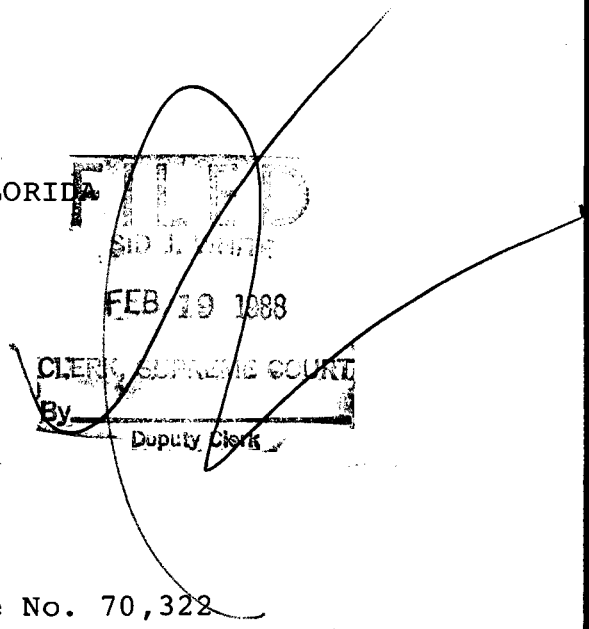
IN THE SUPREME COURT OF FLORIDA



THE FLORIDA BAR,

Complainant,

vs. Case No. 70,322

WILLIAM A. MACGUIRE,

Respondent.

_____/

COMPLAINANT'S ANSWER BRIEF

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STATEMENT OF THE FACTS

On April 10, 1986, a three count information in Leon County, Florida charging Respondent with the felonies of making threats against a public official and making written threats to kill was filed against Respondent.

On August 8, 1986, Respondent entered a plea of nolo contendere to Count I of the information, a third degree felony under Florida Statutes, §838.021, and Count II of the information, a second degree felony under Florida Statutes §836.10.

Based upon the plea of nolo contendere, Respondent was adjudicated guilty of the above-referenced crimes of making a threat against a public official and making a written threat to kill.

Respondent received a prison term of 502 days and received credit for 502 days served for such time as Respondent had been incarcerated prior to imposition of this sentence. Respondent also received terms of probation on the charges of five (5) and ten (10) years respectively, such probation to run concurrently.

Respondent was subsequently suspended from The Florida Bar on September 4, 1986, by order of this Court pursuant to article XI, Rule 11.07(2), of the Integration Rule of The Florida Bar.

Based upon the Leon County Circuit Court convictions of the aforementioned felonies, The Florida Bar filed a formal complaint against Respondent on April 2, 1987.

STATEMENT OF THE CASE

On April 2, 1987, The Florida Bar, Complainant, filed a formal complaint against Respondent based upon Respondent's felony convictions. By order of this Court, this matter was assigned to Judge Ellis T. Fernandez, Jr., Circuit Judge, Fourth Judicial Circuit, as referee to hear this matter.

This matter was set for final hearing on June 12, 1987 by order of the Referee. In response to this order, Respondent mailed a motion for continuance and an objection to final hearing to the referee and Complainant on June 8, 1987. On June 11, 1987, Complainant filed a motion to strike respondent's objection.

On June 12, 1987, the Referee convened the final hearing in this matter. Complainant argued its motion to strike (T 5-7) at the start of the hearing. The Referee entered an order striking Respondent's objection to the final hearing. The Referee also denied Respondent's motion for continuance by the above-referenced order.

Subsequent to the Referee denying Respondent's motions, Complainant presented its evidence of Respondent's having been convicted of the aforementioned crimes. Respondent was not present at the final hearing and offered no testimony.

On September 3, 1987 the Referee filed his report recommending Respondent be found guilty of misconduct and that Respondent be disbarred. On September 30, 1987, Respondent filed a petition to review the Report of the Referee.

SUMMARY OF ARGUMENT

The Florida Bar argues that Respondent fails to demonstrate that the Report of the Referee was erroneous, unlawful, or unjustified based upon the following arguments:

1. The opinion of Respondent that the Bar's prosecution was based upon a void criminal felony conviction is unsupported by rule or case law. Respondent's reliance upon the availability of a 3.850 motion under the Florida Rules of Criminal Procedure as a means of staying disciplinary procedures is misplaced and contrary to present authority.

2. Respondent's reliance upon his belief that his conviction is void due to his being prosecuted by information is erroneous in that Florida law specifically provides that all crimes, other than capital offenses punishable by death, may be prosecuted by information rather than by indictment.

3. Respondent has mistakenly argued that only a state attorney has the authority to sign a criminal information. The law in Florida, by rule, allows a designated assistant state attorney to lawfully sign such informations and prosecution upon such does not render a conviction void.

4. Respondent's plea of nolo contendere to the merits of the criminal charge waived any subsequent right to object to the form of the information after his conviction.

5. Respondent has attempted to obtain a review of his conviction through the disciplinary review process on points that should have been raised at trial or on direct appeal. Such a procedure is improper and cannot be a basis for rejecting the report of the referee.

ARGUMENT I

THE REPORT OF THE REFEREE WAS APPROPRIATELY ENTERED

Respondent argues that the Referee herein acted prematurely in filing his Referee's Report wherein he recommended disbarment of Respondent.

