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IN THE SUPREME COURT OF FLORIDA

CASE NO.: 82,884

FLA BAR NO. 0382371

THE FLORIDA BAR,

Complainant,

vs.

JOHN H. BUSTAMANTE,

Respondent.

_____/

INITIAL BRIEF OF RESPONDENT

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B. PRELIMINARY STATEMENT

References to the transcript of the final hearing held October 7, 1994, shall be by the designation Tr. - _____.

C. STATEMENT OF THE CASE

On October 8, 1993, complainant filed a notice of determination or judgment of guilt with this court showing that respondent had been convicted of a felony in the United States District Court for the Northern District of Ohio. Subsequently, on October 26, 1993, this court entered an order automatically suspending the respondent from the practice of law pursuant to Rule 3-7.2 (e) of the Rules Regulating The Florida Bar. The effective date of the suspension was 30 days from October 19, 1993.

On December 15, 1993, complainant filed it's complaint in the present case. Respondent's answer was filed on March 4, 1994. In his answer, respondent admitted he had entered a plea of guilty to count one of an indictment filed in the United States District Court for the Northern District of Ohio. Respondent asserted he entered into a plea agreement solely because the United States Attorney's Office for the Northern District of Ohio was threatening further investigation and prosecution of members of respondent's family. On March 15, 1994, respondent filed his response to request for admissions.

Complainant filed a motion to deem matters admitted and motion for summary judgment on March 29, 1994. Respondent filed his response to said motion on April 1, 1994. A hearing was held on complainant's motion on June 15, 1994, and the referee subsequently entered an order on July 18, 1994, granting summary judgment. The referee's order of July 18, 1994, also recommended the respondent be found guilty of having violated Rules 4-8.4 (a), 4-8.4(b), 4-8.4(c), and 4-8.4(d) of the Rules of Professional Conduct of the Florida Bar.

The case proceeded to a final hearing before the referee on October 7, 1994. After a lengthy hearing at which the respondent presented the testimony of five character witnesses, along with the testimony of respondent and numerous exhibits, the referee took the matter under advisement awaiting written final arguments from the respective parties. Complainant submitted it's memorandum in support of discipline to the referee on October 13, 1994. Respondent's final argument was submitted on October 14, 1994.

On November 18, 1994, the report of referee was issued. The referee recommended respondent be found guilty of violating Rules 3-4.4, 4-8.4(a), 4-8.4(b), and 4-8.4(c), Rules Regulating The Florida Bar. The referee then noted he considered the aggravating factors of

dishonest or selfish motive, a pattern of misconduct, refusal to acknowledge wrongful nature of conduct, and substantial experience in the practice of law. The referee did not consider any mitigating factors. The referee then recommended that respondent be disbarred from the practice of law in Florida and that respondent be responsible for the costs of the proceedings.

A timely petition for review was filed by respondent on March 3, 1995.

D. STATEMENT OF THE FACTS

Respondent was indicted on September 12, 1990, in a twelve count indictment returned by the grand jury for the United States District Court, Northern District of Ohio (Eastern Division). The case proceeded to a jury trial between the dates of January 22, 1991, and January 30, 1991. After three and one-half days of deliberation, the jury returned a verdict on February 4, 1991, finding respondent guilty of counts one, five, seven, nine and eleven, and not guilty of the remaining counts. The trial court entered a judgment of acquittal as to count twelve of the indictment on January 29, 1991, at the close of the government's case.

Respondent then filed a motion for new trial which was granted by the Honorable John Manos, the trial judge in the case. (Respondent's Composite Exhibit Two). The memorandum of opinion issued by Judge Manos noted that the jury's verdict "because of it's apparent confounding inconsistency, bore little or no relationship to the charges of the indictment." (Respondent's Composite Exhibit Two). The U. S. Attorney's Office for the Northern District of Ohio appealed this decision to the United States Court of Appeals for the Sixth Circuit.

The United States Court of Appeals for the Sixth Circuit entered a *per curiam* opinion on June 12, 1992, which remanded the matter to Judge Manos for further proceedings. Judge Manos then entered a second order dated June 15, 1992, which affirmed his prior decision. (Respondent's Composite Exhibit Two). On August 12, 1992, the United States Court of Appeals for the Sixth Circuit affirmed Judge Manos' ruling granting a new trial. (Respondent's Composite Exhibit Two).

After the affirmance of the order granting a new trial, the case returned to the United States District Court for the Northern District of Ohio. A number of significant events then occurred. First, respondent's daughter became critically ill and at one point was in need of a liver transplant. (Tr. - 108, 141, 203). Further, the United States Attorney's Office for the Northern District of Ohio expanded the scope of it's investigation to include respondent's children and his business, *The Call and Post Newspaper*. (Tr. - 68,71).

On January 19, 1993, respondent's youngest son committed suicide after learning of the efforts of the United States government to continue to prosecute respondent. (Tr. - 73, 108,109,

142 - 143, 204-206). At this point, plea negotiations began in earnest between respondent and the United States Attorney's Office for the Northern District of Ohio.

