

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,

CASE NO. 72,643
TFB NO. 88-10,001 (20B)

v.

BRUCE D. FRANKE,
Respondent.

FILED

2017 FEB 10

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CLERK OF THE COURT

By _____
Clerk

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THE FLORIDA BAR'S INITIAL BRIEF

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Rules Regulating the Florida Bar:
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Rule 4-8.4 (b)

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SYMBOLS AND REFERENCES

In this Brief, the appellant, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar". The appellee, Bruce D. Franke, will be referred to as "the respondent". "C" will denote the complaint. "RC" will denote the response to the complaint. "TR" will denote the transcript of the final hearing on October 31, 1988. "RA" will denote the Request for Admissions. "RR" will denote the Amended Report of Referee.

STATEMENT OF THE FACTS AND OF THE CASE

Final Hearing was held on October 31, 1988. The Honorable Robert M. Deehl deemed the following matters admitted: On or about April 20, 1987, Respondent removed a Swiss Army knife from the Sunshine Hardware Store without authorization, and without having paid for the knife. It was his intent to permanently or temporarily appropriate the knife to his own use or the use of another person not entitled thereto. (RR, p.1, II). Shortly thereafter, the Respondent entered a treatment program for his drug addiction, but failed to complete that program. In about April or May 1988, the Respondent used marijuana. (RR, p.1, II).

The Referee recommended that the Respondent be found guilty of violating Rule 4-8.4(b) (committing a criminal act that reflects adversely on his honesty, trustworthiness, or fitness as a lawyer). He recommended that Respondent be suspended for ninety (90) days, that he enroll in and successfully complete the Florida Lawyers' Assistance Program for Substance Abuse, and that Respondent demonstrate to the satisfaction of the Court that he is fully rehabilitated. It was further recommended that there be a probationary period of two (2) years following rehabilitation, conditioned on the Respondent abstaining from the use of any illegal substances during the probationary period. (RR, p.1, IV) Mitigating factors considered by the Referee included the absence

of a prior disciplinary record, Respondent's full and free disclosure, as well as his cooperative attitude in the proceedings. (RR, p.2, V). The Referee found that costs of \$1,191.71 were reasonably incurred by The Florida Bar. These costs included \$228.67 in investigator expenses.

On June 15, 1987, Respondent entered an inpatient treatment program for substance abuse at the insistence of concerned friends and family members. (TR p.9, lines 1-18). For reasons which the Respondent felt were never explained to him, he was expelled from the treatment program on July 15, 1987. (TR p.16, lines 16-20). Respondent suggested that there had been personal conflicts between his counselor and himself (TR p.10, lines 19-20), and that the staff felt he was setting up an adversary relationship in the treatment program. (TR p.16, lines 4-6).

Respondent had a significant drug dependency problem, involving the use of cocaine (TR p. 18, line 19 - TR 19, line 11), for a year prior to entering the treatment center. (TR p.17, lines 18-21). Respondent admitted that approximately ten (10) months after leaving the treatment facility, he used marijuana. (TR p.16, lines 20-23). He denied cocaine use since leaving the program. (TR 18, line 19, TR 19, lines 1-11).

Following the grievance committee hearing during which Respondent admitted past use of cocaine and marijuana, Respondent was referred by The Florida Bar to the Florida Lawyers' Assistance Program. He was contacted by the director of that

program and an appointment was set for July 19, 1988. Respondent did not appear for the appointment. He also failed to meet with anyone from the Florida Lawyers' Assistance Program following a letter of July 29, 1988 in which it was suggested that he make an appointment so that his cooperation could be reported to The Florida Bar. (TR p. 22, lines 10-15).

Based on Respondent's use of illegal substances and the shoplifting incident, coupled with the failure to participate in the Florida Lawyers' Assistance Program, The Florida Bar petitioned for temporary suspension. Respondent was suspended on September 28, 1988.

SUMMARY OF THE ARGUMENT

The discipline recommended by the Referee in this case is not allowable under the Disciplinary Rules, and is insufficient in light of the extent of the Respondent's use of illegal substances and failure to demonstrate rehabilitation.

Rule 3-5.1(e), Rules of Discipline, states that a suspension of ninety (90) days or less shall not require proof of rehabilitation. Therefore, since the Referee recommended proof of rehabilitation, a ninety one (91) day suspension followed by a probationary period of two (2) years is the appropriate discipline.

Respondent's prior use of illegal substances, even after attending an inpatient program for substance abuse and expulsion from the program, indicates the seriousness of Respondent's drug problem. Further, Respondent's failure to contact the Florida Lawyers' Assistance Program when asked to suggests Respondent is unwilling to acknowledge and deal with his problem.

Respondent should be suspended for ninety one (91) days and required to show rehabilitation prior to resuming the practice of law.

ARGUMENT

ISSUE: Whether a ninety (90) day suspension followed by a two (2) year period of probation is an insufficient disciplinary sanction for an attorney who has experienced a significant drug abuse problem involving cocaine, who has engaged in shoplifting, who has been expelled from a drug treatment program, and who subsequent to being expelled has on at least one occasion used marijuana.

In 1987, the Respondent had a significant problem with drug abuse, including use of cocaine, (TR p.17, lines 19-21) and on June 19, 1987, at the insistence of his friends and family he entered a treatment program for drug abuse. (TR p.5, lines 5-18). However, he was expelled from the program prior to completing it, and subsequent to being expelled, he on at least one occasion used an illegal substance (marijuana). Although the Respondent testified that he does not currently have a substance abuse problem, there was no testimony offered to corroborate his statement. He had been referred to the Florida Lawyers' Assistance Program following his admission of drug use to the grievance committee, but failed to follow up on contacts from

that agency even though a letter from the director indicated to him that his cooperation could be reported to The Florida Bar.

