IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

ROBERT V. PALMER,

Respondent.

CASE NO. 75,557

TFB File Nos. 89-00049-04C, 89-00857-04C, 90-00384-04C, 90-00501-04C, 90-00784-04C.

REPLY BRIEF OF APPELLANT/RESPONDENT

ROBERT V. PALMER, PRO SE
7044 San Sebastian Avenue
Jacksonville, Florida 32217
(904) 733-1227

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE

The Florida Bar's Amended Complaint alleged five Counts of Professional Misconduct against Palmer.

The proceeding was scheduled for Final Hearing, July 20, 1990, before The Referee.

July 19, 1990, Palmer, by telephone, requested a continuance which The Referee, summarily, denied remonstrating that "this matter had been pending for five months and the final hearing itself had been pending for two months...." (AB-3)*

The Referee was adamant that Palmer would be tried and adjudged the next day, as scheduled, unless he was prepared to submit to execution of a Consent Judgment. (HT-11)

Palmer requested that The Bar draft and furnish him a copy of the Proposal.

The Referee scrubbed the Hearing.

The Florida Bar forwarded the document, labelled "Conditional Guilty Plea for Consent Judgment", which Palmer refused to sign, objecting that it was oppressive and had been extracted as a condition upon grant of a continuance. (HT-12, 13)

The Bar moved the Refereee to "Approve and Enforce Consent Judgment." (AB-3)

---

* References to The Bar's Answer Brief will be designated (AB-page number). The Hearing Transcript will be designated (HT-page number). References to The Referee's Report will be designated (RR-page Number).

The Motion was heard November 9, 1990 and The Referee ruled "that... (Palmer) failed to show good cause why the Consent Judgment should not be approved and enforced" according to its terms.(RR-3)

His Report cited Roskind and Silva as controlling cases.(RR-3)

The Bar, accordingly, urges that This Court adopt The Referee's recommendation and give final approval to the unsigned, contested Consent Judgment which purports to authorize discipline consisting of (a) Disbarment for a period of five years nunc pro tunc to May 4, 1989 (b) Restitution... to all parties injured... and (c) Payment of costs. (RR-8)

STATEMENT OF THE FACTS

The Bar's Original Complaint was filed February 16, 1990 and The Referee "scheduled a pre-trial conference on March 30, 1990 in order to expedite the proceedings."(RR-1)

"Both parties appeared and were instructed to file witness lists... within specified time periods." (RR-1)

The Bar's compliance was timely but Palmer's was not - - a delinquency mooted when The Bar, with The Referee's leave, "filed an Amended Complaint and an Amended Request for Admissions." (RR-1)

Thereupon, "the final hearing" was set-down for June 25, 1990 but "Upon being advised by Bar Counsel that an irreconcilable conflict existed on her calendar for that date", The Referee "rescheduled" the hearing for July 20, 1990. (RR-2)

July 19th, Palmer, by telephone, prayed for a continuance

to give him time to rescue his son from trouble and attend him during an illness. (HT-8, 12, 13, 14)

The Referee declared he was vexed because the proceeding had been "pending for five months and the final hearing itself had been pending for two months." (AB-3)

Palmer protested that The Bar's dilatory behavior, not his, had protracted the proceeding. (HT-10, 11)

The Referee was unyielding.

Palmer was denied a continuance absent his instanter commitment, over the telephone, to accept a Consent Judgment. (HT-13)

Fearing a trial in absentia, he caved-in. (HT-11, 12, 13)

Nevertheless, upon receipt of the Proposed Judgment, as drafted by The Bar, he declined execution. (HT-13)

The Referee ordered that it be enforced against him, without his signature, whether he liked it or not. (RR-3)

SUMMARY OF ARGUMENT

Palmer's Point One Argument is:

That prosecutions of Attorneys, for professional misconduct, "are adversary proceedings... of a quasi-criminal nature[1]" in which accused attorneys are protected by procedural[2] and substantive due process;[3]

1- In Re Ruffalo, 390 US 544, 546(1968); Spevack v. Klein, 385 US 511(1967).

2- Willner v. Comm on Character & Fitness, 373 US 96, 103-104(1963)

3- Schware v. Bd of Bar Examiners, 353 US 796(1957)

That enforcement of the Consent Judgment would deprive him of procedural due process and enable his conviction by means of an involuntary guilty plea.[4]

His Point Two Argument is:

That textual analysis of Rule 3-7.9 evidences that This Court did not intend that a Consent Judgment be put at the disposal of The bar for use as a sword to coerce guilty pleas but, to the contrary, intended that The Rule be a shield for use by accused attorneys to save themselves from pillorying;

That The Rule contemplates that Consent Judgment negotiations be initiated by an accused attorney who "states his or her desire to plead guilty" and that, as a matter of right, a plea may be withdrawn at any time "before final approval by..." This Court.

That, therefore, aside from constitutional grounds, enforcement of the disputed Consent Judgment, against Palmer, would contravene The Rule.

