

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

LEO B. WEST,

Respondent.

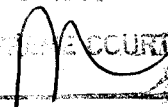
Supreme Court Case
No. 72,424

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THE FLORIDA BAR'S INITIAL BRIEF

WARREN JAY STAMM
Bar Counsel
The Florida Bar
211 Rivergate Plaza
444 Brickell Avenue
Miami, Florida 33131
(305) 377-4445

JOHN T. BERRY
Staff Counsel
The Florida Bar
Tallahassee, Florida
32399-2300
(904) 222-5286

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
Tallahassee, Florida
32399-2300
(904) 222-5286

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SYMBOLS AND REFERENCES

In this Brief, The Florida Bar, will be referred to as "TFB". Leo B. West will be referred to as "Respondent." "T.1" will refer to the transcript of the final hearing held October 14, 1988. "T.2" will refer to the transcript of the final hearing held before the Referee on January 30, 1989. "RR" will refer to the Report of Referee filed March 20, 1989.

STATEMENT OF THE CASE

That on or about June 20, 1985, Respondent was named in a four count felony information filed in the Circuit Court of the Eleventh Judicial Circuit of Florida, County of Dade, in Case No. 85-15266A. The information alleged, inter alia, Respondent's involvement in committing offenses against the State of Florida, to wit: possession of a controlled substance (cocaine) and possession or delivery without consideration of not more than 20 grams of cannabis, both in violation of Florida Statute 893.13 and battery in violation of Florida Statute 784.03.

That pursuant to Article XI, Rule 11.07(3) and (4) of the Integration Rule of the Florida Bar and Chapter 3-7.2(e) and (h) of The Rules Regulating The Florida Bar, Respondent was automatically suspended from The Florida Bar for a period of not less than three years nunc pro tunc to August 20, 1987 and until Respondent is reinstated pursuant to Order of the Supreme Court (see Appendix A).

Respondent subsequently filed a Petition to Modify or Terminate Suspension seeking to stay the suspension pending the appointment and hearing by a referee. Said Petition was objected to by The Florida Bar and denied by this Court by Order dated September 23, 1988. This cause proceeded to referee by Order dated September 2, 1988 wherein it was ordered that:

"The Referee designated to consider the Petition shall hold a

hearing, receive such evidence and hear such argument as is deemed appropriate, and make a report and recommendations to the Court on the question of whether the three year suspension provided for by Rule 3-7.2 of The Rules Regulating The Florida Bar should be terminated or modified."

The Honorable Judge Brian Kay, of Broward County, was appointed Referee to hear this cause.

This matter came to be heard on October 14, 1988 on the issue of the termination or modification of Respondent's court ordered three year felony suspension.

After hearing argument of counsel and presentation of evidence and testimony, the Court deferred ruling and took the matter under advisement (T.1-144).

The Court reconvened on January 30, 1989 wherein the Referee announced his findings (see Appendix B). The Referee recommended that Respondent be found guilty of violating those disciplinary rules as set out in the Notice of Determination or Judgment of Guilt as filed by the Bar, to wit: Disciplinary Rule 1-102(A) (3) (Engaging in illegal conduct involving moral turpitude); Disciplinary Rule 1-102(a) (6) (Engaging in other conduct adversely reflecting on his fitness to practice law), of The Code of Professional Responsibility and Article XI, Rule 11.02(3) (a) and (b) of The Integration Rule of The Florida Bar (Commission of an act contrary to honesty, justice, and good morals and commission of a crime). (T.1-28) Further, the Referee recommended that Respondent's Petition to Modify or Terminate Suspension be granted and that Respondent be suspended from the practice of law nunc pro tunc to August 20, 1987 to be followed by a two year probation.

(T.2-10) The conditions of probation are not only binding on Respondent upon reinstatement, but during the term of suspension as well. (T.2-10)

There is a question as to whether or not the Referee was empowered to recommend that Respondent not be required to show further proof of rehabilitation prior to being reinstated and whether the January 30, 1989 hearing was treated as a reinstatement hearing. (T.2-11-12)

On June 26, 1989, The Florida Bar filed a Petition For Review contesting the Referee's recommendation that proof of rehabilitation not be made a condition of Respondent's discipline.

STATEMENT OF THE FACTS

In and around June, 1985, Respondent did knowingly, unlawfully and intentionally provide cocaine and marijuana to minor females. On June 19, 1985 while at the residence of Respondent, Respondent escorted these females up to the master bedroom of his home for the purpose of engaging in the use of narcotics and various sexual activities.

On this date, officers of the Metro-Dade Police Department, with a search warrant in hand, knocked on the front door of Respondent's residence. Respondent appeared and after making inquiry of who the individuals were that were knocking, Respondent ran back into the residence. The officers entered through the front door and secured the Respondent and other individuals in the home. Cocaine was found on the person of Respondent and in various other locations throughout Respondent's residence. Respondent was arrested and charged with possession of cocaine and marijuana, procuring persons under the age of 15 for prostitution and battery.

On June 20, 1985 an Information was filed alleging violation of Florida Statute 893.13 (possession of a controlled substance) and Section 784.03 (battery). Respondent entered a plea of nolo contendere and a withhold of adjudication was entered placing Respondent on probation for a period of three years. (see Appendix C).

