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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

ARIEL POPLACK,

Respondent.

_____/

Supreme Court Case
No. 76,823

On Petition for Review

Initial Brief of Complainant

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STATEMENT OF THE CASE AND OF THE FACTS

On October 25, 1990, The Florida Bar filed its complaint charging Respondent with misconduct which arose from his arrest for grand theft of an automobile in violation of Florida Statute 810.014 and with the possession of burglary tools in violation of Florida Statute 810.06. As a result Respondent was placed in a Pretrial Intervention Program. After successful completion of the program the criminal charges were nolle prossed.

A final hearing was held before the Honorable Susan Lebow, Referee, on March 14, 1991. The Bar presented evidence which established that the Respondent was discovered by a Coral Gables Police Officer with a Co-Defendant attempting to reattach a stolen vehicle to a tow truck. The Officer asked Respondent to explain what was occurring. Respondent maintained that the vehicle which he had borrowed from a friend had a flat tire.

> [By Officer Swikehardt]: [W]hen I drove up on the scene, my first impression was that it was that it was a disabled vehicle, but when I began to look around, things didn't look right.
>
> There were scuff marks on the road. There was a big chunk taken out of the curb that protruded onto the street from a parking area. There were skid marks through the grass.
>
> The tow truck was sitting in a configuration to the car that the other individual -- not Mr. Poplack -- was trying to hook up the vehicle with the tow truck. It didn't look like he knew what he was doing, to be honest with you.
>
> My first impression was that he was towing the car and either the tow truck hit the curb and the car bounced out of the -- it wasn't a tow truck with a hook on it. It was the kind where the front wheels sit in a rack in the back.

Either the car hit that curb or something happened. Whatever it was, the car bounced out of the back of the tow truck and came down.

[Bar Counsel]: What was Mr. Poplack doing at the time when you approached the scene?

[Officer]: He was standing near the vehicle.

[Bar Counsel]: Did you make any inquiry of him as to what was going on?

[Officer]: Yes, I did.

[Bar Counsel]: What did he tell you?

[Officer]: He told me that he had a flat tire on the vehicle.

[Bar Counsel]: Did he tell you that it was his car?

[Officer]: No, he said he had borrowed the vehicle from a friend.

[Bar Counsel]: Did he give the friend's name?

[Officer]: No, he did not.

[Bar Counsel]: At that time, did he ever tell you that he was removing the car as a prank?

[Officer]: No, he did not.

[Bar Counsel]: Did he say that he was trying to take the car back to where it came from?

[Officer]: No. This part of the conversation was not even -- we weren't even discussing that at this time.

The primary discussion at that point was that he had a flat tire and he had called a wrecker to come and get it.

At this point I still didn't know it was a stolen vehicle.

[Bar Counsel]: Did you try to assist him and Mr. Validares with the car at that point?

[Officer]: By physically helping them?

[Bar Counsel]: Yes.

[Officer]: No.

[Bar Counsel]: What did you then do?

[Officer]: I just began to inquire about what was going on. I said, "Why didn't you just change the tire yourself? Why did you call a tow truck?"

He said that the spare tire was flat.

I was asking questions of -- I was trying to talk to the other individual, Validares, who was hooking up the car.

I handled enough accidents in my time as a police officer that I think I can basically hook up a car myself. This just did not look right. He didn't know what he was doing.

[Bar Counsel]: Was Mr. Validares saying anything?

[Officer]: Not at this point. He wasn't talking at all.

[Bar Counsel]: Mr. Poplack was doing all the talking and explaining?

[Officer]: Correct.

(TR 16-19)

After Officer Swikehardt left the scene he was advised that a vehicle, fitting the description of the vehicle Mr. Poplack claimed had a flat tire had just been reported stolen. (TR 20) The Officer returned to the location and placed Ariel Poplack and the Co-Defendant under arrest. (TR 21) Mr. Poplack then changed his story and stated that he was pulling a prank on a friend. (TR 23)

The Florida Bar presented the testimony of two police officers, the victim and the Assistant State Attorney. The Respondent presented the testimony of five character witnesses and a psychiatrist. The Respondent did not testify.

On July 16, 1991, the Referee issued a Report finding only that Respondent had lied to the police officer and was in violation of Rule 4-8.4(c) of the Rules Regulating The Florida Bar. Although the Bar sought disbarment, it was the Referee's recommendation that Respondent should be suspended for a period of 30 days and placed on probation for 18 months.

The Bar filed its Petition for Review on August 14, 1991. Pursuant to direction from the Board of Governors, the Bar seeks to enhance the recommended discipline to a 91 day suspension based on the Referee's findings. This brief follows.

