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IN THE SUPREME COURT OF FLORIDA

CASE NO.: 81-463

GRAFTON BERNARD WILSON, II

Petitioner/Respondent

-v-

THE FLORIDA BAR,

Complainant

PETITION FOR REVIEW OF REFEREE'S REPORT

REPLY BRIEF OF PETITIONER

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REFERENCES

The Petitioner herein shall be referred to as Petitioner and the Complainant as the Florida Bar or the Bar.

All references to transcript testimony of the hearing will be indicated by the designation "Tr." followed by the page number. References to the Referee's report will be designated by "Report" indicating the page number. References to exhibits will be indicated by the document name and the page number and references to depositions will be indicated by the designation "Depo", followed by the name of the deponent and the page number.

STATEMENT OF ISSUES

Referee's recommendation that Petitioner be disbarred not withstanding overwhelming mitigation evidence by members of the local community that testified to Petitioner's overall good integrity, character, reputation and fitness to practice law.

SUMMARY OF ARGUMENT

The case law presented to the Court in Petitioner's initial brief together with this reply brief does support a change in the Referee's recommendation with respect to disciplinary measures to be applied in this case. The Referee's recommended discipline does not meet the criteria established by this Court as well as the case law and Florida Standards for Imposing Lawyer Sanctions.

Disbarment is not the appropriate discipline in this case based on the facts of this case and the long line of cases by this Court that dictate that discipline other than disbarment is appropriate.

The Referee was of the mind set that a felony conviction automatically warrants disbarment contrary to the many mitigating factors and facts of Petitioner's case. The Referee ignored the testimony directed to Petitioner's fitness to practice law.

ARGUMENT I

THE FINDINGS OF FACT CONTAINED IN THE REFEREE'S REPORT DO NOT SUPPORT HIS RECOMMENDATIONS

The answer brief filed by The Florida Bar fails to respond to the specific errors in the Referee's report raised as issues in Petitioner's brief, in the following particulars:

Page two of the Referee's report states as a finding:

"In late 1983 New York advised nursing homes that the State would make future medicaid reimbursements based on costs reported for 1983."

Petitioner argued that there was no evidence in the record to support this "finding" and the Florida Bar failed to counter or point to any such evidence in the record.

The answer brief also fails to effectively deal with the second factual error of the Referee raised by Petitioner on page 10 of his initial brief. The two findings of the Referee are clearly inconsistent and the Bar's argument requires that the Court blindly ignore the clear language of the Referee and classify his finding at page 5 of the Report as other than a finding of fact.

The Bar agreed that the Referee erroneously found an "informant" was used in the underlying criminal investigation. This is important in that a clear change in analytical approach to viewing evidence must occur. An informant is one who has special knowledge and passes that information to authorities. No such evidence was presented in either the underlying criminal case or the hearing conducted by the Referee.

The answer brief also fails to respond to the factual error of the Referee to the effect that a scholarship agreement was created in 1986 and submitted to the State of New York as a 1983 cost (Report p. 3). Petitioner at page 11 of his initial brief pointed out that the indictment charged in count three the cost was reported in 1984.

The Bar responds to the allegation of factual error by the Referee (page 4 of Report) concerning Respondent's alleged admission of delivering false documents simply by restating the erroneous finding and fails to deal with the argument presented in Petitioner's initial brief.

The Bar's view of the testimony and evidence elicited from a senior circuit court judge, the State's Attorney for the Eighth Judicial Circuit, a local chief of police, another judge, a police officer, attorneys, physicians, members of the Black community, all of whom represent Petitioner's local community from a variety of perspectives and walks of life, that the totality of this evidence is based in ignorance is an affront to each of these witnesses who participated in the hearing before the Referee. This cavalir and condescending approach by the Bar mandates that the Florida Bar's mission is nothing less than blind advocacy for outright automatic disbarment as opposed to the search for a fair and just resolution in the interests of the community as a whole and the individual attorney. A review of the testimony, the evidence and argument

taken together as a whole leads to the inescapable conclusion that the Referee was in error when he found that the evidence and testimony elicited from Petitioner's witnesses was "based in their personal relationships rather than any understanding of the New York evidence" (Report p. 7-8).

