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FILED

SID J. WHITE

OCT 10 1991

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

Case No. 77,082

THE FLORIDA BAR

Petitioner/Appellee

vs.

LOUIS C. CORBIN,

Respondent/Appellant

ON REVIEW OF RECOMMENDED ORDER OF REFEREE

RESPONDENT/APPELLANT'S INITIAL BRIEF

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Bar v. Corbin
77,082

Respondent
amended Br.
filed 10-10-91

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PRELIMINARY STATEMENT

The Respondent/Appellant, LOUIS C. CORBIN, will be referred to herein as the "Appellant". The Petitioner/Appellee, THE FLORIDA BAR, will be referred to herein as "The Bar." (This designation is done for clarity of reference, notwithstanding that the original proceedings which underlie this matter were brought in the name of THE FLORIDA BAR as Petitioner and LOUIS C. CORBIN, as Respondent.)

1. References to the Record on Appeal and Transcript of the proceedings before the Referee will be designated by the name of the pleading and "[Tr.]", respectively, followed by the appropriate page numbers set out in brackets.

2. References to Exhibits as part of the proceedings before the Referee will be designated as "[Tr., Ex.]" followed by the appropriate Exhibit number.

STATEMENT OF THE CASE AND OF THE FACTS

The Appellant was suspended from the practice of law for three years, effective November 30, 1987, and thereafter until such time as he proved rehabilitation. See, The Florida Bar v. Corbin, 540 So.2d 105 (Fla. 1989). The suspension was predicated upon the entry of a plea of nolo contendere to the crime of attempted sexual activity with a child twelve years of age or older, but less than eighteen years of age, with whom he stood in a position of familial or custodial authority.

On December 13, 1990, the Appellant filed his Petition for Reinstatement to Membership in The Florida Bar. By Order of this Court, a Referee was appointed, and a hearing was held upon the Petition on June 5, 1991.

At the hearing upon the Petition, the Appellant offered the following:

1. The testimony of the Appellant detailing his having complied with all court orders [Tr. 17]; not having engaged in the unauthorized practice of law during the period of suspension [Tr. 17]; completion of a psycho-sexual counseling program [Tr. 18]; completion of treatment for alcohol dependency and participation in all recommended counseling [Tr. 20]; payment of all counseling costs incurred by his children [Tr. 20]; restitution in full to the Victim's Crime Compensation Fund [Tr. 21]; and a description of his lifestyle since his appearance before the Referee who heard the original proceeding which precipitated the three year suspension.

The Appellant further testified he had consumed no alcohol since April 19, 1989 although he was never forbidden to consume it. [Tr. 22]. He had contributed his talents as a professional musician to perform for various charitable benefits [Tr. 22]. He had counseled others on the benefits of Alcoholics Anonymous training and self-discipline. [Tr. 23]. He was genuinely interested in being reinstated as an attorney and further sincerely believed his experiences would serve as a lesson to others that rehabilitation is a legitimate possibility. [Tr. 24].

Upon the filing by The Bar of a Motion for Mental Examination (see Record), the Appellant voluntarily submitted to a full psychiatric examination by Dr. Ernest C. Miller, Chief of Psychiatry, University of Florida, Health Science Center, notwithstanding a belief by the Appellant and his counsel that The Bar would not have been entitled to such an examination. [Tr. 27, 18]. Finally, the Appellant testified that his criminal probationary term was satisfactorily concluded on August 6, 1990, [Tr. 30], and that Supreme Court disciplinary costs were paid promptly and in full. [Tr. 30].

2. The report of Dr. Ernest C. Miller, Chief of Psychiatry, University of Florida, Health Science Center, was received in evidence. The conclusion of Dr. Miller was that the Appellant was "capable of safely engaging in the unsupervised practice of law." [Tr., Ex. 2].

3. The Order satisfactorily terminating the Appellant's criminal probation was admitted in evidence. [Tr., Ex. 3].

4. A composite exhibit consisting of twenty-one (21) letters attesting to the Appellant's good moral character and professional ability was admitted. [Tr., Ex.1].

