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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

SAM ESSIE BARKET, JR.,

Respondent.
_____/

Case No. 77,961

TFB File No. 91-01124-04A

ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellant, Sam Essie Barkett, Jr., will be refereed to as Respondent throughout this Brief. The Appellee, The Florida Bar, will be referred to as such or as the Bar.

References to the Report of Referee shall be by the symbol RR followed by the appropriate page number.

References to the final hearing before the Referee shall be by the symbol TR followed by the appropriate page number.

STATEMENT OF THE CASE

The Respondent was charged in 1989 with sexual battery under the provisions of Chapters 794 and 800, Florida Statutes upon a young girl fifteen years of age. (Bar's Exhibit 1). After being found guilty at a jury trial, Respondent was adjudged guilty of the crime of sexual battery on April 19, 1991 and sentenced to a prison term. (Bar's Exhibit 2).

Based upon the felony conviction of Respondent, The Florida Bar filed a formal complaint against Respondent on May 15, 1991. A Request for Admissions was filed simultaneously with the complaint and both were served upon Respondent.

The Florida Supreme Court assigned the Honorable Judge James Tomlinson as referee in the case on May 29, 1991.

On or about June 3, 1991, Respondent filed his Answer to the Bar's Request for Admissions, wherein he admitted all requests made as to facts surrounding his conviction.

The referee herein continued the case until such time as the Respondent's conviction was affirmed by the First District Court of Appeal. Upon being informed that Respondent's conviction had been affirmed, the referee scheduled a final hearing on December 10, 1992.

After hearing evidence and arguments by respective counsel, the referee entered a report wherein he found Respondent guilty of violating Rule 3-4.4, of the Rules of Discipline; and Rule 4-8.4(b), of the Rules of Professional Conduct of The Florida

Bar. In his report, the referee recommended that Respondent be disbarred.

On or about September 29, 1993, Respondent filed his Petition for Review and this appeal was commenced.

STATEMENT OF THE FACTS

The Florida Bar takes exception to certain statements made by Respondent in his Statement of the Facts and will submit a separate statement.

Based upon the admissions made by Respondent he was charged with sexual battery under Sections 794.011(i)(h) and 800.04, Florida Statutes as the result of having sex with a fifteen year old girl who was a runaway. Upon trial by jury, Respondent was convicted of the crime of sexual battery and adjudged guilty on April 19, 1991. Respondent was originally sentenced to a term of three years in prison which was later reduced to a one year term.

The criminal charged against Respondent resulted from his paying a client $100 for the opportunity to have sexual intercourse with a young girl. At the time Respondent had sexual intercourse with this girl, she was fifteen years old, staying in the house of Respondent's client and was a runaway from North Carolina. (Paragraph 2, Page 3, RR).

Respondent had been previously convicted of a felony charge of dealing in stolen property in 1976 and was subsequently suspended for three years from the practice of law. (Section V, Page 5, RR)

In Respondent's Statement of Facts, he states that he was arrested at the home of a Mr. C. Lee Daniel, who brought the girl to Jacksonville for the purpose of prostitution, that Respondent admits having sexual had intercourse with.

Respondent fails to cite in the record where there is any evidence to support the statement that this young girl was brought to Florida for the purpose of prostitution.

Respondent offered no testimony or evidence to support his contention that the victim in question was a prostitute.

Respondent also alleges as a fact that Respondent did not know the victim was only 15 years old and that no proof was presented in the lower court. Respondent fails to cite to such evidence in the record.

Contrary to Respondent's assertion there was evidence presented to the trial court and given to the referee that establishes Respondent knew of the girl's age at the time Respondent had sexual intercourse with her. Two detectives testified that Respondent admitted to them he believed the age of the girl was between 15 and 16 years old. (pp. 210-12, 239-40, trial transcript). It was also shown Respondent admitted to the Chief Assistant State Attorney that he knew the girl was under 16 years old. (pp. 264-265, trial transcript). The victim also testified at the criminal trial that both the Respondent and his client, C. Lee Daniel, knew she was 15 years old at the time Respondent had sexual intercourse with her. (p. 176, trial transcript).

In that the statements of Respondent referencing the allegation that the victim was procured by Respondent's client for prostitution and that Respondent was not aware the victim was under 16 years old are not supported by evidence before the

referee here, these facts should not be considered and should be stricken from Respondent's brief.

SUMMARY OF ARGUMENT

Respondent is a twice convicted felon that has engaged in conduct that adversely reflects upon his fitness as a lawyer.