ARGUMENT II

THE REFEREE'S RECOMMENDATION OF DISBARMENT IS NOT APPROPRIATE IN LIGHT OF CASE LAW THE ESTABLISHED PURPOSES OF DISCIPLINE AND THE FACTS OF THIS CASE.

The Bar agrees with Petitioner that an attorney who is convicted of a felony does not automatically suffer the sanction of disbarment. However the Bar in its answer brief adroitly side steps the issue of sanctions other than disbarment decided by this Court in cases cited by Petitioner. The Bar in essence relies on the vituperative comments of a prosecutor as evidence that is dispositive of the issue of disbarment, and on the other hand, the Bar advocates that the evidence and testimony elicited by Petitioner before the Referee should essentially be ignored.

In The Florida Bar v. Jahn, 509 So. 2d 285 (1987), the Bar in its answer brief argues that Jahn's three year suspension is appropriate because he (Jahn) was addicted to drugs and voluntarily worked to overcome his addiction. The point is that Jahn was sentenced to four and one-half years of prison. Petitioner on the other hand was placed on probation. It is inconceivable that the Bar takes the position that Petitioner should be treated more harshly than was Jahn who was involved in the use of illicit drugs with a minor female.

The Bar's analysis of The Florida Bar v. Fertig, 521 So. 2d 1213 (Fla. 1989) side steps the issue of sanctions other than disbarment. Fertig received a 90 day suspension after he was

convicted of violating the Florida Racketeer Influenced and Corrupt Organizations Act. Fertig helped drug dealers launder money for six years. He continuously supported the business of supplying drugs, the evil poison that has sickened our society at every level. Can any acts or actions attributed to Petitioner in his circumstances be considered so vile as those of Jahn and Fertig?

The Bar's analysis of The Florida Bar v. Chosid, 500 So. 2d 150 again side steps the issue of an appropriate sanction other than disbarment. Chosid was convicted of a long term drug smuggling and distribution enterprise and the filing of false income tax returns. Chosid is distinguishable form Fertig, supra in that there is no suggestion that Chosid had a drug impairment problem.

Chosid was sentenced to two years prison, and this Court despite his prior disciplinary problems, placed him on three years probation. The Bar cannot advance any credible argument that Petitioner had the same or similar degree of culpability and had generated as much harm as the acts of Chosid.

In The Florida Bar v. Diamond, 548 So. 2d 1107 (Fla. 1989), the Bar argues in its answer brief that the trial judge testified in Diamond's behalf which therefore resulted in Diamond's suspension as opposed to disbarment. However, the very same trial judge also sentenced Diamond to prison. The trial judge in

Petitioner's case did not testify, but the trial judge over the prosecutor's strenuous argument for an incarcerative sentence, placed Petitioner on probation pending an appeal of the jury's verdict.

Similar to Petitioner, Diamond presented at his hearing abundant character testimony together with mitigation evidence equal to that of Petitioner. Comparing Diamond with Petitioner's case in the light most favorable to the Bar, the Bar's harsh stance of disbarment cannot stand.

The Bar in its answer brief does not challenge the sanction of suspension as opposed to disbarment in The Florida Bar v. Stark, 616 So. 2d 41 (Fla. 1993). In Stark, extensive mitigating testimony similar to that of Petitioner's was taken into consideration in rendering a sanction of suspension. Stark was accused of stealing client trust funds over an extensive period of time, and, was found to have violated an order of suspension by continuing to practice law. Comparing Stark, to Petitioner's case it can not be credibly argued that Stark can be considered to have been committing acts less egregious than those attributed to Petitioner.

The Bar in its answer brief claims that this Court should not look to or consider The Florida Bar v. McShirley, 573 So. 2d 807 (Fla. 1991) as guidance in determining the appropriate sanction to

be applied to Petitioner. Petitioner has appealed his conviction and the restitution ordered as a condition of probation. The amount of restitution therefore, is a matter not yet fully litigated and determined. The other factors cited in mitigation in McShirley are also present in the instant case plus there was a large amount of character and other evidence submitted on behalf of Petitioner bearing on Petitioner's fitness to practice law which was not presented on behalf of McShirley. It can not be logically argued that McShirley, an attorney who stole his client's funds over a six year period and whose record is absent the public service and commitment to the profession exhibited by Petitioner, that Petitioner is less deserving of the sanction of suspension.