5. Two attorneys testified to the Appellant's unimpeachable moral character and professional abilities [Tr. 5-10, 11-15] and the Appellant's wife testified to his lifestyle since their marriage on July 4, 1989. [Tr. 34-35].

The Bar offered no evidence to rebut any of the foregoing evidence. [Tr. 36].

The Appellant and The Bar stipulated that if the Referee recommended reinstatement, a two year probationary condition would be agreed to which would require the Appellant to be monitored by the Florida Lawyer's Assistance Program. (This stipulation is nowhere of record, but counsel for the Appellant acknowledges that the origin of the second special condition of the Referee's Order recommending reinstatement is predicated on this precise stipulation, and acknowledged personally by the Appellant.)

The Referee entered a Report of Referee on June 11, 1991. (See Report of Referee.) The Referee found the presence of rehabilitation, remorse, a deep concern for Appellant's obligations as an attorney and as a citizen, compliance with all trial court orders, payment of all costs required, the maintenance of strict compliance with all disciplinary orders, unimpeachable character, outstanding reputation in the community, the demonstration of professional ability, the payment of a substantial price for his wrongdoing, the absence of malice or ill will toward those who brought the

proceeding, repentance, and the absence of any evidence that the disciplinary proceedings were predicated on the defalcation of funds.

The Referee recommended the reinstatement of the Appellant subject to the following three conditions:

1. A two year probationary period to be monitored by the Florida Lawyers Assistance Program;
2. Payment of costs of the proceedings in the amount of \$513.02.
3. Submission not less than once per year to a licensed psycho-sexual counselor for interview and evaluation to demonstrate Appellant has no proclivity towards physical (sexual) involvement with minors. This requirement to extend for a period of five (5) years after reinstatement.

The Appellant filed a Motion for Rehearing as to the third condition only (emphasis supplied), seeking rehearing on the contention that the condition was not supported by the Record; the condition constitutes an unenforceable condition of Bar membership; the opportunity to present evidence that no such examination exists in the area of psycho-sexual counseling; and finally that The Bar did not oppose the deletion of the condition from the Order recommending that the Appellant be reinstated.

The Referee entered his Order on Motion for Rehearing (see Record) on June 21, 1991 denying the Appellant's Motion for Rehearing. No facts were identified in the Order which supported the inclusion of the third special condition. The Referee did, however,

state in the Order that the Referee sought to "maintain the best interest of The Florida Bar and fairly render its Recommendation."

The Bar did not petition for review of the Report of Referee (see Record, letter of August 2, 1991, from John A. Boggs to Sid J. White, Clerk, Supreme Court of Florida). It is from the inclusion of this third special condition only that the Appellant takes this appeal.

SUMMARY OF ARGUMENT

The Referee in the proceedings below correctly concluded that the Appellant was morally and by training fit to resume the practice of law and recommended his reinstatement. In finding the existence of numerous facts to support the Recommendation of Reinstatement, the Referee followed the appropriate Supreme Court guidelines and case authority in making that recommendation.

Two of the three conditions which the Referee recommended accompany reinstatement were legally appropriate: the payment of costs incident to the reinstatement proceedings and a two year probationary provision requiring that the Appellant be monitored by the Florida Lawyers Assistance program.

A third condition of reinstatement, i.e., that the Appellant submit to an annual examination by a licensed psycho-sexual counselor to determine if the Appellant had a "proclivity toward sexual involvement with minors" is illegal because:

1. There is no competent, substantial evidence in the record to support such a finding;
2. There is no finding of fact made by the Referee to support the recommendation;
3. The condition does not relate to the practice of law, and no lawful authority exists allowing the Referee to do other than make findings of fact and then make a recommendation as to whether the Appellant is qualified to resume the practice of law;

4. The underlying problems which precipitated the Appellant's conduct focused on alcohol abuse, which served as The Bar's interest in a stipulation which assured the monitoring of the potential for such abuse for two years. The Florida Bar itself sought no condition similar to that which the Appellant seeks to review here.