The referee has found Respondent guilty of misconduct in violation of the Rules of Discipline of The Florida Bar and recommends Respondent be disbarred.

The evidence supports the findings and recommendations of the referee and the case law supports the discipline of disbarment.

The absence of evidence in mitigation in the referee's report helps to distinguish Respondent's case from an argument for mere suspension.

Based upon the facts surrounding Respondent's felony conviction and the aggravating circumstances the appropriate discipline is disbarment and the referee's report should be approved.

ARGUMENT

Respondent argues that the recommendation of disbarment by the referee is unwarranted and inconsistent with discipline in similar offenses.

Petitioner does not disagree with Respondent's opening remark that the commission of a felony does not in itself mandate disbarment. In support of this position, Respondent cites four cases wherein the subject attorneys had been cited with criminal conduct of a felonious nature and were not disbarred.

The cases cited by Respondent go beyond the simple premise used by Respondent to argue against automatic disbarment. In each case cited by Respondent, the Court addresses the weight of mitigation and what part this factor plays in the ultimate discipline imposed against the lawyer.

In the cited case of The Florida Bar v. Pavlick, 504 So. 2d 1231 (Fla. 1987), the referee cited the mitigation of no prior disciplinary convictions, the attorney being an exemplary father and family man and participation in community activities. The court accepted the evidence of mitigation in support of discipline less than disbarment.

In The Florida Bar v. Jahn, 509 So. 2d 1231 (Fla. 1987), the court recognized that felony convictions based upon the use of drugs due to addiction would mitigate discipline from disbarment to suspension. The Court again referred to the substantial amount of mitigation presented in the referee's

report and what role this should play in determining the proper discipline. Citing a lack of prior disciplinary history, no injury to clients and exemplary efforts to rid himself of a chemical dependency, the attorney was suspended rather than disbarred.

In The Florida Bar v. Carbonaro, 464 So. 2d 549 (Fla. 1985), the Court approved the referee's recommendation of suspension in a matter based upon a felony conviction based upon drug violations. In approving the referee's discipline, the Court cited mitigation that included psychiatric problems, remorse and personal hardship and demonstrated potential for rehabilitation.

Petitioner would distinguish each of these cases from Respondent's by pointing to the finding of no mitigating circumstances by the Referee in his report. This Court has continuously held that a referee's finding of fact is presumed correct and will be upheld unless clearly erroneous and lacking evidentiary support. The Florida Bar v. Pierce, 478 So. 2d 812 (1985).

A review of the record shows a lack of any evidence that would support findings of mitigation of the nature used in the cited cases by Respondent that could be relied upon to argue for a discipline less than disbarment.

Respondent next argues that a finding of guilt on a charge of sexual misconduct does not mandate disbarment. In support of his position, he cites the cases of The Florida Bar v. Turner, 369 So. 2d 581 (1979) and The Florida Bar v. Corbin, 540 So. 2d

105 (1989). Both of these cases are distinguishable from Respondent's and are not controlling.

In Turner, the lawyer had been charged with a violation of Section 798.02, Florida Statutes, lewd and lascivious misconduct, a second degree misdemeanor. The conviction was ultimately reversed on appeal and a joint recommendation between the Bar and Mr. Turner resulted in a 45 day suspension.

In the instant matter, Respondent was convicted of a felony charge of sexual battery and had his conviction affirmed on appeal. In this case, the Bar's only position has been to seek disbarment.

Respondent has also cited The Florida Bar v. Corbin, 540 So. 2d 105 (Fla. 1989) as authority in support of his contention that he should be suspended, not disbarred. The reliance of Respondent on Corbin is misplaced for his argument against disbarment.

In Corbin, the referee cited to the extensive mitigation presented by Corbin that included voluntary treatment in a residential alcohol treatment program, genuine remorse over the injury to the victim and embarrassment caused the Bar, and the incident did not include the practice of law.

In the instant case, none of these mitigating circumstances are present. Respondent was convicted and adjudged guilty after a jury trial while Corbin pled to his charge and adjudication was withheld. Respondent, rather than acknowledging the wrongfulness of his misconduct, still places blame on the victim, arguing she was a prostitute and misrepresented her age.

Respondent made no effort to appear before the referee to express his remorse as did Corbin. Unlike Corbin, Respondent could not provide any evidence that his misconduct was the aberration of a drug addiction or mental illness.