The Bar in its answer brief fails to address, discuss, counter, or, rebut Petitioner's arguments based on the cases cited herein and in Petitioner's initial brief. Also the Bar in its answer brief ignores the following two important cases, The Florida Bar v. Hirsch, 342 So. 2nd 970 (Fla. 1977) and The Florida Bar v. Neu, 597 So. 2nd 266 (Fla. 1992). The import of these two cases is that this Court set forth therein the principles that should be used as a guide in determining the appropriate sanctions in attorney discipline cases. This Court in Hirsh, held:

> "1. Disbarment is the extreme and ultimate penalty in disciplinary proceedings. It occupied the same rung of the ladder in these proceedings as the death penalty in criminal proceedings. It is reserved, as the rule provides, for those who should not

be permitted to associate with the honorable members of a great profession. But, in disciplinary proceedings, the purpose of the law is not only to punish but to reclaim those who violate the rules of the profession or the laws of society of which they are a part.

2. Ordinarily the occasion for disbarment should be the demonstration, by a continued course of conduct, or an attitude wholly inconsistent with the recognition of proper professional standards. Unless it is clear that the lawyer will never be one who should be at the bar, suspension is preferable.

3. For isolated acts, censure, private or public, is more appropriate. Only where a single offense is of so grave a nature as to be impossible to a respectable lawyer, such as deliberate embezzlement, bribery of a juror or court official, or the like, should suspension or disbarment be imposed. Even here the lawyer should be given the benefit of every doubt, particularly where he has a professional record and reputation free from offenses like that charged."

In Neu, supra, this Court held:

"Discipline for unethical conduct must serve three purposes: First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing a penalty. Second, the judgment must be fair to the respondent, being sufficient to punish the breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations."

This Court in Hirsh best phrased the philosophy or principles that should guide those imposing sanctions in lawyer discipline cases:

> "Just as a lawyer who has been habitually dishonest will almost certainly revert to his low professional standards when necessity, temptation, and occasion recur, so one who has been consistently straight and upright can properly be trusted not to repeat an isolated offense unless of such a nature as of itself to demonstrate a basically depraved character."

Is is both telling and sad that the Bar chose to ignore the principles postulated in Hirsh and Neu in formulating the tone and content of its answer brief. Lawyers too are human beings subject to the principles of justice. And the principles of appropriate justice in disciplinary proceedings enunciated by this Court dictate that justice and mercy are not antithetical.

The Florida Bar also chose to not respond to Petitioner's argument that the sanction of disbarment in this case and its vigorous pursuit of disbarment violates the protections of due process and equal protection as set forth in the Florida and United States Constitutions. The Florida Bar does not seek disbarment in all cases where an attorney is convicted of a felony. No statistics are maintained concerning the pursuit or non-pursuit of disbarment in such cases and the Bar acts arbitrarily and capriciously in selecting those against whom the "death penalty" of disbarment is applied.

CONCLUSION

Disbarment in this case is inappropriate, disproportional, and is unsupportable in light of the mitigating testimony and evidence elicited at Petitioner's hearing before the Referee.

Based upon the findings of fact by the Referee the aggravation and mitigation present in this case, the applicable case law and Florida Standards for Imposing Lawyer Sanctions, the Referee's recommendations should not be accepted by this Court.

The mitigation evidence that came from the mouths of many different persons representative of a broad cross section of Petitioner's local community bespeak the fact that Petitioner has been consistently fit to practice law and can be properly trusted not to repeat an isolated offense.

Petitioner's unblemished past, his dedication to his local community and public service, his remorsefulness, and the mitigating evidence on his behalf by persons cognizant of the seriousness of these proceedings taken together as a whole present a compelling case for suspension.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing were provided to Sid White, Clerk of this Court, and one copy to John V. McCarthy, Assistant Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, and to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 17th day of February, 1994.

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