Charles Hagen, Director of the Florida Lawyers' Assistance Program, was present at the Referee hearing while the Respondent testified. After listening to Respondent's testimony, Mr. Hagen noted that drug abusers become pretty good con artists and convince others that they do not have a problem. (TR p. 38, lines 5-13). He further indicated that leaving the treatment program early was a very specific danger sign. (TR p. 37, lines 1-3). He stated that very seldom can "these people" handle the problems on their own. (TR p. 37, lines 23-25). In fact, the Respondent himself acknowledged that people who are drug dependent can not solve their problems themselves. (TR p. 27, lines 1-5). Mr. Hagen opined that one use of marijuana after having been in a treatment program for cocaine indicates that the user has not internalized the fact that the use of mind altering substances will lead him back to where he started. (TR p. 33, lines 12-23).

At the final hearing there was no evidence that the Respondent does not have a continuing substance abuse problem, with the sole exception being Respondent's uncorroborated testimony. The Respondent should not be readmitted to practice until he has completed an evaluation program and shown that he is capable of refraining from substance abuse. This should be demonstrated through successful participation in the Florida Lawyers' Assistance Program or a comparable program. As noted by the Referee, "when a lawyer has a problem of this type, the

chance of somebody suffering more pops up real fast, is usually seen after it is too late, and he's flown the coop and the money is missing and somebody has suffered a tremendous amount of harm". The public has a right to the assurance that the Respondent is not suffering from a substance abuse problem, and that assurance should be provided prior to his being readmitted to the practice of law in the State of Florida.

ISSUE: Whether the Referee's recommendation that Respondent prove rehabilitation necessitates a minimum suspension of ninety one (91) days, since a ninety (90) day suspension may not require proof of rehabilitation.

Rule 3-5.1(e), Rules of Discipline, states that a suspension of ninety (90) days or less shall not require proof of rehabilitation. Therefore, in keeping with the Referee's recommendation that the Respondent demonstrate to the satisfaction of the Court that he is rehabilitated, Respondent must be suspended for at least ninety-one (91) days. The Florida Bar recommends suspension for ninety-one (91) days, with enrollment in and successful completion of the Florida Lawyers' Assistance Program for substance abuse or a comparable program required as proof of rehabilitation. The suspension should be

followed by a probationary period of two (2) years conditioned on the Respondent abstaining from the use of any illegal substances.

The instant case involves use of illegal drugs and shoplifting. There is no indication of possession with intent to distribute.

In The Florida Bar v. Holtzinger, 505 So.2d 1329 (Fla. 1987), Holtzinger was charged with possession and use of illegal drugs. He entered into a consent judgment for a ninety (90) day suspension, to be followed by a two (2) year probation. In addition, Holtzinger was to undergo periodic drug evaluation to determine his use, if any, of an illegal narcotic substance, this evaluation to be performed bi-monthly for a period of six (6) consecutive months beginning no later than fifteen (15) days subsequent to the probationary period.

In the instant case Respondent, like Holtzinger had no criminal conviction based upon his possession and use of an illegal substance. However, unlike Holtzinger, he engaged in criminal conduct in addition to the use of illegal substances. Respondent has admitted that he might have been under the influence of cocaine when he shoplifted a small knife. Also, Respondent's drug problems have been extensive. He participated in an inpatient treatment program but was expelled prior to the time the program would normally have ended. Although the Respondent was contacted by the Florida Lawyers' Assistance Program, he chose not to cooperate with the program. Under the

circumstances, for the protection of the public the Respondent should be required to prove rehabilitation prior to being readmitted to the practice of law. In keeping with that recommendation, he should be suspended for ninety-one (91) days.

CONCLUSION


A ninety (90) day suspension, coupled with proof of rehabilitation, followed by a two (2) year probation, is not an appropriate discipline under the facts of this case.

The discipline recommended by the Referee is not sufficient for the Respondent's misconduct. He engaged in at least three instances of criminal conduct, including use of illegal substances and a shoplifting incident. Following the participation in an inpatient program for substance abuse and expulsion from that program, the Respondent used an illegal substance on at least one occasion. In addition, when the Respondent was offered the opportunity to participate in the Florida Lawyers' Assistance Program, he failed to follow through on his contact with that program.

Before returning to practice, the Respondent should demonstrate rehabilitation, as recognized by the Referee in his report. The Rules of Discipline clearly indicate that a suspension of ninety (90) days or less shall not require proof of rehabilitation. Therefore, the appropriate discipline is a ninety-one (91) day suspension, with a requirement that the Respondent enroll in and successfully complete the Florida Lawyers' Assistance Program for substance abuse and thereby show rehabilitation prior to reentering the practice of law.

Following readmission to the practice of law, Respondent should be placed on probation for a period of two (2) years during which he should undergo periodic drug screening.


WHEREFORE, The Florida Bar respectfully requests this Honorable Court to disapprove the referee's recommended discipline and suspend Respondent, BRUCE D. FRANKE, for ninety-one (91) days, with proof of rehabilitation to be shown prior to readmission. Respondent should be required to enroll in and successfully complete the Florida Lawyers' Assistance program, or a comparable program, prior to readmission, and should be placed on a two (2) year probation following his readmission. Respondent should be assessed the reasonable costs of this action.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing, THE FLORIDA BAR'S INITIAL BRIEF, has been furnished to DONALD T. FRANKE, Counsel for Respondent, at his address of 849 - 7th Avenue South, Suite 101, Naples, FL 33940, by Regular U.S. Mail; and to JOHN T. BERRY, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, by Regular U.S. Mail; on this 21 day of February, 1989.



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