IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

RICHARD L. CLARK,

Respondent.

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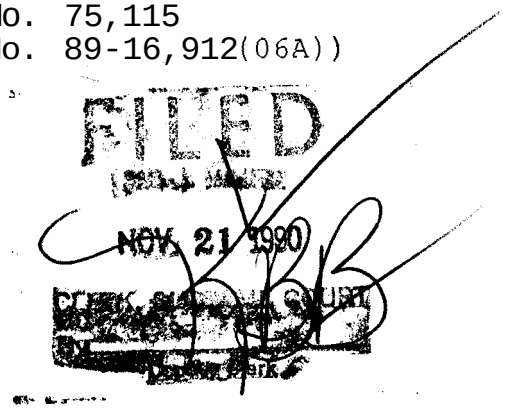
Case No. 75,115
(TFB No. 89-16,912(06A))



INITIAL BRIEF OF THE FLORIDA BAR

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TABLE OF CONTENTS

TABLE OF CITATIONS

SYMBOLS AND REFERENCES

In this Brief, the appellant, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar". The appellee, Richard L. Clark, will be referred to as "Respondent". "TR" will denote the transcript of the Final Hearing before the Referee. "R" will refer to the record in this cause. "RR" will refer to the Report of Referee.

STATEMENTS OF THE FACTS AND OF THE CASE

In May 1984, the Respondent agreed to assist Berry Flarity, a childhood friend, in the importation of approximately three hundred (300) pounds of marijuana from Colombia, South America to St. Petersburg, Florida. (R, Complaint, paragraph 2; TR, p.4, L.14-25, p.5, L.l-5, and p.34, L.17-24). The Respondent's participation in the scheme to import the marijuana referred to above consisted of his taking his sailboat out into the Gulf of Mexico in June 1984, retrieving the marijuana from the water, and thereafter transporting the same into St. Petersburg, Florida. (R, Complaint, paragraph 3; TR, p.4, L.14-25; and TR, p.5, L.l-5). The Respondent received approximately Three Thousand Dollars ($3,000.00) for his participation in the criminal importation scheme. (TR, p.8, L.10-14).

In early 1989, Mr. Flarity was apprehended in a drug transaction. The Respondent was not involved in the drug transaction which led to Mr. Flarity's arrest in 1989. (TR, p.36, L.7-9). At the time of the arrest, Mr. Flarity advised law enforcement authorities of the Respondent's participation in the importation of the three hundred (300) pounds of marijuana in 1984. (TR. p.8, L.22-25, p.9, L.l-2, and p.36, L.7-9). Subsequently, the Respondent was approached by agents from the Drug Enforcement Administration and questioned about the information received from Mr. Flarity. The Respondent admitted to the drug enforcement agents his involvement in the importation scheme in 1984. (TR, p.36, L.9-12).

In or about March, 1989, the Respondent was indicted in the Middle District of Florida for the following offenses:

> a. One count of knowingly and intentionally combining, conspiring, confederating, and agreeing to import into the United States, from a place outside thereof, a quantity of the Scheduled I Controlled Substance, marijuana, in violation of Title 21, United States Code, Sections 952(a) and 963;
>
> b. One count of knowingly and intentionally combining, conspiring, confederating, and agreeing to possess, with intent to distribute, a quantity of the Scheduled I Controlled Substance, marijuana, in violation of Title 21, United States Code, Sections 841(a) (1) and 846;
>
> c. One count of knowingly and intentionally aiding and abetting others to import into the United States, from a place outside thereof, a quantity of a Scheduled I Controlled Substance, marijuana, in violation of Title 21, United States Code, Section 952(a) and Title 18, United States Code, Section 2; and
>
> d. One count of knowingly and intentionally possessing, with intent to distribute, a quantity of the Scheduled I Controlled Substance, marijuana, in violation of Title 21, United States Code, Section 841(a) (1). (R, Complaint, paragraph 6).

The Respondent initially pled not guilty to the charges against him; however, on May 18, 1989, Respondent entered a plea of guilty to all (4) four counts contained in the indictment. (TR. P.42, L.15-19; and R, Complaint, paragraph 7).

The Respondent was sentenced to imprisonment for three years on each count in the indictment, to run concurrently with one another. (R, Complaint, paragraph 8).