SUMMARY OF ARGUMENT

It is The Florida Bar's position that the imposition of a 30 day suspension, together with probation is woefully lenient in light of Respondent's misconduct. The Referee found that Respondent's arrest for grand theft of an automobile and possession of burglary tools resulted from a prank he and a Co-Defendant orchestrated. The Referee further found that the Respondent lied to the police officer who encountered Mr. Poplack and the Co-Defendant rehitching the vehicle to a tow truck when he stated that he was changing his friend's flat tire.

The Bar seeks a 91 day suspension.

POINT ON APPEAL

WHETHER THE REFEREE ERRED BY RECOMMENDING A 30 DAY SUSPENSION AND PROBATION RATHER THAN A 91 DAY SUSPENSION?

ARGUMENT

THE REFEREE ERRED BY RECOMMENDING A 30 DAY SUSPENSION AND PROBATION RATHER THAN A 91 DAY SUSPENSION.

It is well established that The Florida Supreme Court enjoys a broader scope of review over a Referee's recommendation for discipline than over a Referee's findings of fact in support of such discipline. The Florida Bar v. Anderson, 538 So.2d 852 (Fla. 1989). In light of the Referee's finding in the case sub judice that Respondent lied to a police officer, it is urged that the imposition of a 30 day suspension does not comport with precedent.

This Honorable Court has held that one who either lies or omits truth from their Bar application is unfit to practice law in the State of Florida. Florida Board of Bar Examiners v. Lerner, 250 So.2d 852 (Fla. 1971). It has also been held that members of the Bar must conform to "the highest standard of integrity in all dealings with the legal system". The Florida Bar v. Lancaster, 448 So.2d 1019, 1024 (Fla. 1984).

In Lancaster, supra an attorney who was unwittingly involved in suspicious activity after receiving property which he later suspected was stolen was suspended for two years from the practice of law. In that case the Respondent initially lied to a state attorney about whether or not the subject property could have been stolen. This Court found that Respondent's lack of complete candor in that matter raised questions about his fitness to practice law. The instant case is quite similar to Lancaster, supra. Mr. Poplack was actually in the throes of a car theft when approached by the police. Without any hesitation Respondent told the police a bald-

faced lie. Rather than confessing to the law enforcement official that he was pulling a purported "prank", he stated that he and his cohort were innocently changing a flat tire.

In The Florida Bar v. Colclough, 561 So.2d 1147 (Fla. 1990), that attorney made misrepresentations in a lawsuit to the court and to opposing counsel. The Court noted Respondent's lack of any disciplinary history and evidence of otherwise good character and imposed a six month suspension. Interestingly, then Chief Justice Ehrlich issued a dissenting opinion which stated:

> Members of the bench and bar as well as the public have a right to expect that a lawyer's representations are truthful and that he can be trusted. I feel that the discipline imposed by the Referee, a suspension of twelve months is appropriate in light of the seriousness of the misconduct at issue.
>
> Colclough, at 1150

Certainly, Mr. Poplack's overall conduct casts a dark shadow on the legal profession. He was discovered in the middle of the night in a disheveled state attempting to attach a vehicle to a tow truck, after it had fallen off. He was arrested for grand theft and possession of burglary tools. As a result he entered a Pretrial Intervention Program. Although the Referee believed Mr. Poplack's claim that he was merely a practical joker, the overall situation[1] together with Mr. Poplack's admitted lie to the police, is egregious. Justice Ehrlich would have undoubtedly expressed the

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[1]See The Florida Bar v. Turner, 369 So.2d 581 (Fla. 1979) which stands for the proposition that personal misbehavior engaged in by an attorney reflected poorly on that Respondent's conduct as a citizen of the State and an Officer of the Court. In that case the Respondent was convicted by a jury of lewd and lascivious conduct. The Respondent was disciplined notwithstanding the fact that the criminal conviction was reversed on appeal.

same outrage as he did in Colclough, supra at the lenient discipline recommended by this Referee.

In The Florida Bar v. Lopez, 406 So.2d 1100 (Fla. 1982), Lopez urged witnesses or parties to testify under oath concerning matters which Lopez knew, or should have known, were untrue. That Respondent was suspended for one year. In the instant case the Respondent himself uttered the deception.

Clearly, the totality of the circumstances together with Respondent's undisputed act of lying to a law enforcement officer does warrant the imposition of a 91 day suspension.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the Referee erroneously imposed a 30 day suspension and 18 months of probation and would urge this Court to suspend Respondent for ~~91~~ days.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the above and foregoing Complainant's Initial Brief on Petition for Review sent Airborne Express to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927 and that a true and correct copy was mailed to Harold Braxton, Attorney for the Respondent at One Datran Center, 9100 South Dadeland Boulevard, Suite 400, Miami, Florida 33156 on this 13th day of September, 1991.

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