Integration Rule of The Florida Bar establishes that a judgment of guilt of a felony is conclusive proof of the guilt of the offense charged. The referee erred in permitting Respondent to go behind his conviction to assert his innocence. Moreover, the referee erred by not accepting the factual basis of Respondent's conviction as presented to the trial court at the plea proceedings as establishing a factual basis for misconduct in the disciplinary proceedings.

As to discipline, the referee's recommendation of a two-year suspension is improper in that a two-year suspension requires proof of rehabilitation pursuant to Rule 11.10(4). Moreover, a two-year suspension is too lenient when considering both the nature of the offense and the fact that the conduct constituted a felony. When considering these factors, disbarment is the appropriate disciplinary sanction.

ARGUMENT

I. THE REFEREE ERRED IN FAILING TO CONSIDER RESPONDENT'S FELONY CONVICTION AS CONCLUSIVE PROOF OF THE COMMISSION OF THE OFFENSE CHARGED.

Article XI, Rule 11.07(4), Integration Rule of The Florida Bar provides that:

> If a determination or judgment of guilt of a felony is entered against a member of The Florida Bar and becomes final without appeal . . . such judgment shall be conclusive proof of the guilt of the offense charged.

In the case sub judice, Respondent tendered a plea of guilty to a felony (COMPL. EX. 2) and was adjudicated guilty (COMPL. EX. 5). Since no appeal was taken, Respondent's conviction was final and for purposes of disciplinary proceedings constituted conclusive proof of Respondent's guilt of the offense charged, as provided by Rule 11.07(4).

Where an attorney has been convicted of criminal conduct, even on a misdemeanor charge, this Court has held that the referee is not "empowered to 'go behind the convictions'" and the Respondent is not entitled to a "trial de novo" before the referee to show that he was not guilty of the offense. The Florida Bar v. Vernell, 374 So.2d 473, 475 (Fla. 1979).

Although judgment of guilt of a felony establishes proof of the commission of the act, a respondent may explain the circumstances surrounding the offense and offer testimony in excuse or mitigation. The Florida Bar v. Fussell, 179 So.2d 852, 854 (Fla. 1965). Mitigating factors are generally related to a respondent's health (e.g., alcoholism, drugs, mental illness), personal difficulties, and cooperation. The Florida Bar v. Musleh, 453 So.2d 794 (Fla. 1984); The Florida Bar v. Pettie, 424 So.2d 734 (Fla. 1982) [material and substantial assistance to law enforcement].

At the pretrial hearing, Respondent's counsel represented that at the final hearing Respondent would be presenting evidence of the "surrounding circumstances" in mitigation, "without attempting to go behind the conviction". Counsel further commented "[w]e understand that the Rule is very clear on that point" (Tr.A 12).

However, at final hearing the evidence presented on behalf of Respondent went directly behind Respondent's conviction and was a transparent attempt to demonstrate to the referee that Respondent is not guilty of the offense (Tr. 29). Moreover Respondent sought to buttress his credibility through the testimony of a polygraph expert (Tr. 30).

Although the Bar strenuously objected to the admission of evidence directed at proving that Respondent was not guilty of the felony of which he had been convicted (Tr. 37, 38), the Referee admitted evidence of Respondent's innocence as a "mitigating circumstance" (Tr. 38).

The referee's report reflects that the referee accepted Respondent's claim of innocence. In fact, in his report the referee identified the issues before him in the disciplinary proceedings as:

> Whether or not this attorney conspired to have his client lie before a grand jury investigation or was indicted as the result of another attorney and co-counsel testifying against him in order to have himself excused from a pending indictment.
>
> * * *

> This case revolves itself around two main questions: Question No. 1. Did Mr. Pavlick meet with Mr. Merhige and the three defendants . . . to conspire to have the defendants lie before the grand jury investigation . . . Mr. Pavlick denies this and states that he was never in Tallahassee on those dates and never conspired to get the defendants to lie to the grand jury.
>
> The second question is whether Mr. Pavlick at the time he pled guilty to the charge of Accessory After the Fact . . . did so not because he was guilty of said crime but only because this was a plea bargain to reduce the two count indictment . . . and that he did so because of pressure from his wife . . . .

(R.R. Sec. II)

By defining the issues in this manner, it is apparent that the referee considered his function as a trier of fact to determine whether Respondent was innocent of the criminal conduct, as he claimed. Thus Respondent's conviction was not considered by the referee as conclusive proof of guilt. This, The Florida Bar claims is error. It is not the function of the referee to determine Respondent's innocence; Respondent's guilt is conclusively established by his conviction pursuant to Rule 11.07(4). See The Florida Bar v. Wilson, 425 So.2d 2, 3 (Fla. 1983) where in response to Respondent's testimony as to his innocence, the referee correctly found that respondent's judgment and sentence were proper proof of guilt of the offenses of which respondent was charged.