On August 30, 1989, this Court entered an Order effective September 25, 1989, suspending the Respondent from the practice

of law for his felony conviction. Thereafter, The Florida Bar filed a complaint charging Respondent with violating The Florida Bar Integration Rule 11.02(3)(a), Code of Professional Responsibility, in effect prior to January 1, 1987 (the commission by any lawyer of any act contrary to honesty, justice or good morals); Disciplinary Rule 1-102(A)(3) Code of Professional Responsibility in effect prior to January 1, 1987 (a lawyer shall not engage in illegal conduct); and Disciplinary Rule 1-102(A)(6), Code of Professional Responsibility, in effect prior to January 1, 1987 (a lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law). (R, Complaint, paragraph 11). The Respondent filed an Answer to the Bar's Complaint, wherein he denied several of the Bar's allegations. (R, Answer, paragraphs 2-5 and 9-11). At the commencement of the Final Hearing in this cause, the Respondent admitted all of the allegations contained in the Bar's Complaint. (TR, p.4, L.14-25, and p.5, L.1-13).

The Referee found the Respondent guilty of violating The Florida Bar Integration Rule 11.02(3)(a), Disciplinary Rule 1-102(A)(3), and Disciplinary Rule 1-102(A)(6). In addition, the Referee recommended that the Respondent be suspended from the practice of law for a period of thirty-six (36) months, and thereafter until he showed proof of rehabilitation and paid The Florida Bar's costs associated with the disciplinary proceedings against the Respondent. (RR, paragraphs II and IV).

The Florida Bar Board of Governors reviewed the Report of Referee and voted to seek the disbarment of the Respondent in this matter.

SUMMARY OF ARGUMENT

In June 1984, the Respondent participated in a scheme to import three hundred (300) pounds of marijuana into St. Petersburg, Florida. The Referee's recommendation of a three (3) year suspension is not a sufficient disciplinary sanction for such criminal and unethical conduct, notwithstanding the mitigating factors considered by the Referee in reaching said recommendation.

It is the Bar's position that there should be no mitigation of discipline when an attorney deliberately engages in a drug importation scheme unless the mitigation reaches the magnitude of the mitigation found to exist in The Florida Bar v. Pettie, 424 So.2d 734 (Fla. 1986). The mitigating factors considered by the Referee in the case sub judice, do not reach the magnitude of the mitigating factors found in Pettie thus disbarment is appropriate.

The Bar's position, as set forth herein, is supported by this Court's ruling in The Florida Bar v. Hecker, 475 So. 2d 240 (Fla. 1985) wherein Hecker was disbarred for illegal drug activity, notwithstanding the presence of mitigating factors.

The Respondent's egregious misconduct is a disgrace to the legal profession and deserves the severest discipline available, disbarment.

Therefore, The Florida Bar respectfully requests this Court to disapprove the Referee's recommendation of a three (3) year suspension and order the Respondent disbarred from the practice of Law in the State of Florida.

ARGUMENT

ISSUE: WHETHER A THREE (3) YEAR SUSPENSION IS A SUFFICIENT DISCIPLINARY SANCTION FOR AN ATTORNEY WHO PARTICIPATES IN ILLEGAL CONDUCT INVOLVING THE IMPORTATION OF MARIJUANA INTO THE STATE OF FLORIDA.

A three (3) year suspension is an insufficient disciplinary sanction for the Respondent's illegal conduct of importing approximately 300 pounds of marijuana into St. Petersburg, Florida. "Illegal behavior involving moral turpitude demonstrates an intentional and flagrant disregard for the very laws a member of the bar is bound to uphold, for the well-being of the members of society, and for the ethical standards applicable to members of the Bar." The Florida Bar v. Wilson, 425 So.2d 2 (Fla. 1983). The Respondent's illegal and unethical conduct warrants disbarment.

In the past, this Court has not been reluctant to disbar an attorney for involving himself in illegal drug activity. (See The Florida Bar v. Marks, 492 So.2d 1327 (Fla. 1986); The Florida Bar v. Kline, 475 So.2d 1237 (Fla. 1985); The Florida Bar v. Nahoom, 523 So.2d 1137 (Fla. 1988); The Florida Bar v. James, 519 So.2d 614 (Fla. 1988)).