5. The Florida Bar itself consented to the deletion of this condition sought to be reviewed from the Report of Referee.

6. The Appellant was never given the opportunity to address the issue of the propriety of such a condition before the Referee since the condition was never sought by the adverse party; no evidence arose that such a condition might be recommended; no evidence existed that such an examination existed medically, psychiatrically, or psychologically; and upon seeking the opportunity to address the condition upon Motion for Rehearing, the Appellant was denied the opportunity because the Referee "heard the evidence in this case" and sought "to maintain the best interest of The Florida Bar." Since The Florida Bar was represented by counsel and, in an adversary process did not seek the condition and in fact consented to its removal from the final Order, there is no means by which to determine what was meant by the Referee's definition of the "best interest of The Florida Bar."

7. The condition sought to be reviewed is, in effect, meaningless because it requires an examination the results of which can serve no purpose, i.e., the condition in no way allows

The Florida Bar to address the results of an examination which might show, if medically possible, that the Appellant had a "proclivity" towards sexual involvement with minors.

ARGUMENT

The Appellant sought reinstatement by filing a Petition as required by Rule 3-7.10(c), Rules Regulating The Florida Bar, after expiration of the three year period of suspension required by this Court's Order. (See The Florida Bar v. Corbin, 540 So.2d 105 (Fla. 1989). The standards governing reinstatement as a member of The Bar have been specifically delineated by this Court in several decisions. (See, In Re: Timson, 301 So.2d 448 (Fla. 1974); Petition of Wolf, 257 So.2d 547 (Fla. 1972); and In Re: Sickmen, 523 So.2d 154 (Fla. 1988).

The elements to be considered are strict compliance with the disciplinary order; evidence of unimpeachable character; clear evidence of a good reputation for professional ability; evidence of lack of malice and ill feeling toward those involved in bringing the disciplinary proceedings; personal assurances of sense of repentance and desire to conduct a practice in exemplary fashion in the future; and restitution of funds. Timson, at 449, citing In Re: Dawson, 131 So.2d 472 (Fla. 1961); Wolf, at 549; and Sickmen, at 155.

The Report of Referee filed in this cause made specific findings that each of these foregoing criteria were supported by the evidence, other than matters of restitution which were inapplicable here. The Record filed in this cause and presented before the Referee contains competent, substantial evidence to support each of these findings per the standards of this Court set forth in In Re: Inglis, 471 So.2d 38 (Fla. 1985). " . . . We must accept the Referee's findings of fact

unless they are not supported by competent, substantial evidence in the Record." Inglis at 40, 41.

This Court has distinguished between findings of fact which are supported by competent, substantial evidence in the Record as opposed to "legal conclusions and recommendations of the Referee, . . . (wherein) this Court's scope of review is somewhat broader as it is ultimately our responsibility to enter an appropriate judgment." Inglis, at 41. The Summary and Recommendation (c) of the Report of Referee) constitutes a conclusion and recommendation for which no factual predicate is found in the Record before the Referee. Consequently, this Court enjoys the power to review this recommendation and determining what is an appropriate judgment. Rule 3-7.10(i), Rules Regulating The Florida Bar, provides that the Referee "shall make and file with the Supreme Court of Florida a report which shall include the findings of fact and a recommendation as to whether or not the petitioner is qualified to resume the practice of law." Rule 3-7.10(k), Rules Regulating The Florida Bar, provides that this Court's judgment "may make such reinstatement conditional upon the payment of all or part of the costs of the proceeding and upon the making of partial or complete restitution to parties harmed by the petitioner's misconduct. . . ." There is no provision within the Rules Regulating The Florida Bar for such a recommendation, even if it were supported by competent, substantial evidence, although in the instant cause there is no evidence to support it. The same rule of law requiring that a conclusion and recommendation be supported by matters of record is found in The Florida Bar Re: Lopez, 545 So.2d

835 (Fla. 1989) at 837; The Florida Bar v. McCain, 361 So.2d 700 at 706, 707 (which further finds that the evidence must be clear and convincing); and In Re: Cohen, 560 So.2d 785 (Fla. 1990) (requiring that the Appellant, in seeking reversal of the Referee's report, must show that the "report is unsupported by the evidence", at 786).

