Kogan
O.d. 2-689

72,614

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellant,

v.

ARTHUR B. KRAMER,

Respondent-Appellee.

The Florida Bar File No. 88-50,261 ~~(15E)~~

Supreme Court Case No. 72,614

INITIAL BRIEF OF THE FLORIDA BAR

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STATEMENT OF THE CASE AND OF THE FACTS

During **1985,** in the State of New Jersey, respondent abused his fiduciary obligations as an attorney by misappropriating property entrusted to him.* In **1986,** respondent executed a false affidavit of title for the purpose of deceiving and injuring parties in connection with the purchase, sale and/or mortgaging of certain realty.

Each of the foregoing instances of misconduct constituted felonies. Respondent was arrested, charged with the commission of such felonies and, upon his plea of guilty thereto **was** adjudicated guilty and sentenced.

The bar filed a notice of felony conviction which resulted in respondent's suspension under Rule 3-7.2(e) **,** Rules of Discipline. The Florida Bar v. Kramer, No. 72,564 (Fla. June **24, 1988).** The bar then filed its canplaint in this separate disciplinary action under Rule 3-7.2(i) (1).

The bar's canplaint, together with its requests for admissions which exactly tracked the canplaint, were duly served upon the respondent. Respondent defaulted in answering the bar's requests for admissions. Upon the bar's application for judgment on the pleadings, to which respondent failed to respond, the referee granted the bar's motion and filed his report. .

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* All facts recited are from the bar's canplaint and were deemed admitted by virtue of respondent's default in responding to the bar's requests for admissions which tracked the canplaint, exactly.

In noticing its application for judgment on the pleadings, the bar took pains to place respondent on notice not only of its motion for judgment on the pleadings, but also of its "notice of seeking disciplinary sanctions and costs." Its notice specifically recited:

> "TAKE FURTHER NOTICE that at the time, date and place hereinabove set forth, The Florida Bar will also seek to have imposed upon respondent appropriate disciplinary sanctions and costs."

In addition, the bar prepared and served upon respondent, together with the notice of hearing aforesaid, a proposed referee's report which provided:

> IV. RECOMMENDATIONS AS TO DISCIPLINARY MEASURES TO BE APPLIED: I recommend as discipline for the violations hereinabove enumerated that respondent be disbarred. (See bar's August 17, 1988 letter to referee.)

Respondent defaulted in attending the hearing on the bar's motion for judgment on the pleadings and made no suhnission addressed thereto or to the proposed referee's report.

Upon respondent's default, the referee telephoned bar counsel regarding the sanctions to be imposed and invited bar counsel to make a written suhnission regarding appropriate discipline. Bar counsel made such submission and despite the bar's argument in favor of disbarment, elicited no action on respondent's part (see bar's September 9, 1988 letter to the referee).

The referee filed his report with a recommendation that respondent be suspended for three (3) years. The report recites no basis for the referee's departure from recommending a disbarment.

The Board of Governors of The Florida Bar, upon review of the referee's report, has directed that the bar seek review and urge that the court direct respondent's disbarment.

SUMMARY OF ARGUMENT

An attorney, convicted of two (2) felonies, one involving misappropriation and the other, misrepresentation with intent to injure and deceive, must be disbarred. Each offense, in its own right, merits imposition of the highest sanction.

While either offense, in the bar's view, is sufficient to sustain a disbarment, regardless of client injury, where a respondent defaults at every level of a disciplinary proceeding involving such extreme misconduct, there can be no rationale for imposition of a lesser sanction. The referee's recommended discipline does not protect the public, is not designed to correct respondent's unethical behavior and cannot act as a deterrent to others with similar proclivities.

ARGUMENT

I. THEFT AND MISREPRESENTATION WITH INTENT TO INJURE AND DECEIVE, WARRANT DISBARMENT.

In the bar's view, theft, alone, regardless of client injury, warrants k ıt. Florida's Standar for Imposing Law Sanctions expressly so provides in Rule 4.11. Most recently, the court has adopted the same view. In The Florida Bar v. Roman, No. 69,358 (Fla. June 2, 1988) the court directed a disbarment notwithstanding extensive mitigation such as remorse, restitution, cooperation with the bar, an acute anxiety reaction stemming from domestic turmoil, respondent's psychotherapy and medication with a strong tranquilizer. In rejecting the referee's recommendation of a three (3) year suspension, the court reminded the legal profession of the warning of disbarment consequences issued in The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979) stating:

> We warn the legal profession that henceforth we would not be reluctant to disbar an attorney for such misconduct. This case involves not only theft, but fraud on the court which strikes at the very heart of a lawyer's ethical responsibility. Either offense is sufficiently grave to justify disbarment.

Even where the court has, despite its Breed warning failed to disbar in theft cases, it has nonetheless scoured the record for that quality and quantity of mitigating circumstances it regards as a sufficient basis for departing from Breed. In The Florida Bar v. Tunsil, 503 So.2d 1230 (Fla. 1986) the court recognized that "[I]n the hierarchy of offenses for which lawyers may be disciplined, stealing from a client must be among those at the very top of the list.'' It was

only by virtue of what the court perceived as substantial mitigating circumstances that, in its view, a departure fran the otherwise disbarment consequences of theft was merited.

In the case sub judice, there is no trace, no hint, no evidence of any mitigating circumstances that justify the referee's recommendation of suspension rather than disbarment. Nor could there be. The respondent defaulted at every stage of the proceeding. Even when served with a copy of the bar's proposed referee's report, including a disbarment recommendation, the respondent remained mute. Nor did respondent make any attempt to argue for a lesser sanction when, upon the referee's invitation, the bar submitted a written argument in support of the bar's recommendation of disbarment.

Left undisturbed, the referee's discipline recommendation would produce a remarkable precedent, viz., that an attorney who steals and defrauds with intent to injure and deceive may escape disbarment consequences merely by ignoring the bar's disciplinary process. The bar can imagine no more chilling message to the public and no more confusing message to its membership.

CONCLUSION

A respondent/felon, convicted of theft and fraud with intent to injure and deceive, who defaults in a resultant bar disciplinary proceeding, must be disbarred. Either offense, standing alone, mandates such result. A contrary result would render all bar disciplinary proceedings in addition to the automatic felony suspension under Rule 3-7.2(e), Rules of Discipline, a waste of time. The referee's recmndation of a three (3) year suspension should be rejected and a disbarment ordered.

All of which is respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing initial brief of The Florida Bar was furnished to Arthur B. Kramer, respondent, at his official record bar address of Post Office Box 470632, Charlotte, NC 28226-0006 and to Joseph Spagnoli, Esquire, 115 Westminister Avenue, Elizabeth, NJ 07208 on this 19th day of October, 1988 by regular mail.

DAVID M. BARNOVITZ