In The Florida Bar v. Price, 478 So.2d 812 (Fla. 1985), this Court disbarred Mr. Price for his participation in a scheme to import marijuana into the United States. In disbarring Mr. Price, this Court stated:

> Respondent's reprehensible acts are completely inconsistent with the high Professional Standards expected, indeed required, of members of The Florida Bar. Id. at 814.

The Respondent in the case at hand committed the same reprehensible act as Mr. Price. The only significant factor distinguishing Price from the case sub judice is the presence of mitigating factors. In the instant case, the Referee considered the following factors in recommending a three (3) year suspension:

> 1. Respondent was, at the time of the criminal activity, experiencing personal problems associated with the break-up of his marriage, and the divorce from his wife;
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> 2. Respondent was, at the time of the criminal activity, attempting to operate a law office in partnership with his father, who drank to excess, and was attempting to carry the workload for both himself and his father due to his father's failing health;
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> 3. Respondent admitted his involvement in the criminal activity:
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> 4. Respondent's criminal activity was remote in time to the disciplinary proceedings;
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> 5. Respondent apparently did not participate in any other criminal activity;
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> 6. Respondent was truly remorseful for his criminal conduct;
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> 7. Respondent's criminal activity did not involve a client;
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> 8. Respondent's cooperative attitude in the disciplinary proceedings by admitting the allegations of the Bar's Complaint; and
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> 9. Respondent's reputation in the legal community for honesty and integrity. (RR, p.3, 4).

The Bar submits that the aforementioned factors considered by the Referee are not sufficient to justify reducing the sanction for the Respondent's misconduct from disbarment to suspension. In fact, it is the Bar's position that there should be no mitigation for misconduct as egregious as the Respondent's misconduct unless the mitigation reaches the magnitude of the mitigation found to exist in The Florida Bar v. Pettie, 424 So.2d 734 (Fla. 1986).

In Pettie, this Court ruled that a one year suspension was appropriate for Mr. Pettie's involvement in a criminal conspiracy to illegally import marijuana into Florida. In recommending a suspension the Court stated that "absent the cooperation of Mr. Pettie with Law Enforcement Authorities, his direct and knowing participation in serious felonies warrants disbarment." Id, at 736. In addition, as justification for its ruling, the Court stated that "It is undisputed that he rendered material assistance to Law Enforcement. He suffered financial loss and the substantial loss of his law practice as a result, and incurred personal danger to himself. It was possible for Law Enforcement to penetrate the higher levels of a drug smuggling operation because of his cooperation." Id, at p.736.

In the case on review, the factors considered by the Referee in recommending a three (3) year suspension clearly do not reach the magnitude of the mitigating factors considered by this Court in Pettie; thus, said factors do not warrant reducing the appropriate discipline in this case from disbarment to a three (3) year suspension.

The Bar's position is supported by this Court's decision in The Florida Bar v. Hecker, 475 So.2d 1240 (Fla. 1985). In Hecker, this Court disbarred Mr. Hecker for his participation in a criminal conspiracy to traffic in one thousand (1,000) pounds of marijuana, even though the Referee recommended a three (3) year suspension due to numerous mitigating factors. In disbarring Mr. Hecker, this Court stated:

> Respondent's conduct in attempting to act as a drug procurer is wholly inconsistent with his professional obligation as a member of the Bar. We appreciate that disbarment is the severest sanction available to us and should not be imposed where less severe punishment would accomplish the desired purpose... We appreciate also that Respondent has served his prison sentence, suffered other personal misfortune, and appears genuinely remorseful. Nevertheless, Respondent deliberately set out to engage in illegal drug activity for pecuniary gain. Illegal drug activities are a major blight in our society, nationally, statewide and locally...Members of the Bar should be on notice that participation in such activities beyond professional obligations will be dealt with severely.
> The conduct of Respondent warrants disbarment. The legal profession cannot tolerate such conduct. Id, at 1243.