Respondent also misplaces reliance upon the fact that in Corbin, the attorney had been a sitting Circuit Judge at the time of his misconduct. The Court ruled in Corbin that the standards are no different and lawyers are to be held to the same standard no matter what their position.

As previously cited, this Court has held that a referee's finding of fact is presumed correct and will be upheld unless clearly erroneous and lacking in evidentiary support. The Florida Bar v. Price. Each and every finding set forth in the referee's report is supported by substantial and competent evidence and Respondent has not shown that the report should not be upheld.

Based upon Respondent's felony conviction and admissions filed with the referee, it has been shown that Respondent paid $100 to one of his clients for the opportunity of having sexual intercourse with a 15 year old girl. The sexual battery occurred at the home of Respondent's client while Respondent was there answering several legal questions the runaway girl was asking.

At the time Respondent had sexual intercourse with this young girl, he had previously been convicted of a felony, i.e., dealing in stolen property in 1976 and had served a three year suspension from The Florida Bar based upon that conviction.

Respondent was intimately familiar with both the legal system and the Bar's disciplinary system.

While neither a felony conviction nor sexual misconduct mandate automatic disbarment, the Court has expressed its condemnation of such misbehavior.

In the recent case of The Florida Bar v. McHenry, 605 So. 2d 459 (Fla. 1992), the attorney was disbarred for two instances of sexual misconduct with his clients. In McHenry, the referee found the attorney guilty of violating Rule 4-8.4(b) of the Rules of Professional Conduct, Rules Regulating The Florida Bar, for behavior with two clients that amounted to a battery on his clients.

In McHenry, the Court held that such conduct reflects adversely on his fitness as a lawyer and on the reputation and dignity of the profession. McHenry, p. 461.

In The Florida Bar v. Hefty, 213 So. 2d 422 (Fla. 1968), this Court disbarred the attorney where he was found to have had continuous sexual intercourse with his young stepdaughter and had a previous disciplinary record.

A review of the Florida Standards for Imposing Lawyer Sanctions results in the proper discipline in this matter being disbarment. Section 5.11(a) hold that disbarment is appropriate when a lawyer is convicted of a felony. Section 8.1(b) holds that disbarment is appropriate when a lawyer has been suspended for similar misconduct. In this matter, the following aggravating factors under Section 9.22 should be considered:

(a) a prior disciplinary offense; (c) refusal to acknowledge nature of conduct; and (h) vulnerability of victim.

On the occasion of Respondent's criminal misconduct, he stood already once convicted of a felony and having been suspended from the practice of law for three years. Respondent appeared at the home of his client, who was himself engage in the commission of the same felony of which Respondent subsequently was adjudged guilty--sexual battery.

In the present case, Respondent found himself in a situation where bells and sirens should have been going off and rather than running in the opposite direction, Respondent made the conscious decision to engage in conduct that was clearly criminal and in violation of the Bar's disciplinary rules.

In the recent case of The Florida Bar v. Anderson, 594 So. 2d 302 (Fla. 1992), this Court specifically addressed the obligation each member of the Bar has to honor the law. Therein, the Court held that:

> No one is privileged to commit crime merely because others are doing so. This is especially compelling with a licensed attorney, whose unique and special obligation is to honor the law and encourage others to do so. When others see an attorney breaking the law, they may well assume that such misconduct is acceptable. Attorneys who initiate the crimes of non-lawyers effectively place the imprimatur of their legal training on the misconduct, implying that the law itself either condones such misconduct or at least will ignore it. Anderson, p. 303-304.

Respondent's conduct in this instance and his previous felony conviction can only be seen as flaunting his total disregard for his oath as a lawyer and his respect for the lawyer.

The nature of Respondent's misconduct and the total lack of mitigation substantiate the recommendation of the referee that Respondent should be disbarred. The report of the referee should be affirmed and a final order entered disbarring Respondent from the practice of law.

CONCLUSION

The findings of fact in the referee's report are supported by competent and substantial evidence. The prior disciplinary history of Respondent, the criminal nature of his misconduct and lack of mitigation support the referee's recommendation of disbarment. The referee's report should be affirmed and Respondent disbarred from practicing law in Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief regarding Supreme Court Case No. 77,961, TFB File No. 91-01124-04A has been forwarded by regular U. S. mail to **NORMAN J. ABOOD**, Counsel for Respondent, at his record bar address of 233 East Bay Street, Suite 1015, Jacksonville, Florida 32202-3417, on this 23rd day of December, 1993.

JAMES N. WATSON, JR.
Bar Counsel