Moreover, the factual basis set forth in the plea proceedings was not considered by the referee as conclusive proof of the facts underlying Respondent's conviction. However, since the conviction is conclusive proof of commission of the offense, the

factual basis which is accepted by the trial court in approving Respondent's plea and adjudicating him guilty should be considered by the referee, in disciplinary proceedings, as conclusively establishing the facts which underlie the conviction.

By accepting Respondent's assertion of innocence, the referee has essentially found Respondent's conviction and plea as conclusive proof of Respondent's having plead guilty but not conclusive proof of Respondent's commission of the offense and misconduct for disciplinary purposes. Since the referee's findings and conclusions are improperly based upon a claim of innocence, the referee's findings and conclusions should be rejected.

II. THE REFEREE ERRED WHEN HE DENIED THE FLORIDA BAR AN OPPORTUNITY TO PRESENT REBUTTAL TESTIMONY.

The Florida Bar did not present witnesses to establish Respondent's guilt of the felony for which he had been convicted based upon the established principle that a respondent is not entitled to a trial de novo or to go behind his conviction to assert innocence. Vernell at 475. In addition at the pre-trial hearing, counsel for Respondent represented that only evidence of mitigation, without going behind the conviction would be presented at final hearing (Tr.A 12). At the final hearing, however, the scope of Respondent's testimony and the evidence

presented far exceeded an explanation of mitigating circumstances and, in fact, was specifically directed towards denying the factual basis upon which the conviction was based.

Notwithstanding the Bar's objection to the admission of evidence of Respondent's innocence, both at trial and in its claim of referee error in these proceedings for review, the referee erred in denying The Florida Bar an opportunity to present rebuttal testimony which might have affected Respondent's credibility and would have established, by testimony, Respondent's guilt and the factual basis of his conviction.

Since the referee determined to consider Respondent's assertion of innocence, it was inequitable to deny the Florida Bar an opportunity to present evidence of guilt. Moreover, Respondent attributed statements and motivations to other persons which The Florida Bar could have rebutted had it been afforded the opportunity. [e.g., Mr. Merhige's statements to the grand jury (Tr. 74, 75); cooperation with the pre-sentencing attorney and action to dismiss the charges (Tr. 104, 105)].

III. THE REFEREE ERRED IN FAILING TO REQUIRE PROOF OF REHABILITATION THROUGH REINSTATEMENT PROCEEDINGS PURSUANT TO ARTICLE XI, RULE 11.10(4), INTEGRATION RULE OF THE FLORIDA BAR.

In his report, the referee recommended that Respondent be suspended from the practice of law for a period of two years from the date of his conviction with automatic reinstatement at the end of the period of suspension (R.R. Sec. IV).

Rule 11.10(4) provides that "a suspension of more than three months shall require proof of rehabilitation." Accordingly, the referee's recommendation of automatic reinstatement following a two-year suspension is in error. See The Florida Bar v. Musleh, 453 So.2d 794, 797 (Fla. 1984).

IV. RESPONDENT SHOULD BE DISBARRED BASED UPON HIS CONVICTION OF A FELONY AND THE ABSENCE OF SUBSTANTIAL MITIGATING FACTORS.

The factual basis underlying Respondent's conviction as set forth in the plea proceedings (COMP. EX. 4) involves Respondent's actions in representing three defendants on drug charges. The government alleged that Respondent was an accessory after the fact in that he acted to "hinder and prevent apprehension and detection of known drug importers and distributors" and that he was involved in the misprision of a felony (COMP. EX. 4). Respondent's improper actions involved assisting drug conspirators in their effort to protect the source of the marijuana and specifically, his attendance at a meeting at which time fabrication of a story to be presented to a grand jury was discussed, thereafter forwarding a death notice of a deceased drug smuggler to Mr. Merhige, his co-counsel, for inclusion in the fabricated story (COMP. EX. 6, APPENDIX B), and intervening on behalf of a client to prevent his appearance before a grand jury (COMP. EX. 4).

Respondent's conduct as an accessory is serious. As an attorney, Respondent is an officer of the court and has an obligation to insure that the facts presented to a grand jury are truthful. This court has not hesitated to disbar an attorney for advising clients to give false testimony.