POINTS PRESENTED

POINT ONE: A DISCIPLINARY PROCEEDING AGAINST AN ATTORNEY IS QUASI-CRIMINAL IN NATURE AND DUE PROCESS FORBIDS HIS CONVICTION AND DISBARMENT UPON THE BASIS OF AN INVOLUNTARY PLEA OF GUILT IN THE FORM OF AN UNSIGNED, CONSENT JUDGMENT REPUDIATED IN OPEN COURT.

4- Henderson v. Morgan, 426 US 637(1976); McCarthy v. U.S., 394 US 1166, 1174(1968); U.S. v. Del Prete, 567 F.2d 928(9th Cir 1977).

POINT TWO: RULE 3-7.9 AUTHORIZES AN ACCUSED ATTORNEY, WHO "STATES HIS OR HER DESIRE TO PLEAD GUILTY", TO ATTEMPT TO NEGOTIATE A CONSENT JUDGMENT "CONDITIONAL ON FINAL APPROVAL BY..." THIS COURT; THE RULE, HOWEVER, DOES NOT AUTHORIZE THE BAR TO ENFORCE AN UNSIGNED, CONTESTED JUDGMENT AGAINST AN ATTORNEY ON ALLEGATIONS THAT HE CONSENTED TO PLEAD GUILTY DURING A FUGITIVE TELEPHONE CONVERSATION AND THAT HIS PLEA MAY NOT BE WITHDRAWN.

ARGUMENT

Point One Argument

The Bar's Position

The Bar's Answer Brief concedes there is no precedent for enforcement of the Consent Judgment, in controversy, but cites Silva,[5] Roskind,[6] and Miami Dolphins[7] as having much persuasive value.

Palmer replies that there are two obvious reasons why those cases, actually, are irrelevant.

The first reason is that they involved attempts by parties to renege on stipulations made in open Court and read into the record.

Here, The Bar seeks to enforce an alleged promise made by Palmer during the course of a conference call, over the phone - - a promise, The Bar admits, was made to buy time when The Referee refused to continue the Final Hearing, otherwise.

It is doubtful, to say the least, that The Third District would be pleased to have Silva, Roskind and Miami Dolphins inter-

---

5- Silva v. Silva, 467 So.2d 1065(Fla 3rd DCA 1985).

6- Roskind v. Roskind, 552 So.2d 115(Fla 3rd DCA 1989).

7- Miami Dolphins v. Gender & Bach, 545 so.2d 294(Fla 3rd DCA 1989).

preted as warrants for enforcement of settlement agreements on the Palmer facts.

The second reason - - for the irrelevance of The Third District's Trilogy - - is that they were civil cases whereas The Bar's prosecution of Palmer is an "adversary proceeding of a quasi-criminal nature"[8] in which he is sheltered by procedural due process.[9]

Because it is equivalent to a conviction, due process commands that an involuntary guilty plea be inadmissable against an accused.[10]

The constitutional minimum requirements, for a knowing and voluntary plea, in Federal Courts, are codified in Rule 11 of The Federal Rules of Criminal Procedure.[11]

One of the requirements is that the plea be entered in open court[12] for which an out-of-court written, signed stipulation is not an acceptable substitute.[13]

Rule 11 is not binding on State Courts[14] but Florida's Rule 3.172 incorporates the substance of Rule 11[15] and

---

8- In Re Ruffalo, supra, fn 1.

9- ibid; Willner v. Committee, supra, fn 2.

10- Stano v. Dugger, 921 F.2d 1125, 1141(11th Cir 1991)

11- ibid

12- McCarthy v. U.S., supra, fn 4

13- U.S. v. Del Prete, 567 F.2d p. 930

14- Stano v. Dugger, supra, fn 10, 921 F.2d p. 1141

15- Fanno v. State, 517 So.2d 129, 131(Fla 4th DCA 1987)

Subsection (f) mandates that "No plea or negotiation is binding until it is accepted by the trial judge formally... Until that time, it may be withdrawn by either party without any necessary justification."[16]

At worst, Palmer is entitled to a construction of Rule 3-7.9 which affords him procedural safeguards compatible with those built-into Rule 3.172.[17]

Assuming such a construction, the Judgment is disentitled to enforcement on several grounds, two of which are: (1) an asserted Rule 3-7.9 plea of guilt reduced to writing, but unsigned and disavowed, affronts due poroess as inherently involuntary,[18] and (2) in any event, such plea is conditional and may be withdrawn at any time before "final approval by..." This Court pursuant to Subsection (c) of The Rule.[19]

Point Two Argument

Rule 3-7.9, in pertinent part, provides:

"(a)... If before a formal complaint is filed a respondent states his or her desire to plead guilty to a grievance committee report that finds probable cause... then staff counsel...

16- Warden v. State, 453 So.2d 550(Fla 4th DCA 1984)

17- In Re Ruffalo, supra, fn 1.