The Hecker case and the case sub judice are virtually indistinguishable on critical facts. As in Hecker, the Respondent in the instant case was charged with, pled guilty to, and was convicted of engaging in a conspiracy to import marijuana into the United States. In addition, the illegal conduct of both the Respondent and Mr. Hecker involved acquaintances rather than clients, both served prison terms, were remorseful for their

misconduct, were cooperative in the Bar proceedings, were involved in civic matters, had good reputations for honesty and fair dealing, had never been guilty of any other criminal offenses, and neither had a prior disciplinary record. Although there were additional factors considered by the Referee in the case at hand, to wit: Respondent's personal problems associated with the break-up of his marriage; Respondent's excessive work pressure caused by his father's absence from the law office; and the remoteness in time of Respondent's criminal activity, the Bar contends that said factors should not be considered sufficient mitigating factors. The Respondent's criminal activity was remote in time to the disciplinary proceedings due to the fact that his misconduct went undetected until **1989.** The Respondent should not benefit from the fact that his criminal activity went undetected by Law Enforcement authorities for almost five (5) years. In addition, the Respondent's Dissolution of Marriage was final in January 1984, approximately six (6) months prior to the time that the Respondent engaged in a scheme to import marijuana into St. Petersburg, Florida. Further, the Respondent apparently came to grips with his divorce as evidenced by his remarriage prior to his arrest in **1989.** (TR, p.30, **L.23-25).** Yet when Respondent's mental attitude improved, he did not voluntarily come forth and admitted his criminal misconduct. As for the Respondent's excessive work pressures, the same goes hand-in-hand with the legal profession and should not be considered mitigating.

This Court felt compelled to disbar Mr. Hecker from the practice of law notwithstanding numerous mitigating factors. Disbarment is the only appropriate discipline for the Respondent's misconduct, for he also deliberately set out to engage in illegal drug activity for pecuniary gain.

According to Florida's Standards for Imposing Sanctions (hereinafter referred to as "The Standards"), approved by The Florida Bar's Board of Governors in November 1986, disbarment is the appropriate sanction for Respondent's misconduct in this case.

Section 5.1 of The Standards, entitled "Failure to Maintain Personal Integrity," provides that, absent aggravating and mitigating factors, disbarment is appropriate when a lawyer is convicted of a felony under applicable law or when a lawyer engages in the sale, distribution or importation of controlled substances.

Section 9.0 of The Standards, entitled "Aggravation and Mitigation" sets forth factors that may justify an increase or decrease in the degree of discipline to be imposed. The only aggravating factor set forth in this section that applies to Respondent's misconduct is "dishonest or selfish motive," in that the Respondent committed a criminal act for pecuniary gain. The following mitigating facts set forth in this section were present in this case: absence of a prior disciplinary record: personal or emotional problems: full and free disclosure to the disciplinary board or cooperative attitude toward proceedings, character or

reputation; imposition of other penalties or sanctions: and remorse.

Although arguably there are several mitigating factors which apply to this case according to The Standards, this Court's ruling in Hecker, supra supports the Bar's contention that they do not justify a reduction in the degree of discipline which should be imposed against the Respondent. The Respondent intentionally and knowingly engaged in a scheme to import illegal drugs into St. Petersburg, Florida for pecuniary gain. In *so* doing, the Respondent flagrantly disregarded the very laws that an attorney is bound to uphold. Clearly, the Respondent's misconduct falls far below the professional standards expected of a practicing attorney and warrants the strongest sanction available, disbarment.

Based on the foregoing, The Florida Bar respectfully requests that this Court disapprove the Referee's recommended discipline of a three (3) year suspension and disbar Respondent from the practice of law in this State.

CONCLUSION

In recent case law, this Court has held that disbarment is warranted when an attorney participates in a scheme to import marijuana into the United States.

Although some mitigating factors are arguably present in this case, said factors are not sufficient to justify a reduction in the degree of discipline which should be imposed against Respondent. The only appropriate sanction for the Respondent's egregious misconduct is disbarment.

WHEREFORE, THE FLORIDA BAR respectfully requests this Court to disapprove the Referee's recommended discipline and disbar the Respondent, RICHARD L. CLARK, from the practice of law in this State.

Respectfully submitted,

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E T OF VICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief has been furnished by U.S. Regular Mail to Martin Errol Rice, Counsel for the Respondent, at 696 First Ave. North, St. Petersburg, FL 33701; and a copy to John T. Berry, Staff Counsel, The Florida Bar, Ethics and Discipline Department, 650 Appalachee Parkway, Tallahassee, Florida 32399-2300, this 21st day of November, 1990.

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