The basis of Respondent's argument is that his criminal conviction was not final until the expiration of the two-year period allowing a prisoner in custody to file a motion to vacate, set aside or correct a sentence under Rule 3.850, Florida Rules of Criminal Procedure.

Although Respondent is correct that if he were a prisoner in custody he would have two years to file a motion under Rule 3.850 of the Florida Rules of Criminal Procedure, such a provision has no effect on whether or not Complainant can take action against Respondent. Under the provisions of Rule 3-7.2(h)(1) and (2), Rules of Discipline of The Florida Bar, the resulting suspension from a determination or judgment of guilt shall continue in effect through all periods of appeal and rehearing. Since Respondent has failed to achieve a reversal of his judgment and sentence by appeal or by filing his intended avenue of relief under Rule 3.850 of the Florida Rules of Criminal Procedure, the effect of the conviction is final and it cannot be argued to be a void judgment.

Complainant would also argue that under the provisions of Rule 3.850 the only question involved is the validity of the sentence imposed and such a motion cannot be used as a substitution for a direct appeal of the underlying conviction under the arguments set forth by Respondent. Suarez v. State, 220 So.2d 442 (3rd DCA 1969); Johnson v. State, 183 So.2d 862 (3rd DCA 1965).

Complainant would also argue that Respondent's misplaced reliance upon an avenue he may believe affords him relief is not sufficient to render the Report of the Referee void.

ARGUMENT II

PROSECUTION ON AN INFORMATION FOR A FELONY IS PERMISSIBLE AND MAY BE SIGNED BY AN ASSISTANT STATE ATTORNEY

Respondent again argues that his conviction in Leon County circuit court is void and bases his argument on the fact he was held to answer on an unsupported writ of an assistant prosecutor without a grand jury indictment. Respondent adds that he was outside the geographical boundaries of the state of Florida when he committed the criminal acts upon which he was convicted and this should also void his conviction.

Respondent's arguments are attempting to have this Court rule upon his conviction by determining the validity of those points he should have raised on direct appeal. Under the provisions of Rule 3-7.2(b), Rules of Discipline of The Florida Bar, a judgment of guilt is conclusive proof of the criminal offenses charged. This Court has held that it is impermissible in disciplinary proceedings to go behind the conviction of a lower tribunal. The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979).

Respondent has mistakenly relied upon the provisions of the 5th and 14th Amendments of the U.S. Constitution in attempting to argue that his conviction was void since it was based upon an information signed by an assistant prosecutor and not by indictment.

It is well settled that the provisions of the 5th Amendment requiring all felonies be prosecuted by indictment only applies to United States criminal actions and has no reference whatever to state actions. Hoffman v. State, 169 So.2d 38 (1st DCA 1964).

Rule 3.140(a)(2), Florida Rules of Criminal Procedure, provides that all felonies other than capital offenses punishable by death may be prosecuted by information.

As to the argument of Respondent that the information was signed by an assistant prosecutor and is void is negated by the provisions of Rule 3.140(g), Florida Rules of Criminal Procedure which provide that the signing of an information by a designated assistant state attorney is expressly authorized. State v. Rivero, 400 So.2d 34 (3rd DCA 1981). An inspection of the information under which Respondent was charged shows that the signature line of the information shows the state attorney or his designated assistant as required by law.

Respondent attempts to allege the conviction is void since he was outside the boundaries of Florida when he made the threats against then Governor Graham and his family. Respondent fails to cite any authority to back this mistaken belief. While Respondent may have been outside the State the threats were against a resident public official of Florida and were received in Florida. Such

prosecutions for crimes committed outside the state are allowable under the provisions of Florida Statutes, §910.005(1).

ARGUMENT III

FAILURE TO OBJECT TO DEFECTIVE INFORMATION PRIOR TO PLEADING ON THE MERITS WAIVES OBJECTION

Respondent argues again that the conviction was void and he could not waive such a defect. Respondent argues the basis for the conviction being void was that he was charged by the writ of an assistant prosecutor and not by indictment.

In addition to the grounds for the denial of this argument set forth in Argument II, Complainant would show that in failing to object to the information on such grounds prior to pleading to the merits Respondent cannot now raise such an objection. Hamberson v. State, 239 So.2d 624 (2nd DCA 1970); State v. Frazier, 239 So.2d 630 (3rd DCA 1970).

ARGUMENT IV

THE PROCEEDINGS BY COMPLAINANT WERE NOT PREMATURE

All issues raised by Respondent under this argument have been previously addressed in this brief.

Respondent mistakenly asserts that the Referee only addressed his motion for stay after the final hearing but the transcript clearly shows that Respondent's objection to the final hearing was denied prior to the Referee receiving evidence on the complaint.

Respondent does not clearly argue what it is he is supposed to have waived involuntarily other than a right to present evidence to the referee concerning his misplaced belief that the conviction under which he was prosecuted was void. His failure to present such evidence was by choice and should not be a basis for rendering the Referee's Report improper.

CONCLUSION

Respondent has failed to demonstrate that the report of the referee was erroneous, unlawful or unjustified.

Complainant would urge that the Court enter final judgment in this matter adopting the findings and recommendations of the referee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief has been forwarded by certified mail # P 675 195 294, return receipt requested, to Respondent, WILLIAM A. MACGUIRE, ESQUIRE at his record Bar address of Post Office Box 854, Orange, Virginia 22960, this 19th day of February, 1988.

JAMES N. WATSON, JR.
Bar Counsel