18- McCarthy v. U.S.supra, fn 4; In Re Ruffalo, supra, fn 1.

19- Warden v. State, supra, fn 16.

may consult established... guidelines for discipline and advise the respondent of the discipline that may be recommended to... (This Court) if a written plea of guilty is entered...."

"(b)... If a respondent states his or her desire to plead guilty to a formal complaint that has been filed, then bar counsel ... may consult established guidelines for discipline and advise the respondent of the discipline the bar will recommend to the referee if a written plea of guilty is entered.".

"(c)... Acceptance of any proposed consent judgment... shall be conditional on final approval by..." This Court.

The Rule, plainly,is designed to create an escape hatch for an accused lawyer who finds the pain and shame unbearable - - not to arm The Bar with "powerful form(s) of compulsion to make a lawyer relinquish..." the right to a trial.[20]

It is drawn, carefully, to insure that a plea, really, is consensual and voluntary.

The attorney, for instance, is expected to initiate negotiations by stating "his or her desire to plead guilty...."

It eschews oral, or informal, arrangements conducive to misunderstandings.

The attorney must tender "a written plea of guilty."

It contemplates a change of mind.

A plea is "conditioned on final approval by..." This Court.

20- Spevack v. Klein, 385 US p. 516

Palmer did not "state his... desire to plead guilty."

He did not enter into a "written plea of guilty."

Measured by the strict terms of The Rule, itself, his alleged guilty plea was involuntary.

Ergo, enforcement of the Consent Judgment would violate principles of right and justice.[21]

Potential Prejudice
To Palmer

Palmer need not demonstrate potential prejudice to justify invalidation of the Judgment[22] but he thinks it may be useful and desirable to make such a demonstration anyway.

The Bar's Complaint contains five counts of misconduct.

Count IV charges that, December 18, 1989, he filed a nolo plea to a third degree felony, i.e. cocaine possession. (RR-8)

Count V charges that, in February 1990, he was convicted of a second degree felony, i.e. grand theft based on "alleged misappropriation of client funds." (RR-8)

He admits the public records sustain Count IV but vouches that he is prepared to present convincing mitigating evidence.[23]

He admits the public records, also, sustain Count V, presently, but declares that the charged conviction is on Appeal and that he has been advised the probability of success is good.

21- Selling v. Radford, 243 US 46(1917)

22- In the Matter of Jones, 506 F.2d 527(8th Cir 1974);McCarthy v. U.S., supra, fn.4.

23- In The Matter of Jones, ibid.

Count III charges that The Bar's audit of his "trust account", for "the period January 1986 to April 1989", revealed that he "was not in substantial compliance with Chapter 5, Rules Regulating Trust Accounts..." and, further, that "the audit revealed a shortage of over $110,000.00 in client and guardianship funds... a shortage being defined as the difference between the apparent trust liabilities and the actual bank balance."

The use of the involuntary guilty plea is especially prejudicial as to Count III.

The audit, in question, was conducted by The Bar while Palmer's books and records, seized by a Search Warrant, were in custody of The State Attorney.

They remain, there, even now.

Palmer was not allowed to participate in the audit and, indeed, has been excluded from access to the books and records, entirely, since their seizure,except for a five day interval, immediately, before going on trial in criminal court.

Non-access impaired his defense, there, and, unless rectified, will impair his defense against Count V.

But he is anxious to put on his case and urges that the Consent Judgment should not be permitted to bar him from the opportunity to do so.

The facts, already, known render the audit suspect.

Count V, for example, charges a shortage "of

over $110,000.00" in clients' funds but the criminal prosecution, based on the self-same audit, charged a much, lesser amount.

Palmer, in good faith, believes that an independent CPA's examination of the books would exonerate him, altogether.

As for Counts I and II, facial examination shows that they involve minor offenses.

If true, they would not authorize severe discipline.

Moreover, they are baseless and, given an opportunity, he can prove they are.

CONCLUSION

The Consent Judgment is tantamount to exaction of an involuntary guilty plea, violative of due process, and should be stricken-down.

Further, the Judgment is invalid for repugnancy to Rule 3-7.9 as written.

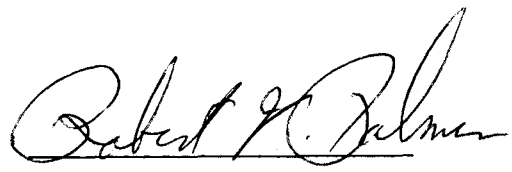
Respectfully submitted,

ROBERT PALMER, Pro Se
7044 San Sebastian Avenue
Jacksonville, Florida 32217
(904) 733-1227

PAGE(S) MISSING

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Respondent/Appellant has been furnished to MIMI DIAGLE, Counsel for The Complainant, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 12th day of August, 1991, by U.S. Mail.



ROBERT V. PALMER, Pro Se
7044 San Sebastian Avenue
Jacksonville, Florida 32217