This Court approved a different Referee's Recommendation of a three year suspension for the Appellant in Corbin, (supra), and therein further approved the finding that the "Respondent's misconduct did not involve the practice of law or actual breach of a professional responsibility to litigants or clients." Corbin, at 107. The Court further approved the finding within that record that "the criminal charge arose from a single incident associated with his depression and increasingly severe drinking problem." Corbin, at 107. Consequently, there is no rational nexus between the special recommendation/condition under review here and the Appellant's fitness to resume the practice of law, which is the standard to be applied pursuant to Rule 3-7.10, Rules Regulating The Florida Bar. In approving a Referee's Report arising from disciplinary (as opposed to reinstatement) proceedings, this Court did in fact approve an anticipatory condition of reinstatement that the disciplined attorney "be certified by such psychiatrist to be free from psychiatric problems which would substantially impair his ability to practice law." The Florida Bar v. Willis, 459 So.2d 1026 (Fla. 1984 at 1028). In Willis however, the condition directly related to the attorney's fitness to practice law inasmuch as the conduct which precipitated the discipline involved serious trust account violations and,

consequently, impacted upon the ultimate issue which was his fitness to practice. In these proceedings, neither the Record nor, for that matter, The Bar raised any issue that a "proclivity towards physical (sexual) involvement with minors" involves any fitness to practice law.

The Bar, prior to the hearing on the Petition for Reinstatement, focused its concern on the Appellant's fitness to practice law to the extent it might be influenced by potential abuse of alcohol. Consequently, The Bar filed a Motion for Mental Examination. This Motion precipitated the voluntary examination of the Appellant by Dr. Ernest C. Miller, which report was received in evidence. The report in no way raises the issue of the "proclivity" discussed in the Referee's Recommendation "(c)". Moreover, the Recommendation "(a)" was a stipulation entered into between the parties because it was the potential abuse for alcohol which might have impacted upon the Appellant's fitness to practice law. Of equal significance is The Bar having consented (emphasis supplied) to the deletion of the recommendation dealing with the psycho-sexual examination when the Appellant moved for rehearing before the Referee to either rehear the issue as to that condition or to have it stricken from the Report of Referee. It is presumably The Bar which is charged, in an adversary proceeding, with determining which issues to raise which are germane to the protection of the public. In a proceeding where the issue is not raised by the evidence, is not sought by either parties and is, therefore, neither argued nor briefed by either party, and further constitutes a matter not relevant according to this Court's own prior

decisions addressing the fitness to practice law, it would seem axiomatic that such a condition cannot stand.

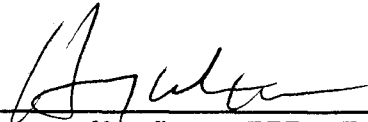
Recommendation "(c)" under review is by its own terms a meaningless recommendation in that no mechanism exists by which The Bar can or could act upon the identification of such a "proclivity." This is to be distinguished from the psychiatric evaluation requirement of Willis, (supra) which required that Willis be "certified by such psychiatrist to be free from psychiatric problems which would substantially impair his ability to practice law." Willis, at 1028. In Willis, a certification that psychiatric problems would substantially impair his ability to practice law immediately triggers the right of The Bar to initiate proceedings necessary to protect the public. With the instant condition, the presence of a "proclivity" not only would bear no relationship to the ability to practice law, but can trigger no Bar proceedings to protect the public, since a "proclivity" may exist for any number of practitioners for a myriad of inappropriate acts of misconduct. The issue would be appropriate, however, if the Appellant engaged in sexual involvement with minors, which would therefore materially impact upon his ability to practice law. Such acts would be actionable independently.

CONCLUSION

The absence of competent, substantial evidence to support the recommendation under review, the lack of nexus between the recommendation and the fitness to practice law, and the consent of The Bar to the condition's deletion from the Report of Referee being evident from the record, there then exists no basis by which this one particular recommendation can be sustained. The Record and the findings of fact of the Referee support all legal standards in favor of reinstatement. No review of the Recommendation of Reinstatement was sought by The Bar and, therefore, the only matter before this Court is the appropriateness of the Recommendation (c) mandating an annual psycho-sexual examination, which cannot stand.

Respectfully submitted this 10th day of October, 1991.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 10th day of October, 1991 to James Watson, Jr., Staff Counsel for The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32299.