SUMMARY OF ARGUMENT

The Referee's recommendation that the Respondent not be required to show proof of rehabilitation is contrary to Rule 3-5.1(e) of the Rules of Discipline.

ARGUMENT

**I. THE REFEREE ERRED IN FAILING TO
REQUIRE PROOF OF REHABILITATION
THROUGH REINSTATEMENT PROCEEDINGS
AS REQUIRED BY RULE 3-5.1(e) ,
RULES OF DISCIPLINE**

While the Referee's findings of fact are presumed to be correct, it is a well established point of law in Florida that the Florida Supreme Court is not bound by the referee's recommendation of the discipline to be imposed. The Florida Bar v. Weaver, 356 SO. 2d 797 (Fla. 1978), The Florida Bar v. Mueller, 351 So.2d 960 (Fla. 1977).

In his Report, the Referee recommended that Respondent be suspended from the practice of law for eighteen months, nunc pro tunc to August 20, 1987. However, the Referee failed to recommend that Respondent be required to show proof of rehabilitation prior to being reinstated, responding to the question: "Judge, you are considering this as a reinstatement hearing also, and your recommendation, as I understand it, is going to be reinstatement at the termination of the 18 month probation?" The Court: "That's correct." (T.2-11-12). (See Appendix Exhibit "B").

Rule 3-5.1(e) of the Rules of Discipline mandates that "a suspension of more than ninety days shall require proof of rehabilitation." In The Florida Bar v. Pavlick, 504 So.2d 1231, 1235,

(Fla. 1987) the Florida Supreme Court held that the referee erred in recommending automatic reinstatement following a two year suspension. In The Florida Bar v. Musleh, 453 So.2d 794, 797 (Fla. 1984), the Florida Supreme Court held that the Referee overlooked the Florida Bar's Disciplinary Rules in recommending automatic reinstatement at the end of a six month suspension since such Rules require proof of rehabilitation for reinstatement after any suspension of more than ninety days. Accordingly, in the case at bar, the Referee's recommendation that proof of rehabilitation not be made a condition of Respondent's discipline is in error.

While The Florida Bar v. Pavlick, supra and The Florida Bar v. Musleh, supra, cite Article XI, Rule 11.10(4) of The Florida Bar Integration Rule, for authority which requires proof of rehabilitation when a Respondent is suspended for more than three months, the new rule, ~~Rule 3-5.1(e)~~, Rules of Discipline is substantially the same. Rule 3-5.1(e), states: "a suspension of more than ninety (90) days shall require proof of rehabilitation...".

A trial by referee for violations of the Code of Professional Responsibility or Rules of Professional Conduct, is different than a trial before a Referee concerning a petition for reinstatement. Therefore, the referee at the grievance hearing should not be permitted to consider whether the Respondent has been rehabilitated for purposes of reinstatement as a member of The Florida Bar in good standing.

Reinstatement proceedings are different in that the Bar Counsel in such proceedings is required to conduct an extensive

investigation to determine whether the Respondent has been rehabilitated. In reinstatement proceedings, the Respondent must supply The Florida Bar with detailed information as described in Rule 3-7.9(n) (2) of the Rules of Discipline. In addition, The Florida Bar Reinstatement Manual requires the Bar Counsel to take certain actions, prior to the final hearing before a referee. (See Appendix Exhibit "D" for appropriate portions of The Florida Bar Reinstatement Manual) .

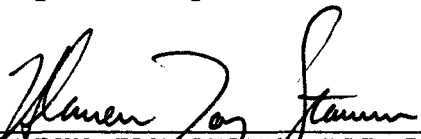
Accordingly, the Bar Counsel at the trial level of this case did not have the opportunity of obtaining the information concerning rehabilitation, as required by Rule 3-7.9, Rules of Discipline and The Florida Bar Reinstatement Manual. Therefore, the referee did not receive evidence from The Florida Bar concerning these matters.

Based upon the foregoing, the Referee erred when he stated that the Respondent be reinstated as a member in good standing without requiring proof of rehabilitation, as described in Rule 3-7.9(n) (2) of the Rules of Discipline.

CONCLUSION

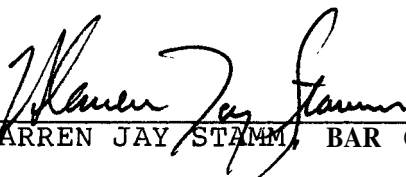
Based upon the foregoing citations to authority and case law, the Referee's recommendation that proof of rehabilitation not be made a condition of Respondent's discipline must be rejected and Respondent shall be required to offer clear and convincing proof of rehabilitation pursuant to Rule 3-5.1 (e) and Rule 3-7.9 (n) (2) , Rules of Discipline.

Respectfully submitted,


WARREN JAY STAMM, BAR COUNSEL
Attorney No. 582440
THE FLORIDA BAR
444 Brickell Avenue, Ste. 211
Miami, Florida 33131
(305) 377-4445

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's Initial Brief was sent to Sid J. White, Clerk of the Supreme Court, Supreme Court Building, Tallahassee, Florida, and a copy was mailed to James Stark, 524 S. Andrews Avenue, Suite 201N, Fort Lauderdale, Florida 33301, to Leo B. West, 803 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130 and a copy was mailed to John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, Florida 32399-2300 this 24th day of July, 1989.


WARREN JAY STAMM, BAR COUNSEL