> When an attorney adds or allows false testimony to be cast into the crucible from which the truth is to be refined and taken to be weighed on the scales of justice, he makes impure the product and makes it impossible for the scales to balance.
>
> No breach of professional ethics, or of the law is more harmful to the administration of justice or more hurtful to the public appraisal of the legal profession that the knowledgeable use by an attorney of false testimony in the judicial process. When it is done it deserves the harshest penalty. (Emphasis Added)

The Florida Bar v. Dodd, 118 So.2d 17, 19 (Fla. 1960)

This court's rationale in Dodd was later reaffirmed in The Florida Bar v. Agar, 394 So.2d 405 (1981). In Agar, an attorney was charged with perjury for allowing a client to perpetrate a fraud upon the court by introducing false testimony. The attorney entered a plea of nolo contendere to a lesser included offense of solicitation to commit perjury, a misdemeanor. In the disciplinary proceedings which followed, this Court rejected the referee's recommendation of a four-month suspension as an appropriate disciplinary sanction and ordered the attorney disbarred. Thus Agar reaffirms "the general rule of strict discipline against deliberate, knowing elicitation or concealment of false testimony". Agar at 406.

It is the Bar's position that an attorney who has been convicted of a felony should be disbarred, absent substantial and

convincing evidence of mitigating circumstances. This policy is based upon the premise that felonious conduct is by its nature antithetical to the oath and standards of the profession. This Court has previously held that

> if the discipline does not measure up to the gravity of the offense, the whole disciplinary process becomes a sham to the attorneys who are regulated by it. Disbarment as a result of felonies is a message loud and clear to the members of The Florida Bar that this court will not countenance or permit the conduct for which respondent was convicted. In our view, a suspension does not have the deterrent effect of disbarment. (Emphasis added)
>
> Wilson at 4.

Moreover, the public's confidence in the legal profession is understandably eroded when an attorney who has been convicted of a felony is not purged from Bar membership.

Accordingly, based upon both policy and consideration of the serious nature of Respondent's misconduct in the case sub judice, disbarment is justified and should be ordered unless there are substantial and convincing evidence of mitigating circumstances, Wilson at 3.

The Bar contends that Respondent has presented neither substantial nor convincing evidence of mitigating circumstances. First, Respondent's motivation in tendering a plea, the character of the plea (i.e., the fact that it is an "Alford" plea) and his assertion of innocence does not render his conviction less onerous or otherwise mitigate its effect as establishing conclusive proof of guilt of the offense charged. Rule 11.07(4).

Where a respondent has been convicted of a felony, the conviction should be conclusive as to all aspects of the disciplinary proceedings. To hold otherwise would result in inherent inconsistencies by allowing a respondent to assert innocence in mitigation of discipline but not as to guilt; a convicted attorney might, therefore, either avoid discipline or be disciplined less severely because he has convinced a referee that his felony conviction was improper and that he is really "innocent".

Secondly, Respondent's testimony as to his activities subsequent to his criminal conviction (Tr. 92) are relevant in reinstatement proceedings as evidence establishing rehabilitation but should not be considered relevant in the instant disciplinary proceedings. The Florida Bar v. Routh, 414 So.2d 1023 (Fla. 1982). Moreover, reinstatement proceedings pursuant to Rule 11.11 differ in purpose as well as procedure in that a Respondent is required to submit extensive information concerning his activities and finances, including income tax returns. This information is investigated by the Bar for purposes of determining fitness to resume the practice of law. It would be inequitable to permit an attorney in disciplinary proceedings to establish "fitness" or "rehabilitation" before a referee without The Florida Bar having had an opportunity to conduct a thorough investigation and to produce rebuttal evidence and witnesses.

Finally, from an evidentiary perspective, the only evidence of Respondent's good character was from Respondent's own testimony and the testimony of Respondent's wife (R.R. Sec V). Evidence of this nature, from two highly interested and obviously biased witnesses, should be accorded little evidentiary weight.

Accordingly, the testimonial evidence presented by Respondent involving his innocence, character and activities subsequent to his criminal conviction are either improperly asserted as a mitigating factor or are neither sufficiently substantial nor compelling so as to justify mitigation of discipline.

CONCLUSION

Based upon the foregoing citations to authority and legal arguments, the referee's report must be rejected and respondent should be disbarred.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the Brief of Complainant on Petition for Review of the Referee's Report in a Disciplinary Proceeding was mailed to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32301, and that a true and correct copy was mailed to the Respondent, ANDREW PAVLICK, 2780 Galloway Road, Suite 100, Miami, Florida, 33165, this 7th day of August, 1986.

Patricia S. Etkin

PATRICIA S. ETKIN
Bar Counsel