On April 2, 1993, respondent signed a plea agreement with the United States Attorney's Office for the Northern District of Ohio. (Bar's Exhibit B). The language of the plea agreement was subsequently amended after respondent's counsel learned of the impact the language of the plea agreement would have upon respondent's ability to ever seek reinstatement to the practice of law in the State of Ohio. (Tr. - 74-78; Bar's Exhibit C).

After entry of his plea, respondent was sentenced on June 11, 1993, to five years probation. Respondent was also ordered to pay restitution to Consumers United Insurance Company.

Respondent entered a plea of guilty to only count one of the indictment. The remaining counts were dismissed by the United States Attorney's Office for the Northern District of Ohio. Also, the plea agreement specifically stated no other members of respondent's family would be prosecuted if the respondent plead guilty. (Bar's Exhibit B). Respondent demanded this language as a condition of the plea agreement. (Tr. - 207-208).

E. SUMMARY OF ARGUMENT

As noted in the numerous character letters and in the testimony of the character witnesses who appeared on behalf of respondent, respondent is recognized as one of the leaders of the black community in Cleveland, Ohio. Although respondent's resume (Respondent's Exhibit 6), his character letters and his witnesses attest to a man of high integrity and respect, the referee found no mitigating factors in regard to the imposition of discipline. The referee's decision in this regard is clearly lacking in support.

The circumstances surrounding respondent's plea of guilty to one count of a twelve count indictment support the finding respondent should not be disbarred from the practice of law in the State of Florida. Respondent's spirit and willingness to fight charges he felt were unjustified were crushed by the tragic death of his youngest son. Once that sad event occurred, respondent was a broken man who looked for a way to put the matter behind him without any further damage to his family.

A felony conviction does not necessarily call for the disbarment of an attorney. The court must look at all the facts and circumstances involved in the case and at any aggravating and mitigating factors. The referee erred in only considering aggravating factors. If the referee had considered the plethora of mitigating factors present in this case, the referee would have, perhaps, made a different recommendation to this court. In any event, the recommendation of disbarment must be rejected.

F. ARGUMENT

1. Whether the referee erred in failing to consider any mitigating factors and in recommending respondent be disbarred from the practice of law in the State of Florida.

The report of referee indicates the referee considered the aggravating factors of dishonest or selfish motive, a pattern of misconduct, refusal to acknowledge wrongful nature of conduct, and substantial experience in the practice of law. Of these factors, respondent will only concede that substantial experience in the practice of law is applicable to the present case. In many ways, however, respondent's experience in the practice of law is a mitigating factor. Respondent served the public as a member of The Florida Bar and the Ohio Bar for over 40 years without a single incident of misconduct. The referee failed to consider this or any other mitigating factors. The record is replete with examples of factors which mitigate against the referee's recommended discipline of disbarment.

The history of the criminal case against respondent itself shows disbarment is not appropriate in this case. After a lengthy trial on a twelve count indictment, a jury found respondent guilty of only five of the counts.[1] The trial court had previously granted respondent's motion for judgment of acquittal as to count twelve of the indictment. The trial judge then granted respondent's motion for new trial finding the jury's verdict "bore little or no relationship to the charges of the indictment." (Respondent's Composite Exhibit Two).

A review of the indictment (Bar's Exhibit 1) and the jury's verdict shows the complete inconsistency of the jury's verdict. For example, count eight of the indictment charges that on or about October 5, 1988, respondent caused a check in the amount of $25,000.00 payable to Bustamante, Donohoe, and Palmisano to be transported in interstate commerce from New York to Ohio. Respondent was found not guilty of count eight. Nevertheless, in count nine, which charges an identical transaction on October 7, 1988, the jury found respondent guilty.

After the United States Attorney's Office for the Northern District of Ohio appealed the

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[1]The jury deliberated 3 1/2 days before returning it's verdict. (Respondent's Exhibit Two - memorandum opinion of Judge Manos). The verdict was obviously a compromise verdict, i.e. respondent was found guilty of basically every other count.

order granting a new trial to the United States Court of Appeals for the Sixth Circuit, several events happened which weakened the resolve of respondent to continue to fight to clear his good name. First, respondent's daughter became critically ill and at one point was in need of a liver transplant. (Tr. - 108, 141, 203). Further, the government expanded the scope of it's investigation to include respondent's children and his business, *The Call and Post Newspaper.* (Tr. - 68, 71).

The testimony of respondent's first trial counsel, Charles Clarke, shows the manner in which respondent was targeted for prosecution by the U. S. Attorney's Office for the Northern District of Ohio. Mr. Clarke's testimony also provides some insight into some of the politics which may have motivated the U. S. Attorney's Office.

According to Mr. Clarke, respondent had achieved "a national reputation as a leader in the black community. Among his clients were a number of distinguished political and semi-political figures in various parts of the United States, and among them was Jesse Jackson." (Tr. - 23-24). At the time respondent represented Jesse Jackson, both the FBI and the Treasury Department were interested in Jesse Jackson due to his alleged links to the government of Libya and the government of Syria. (Tr. -24). Shortly after respondent represented Jesse Jackson, the FBI began an investigation of respondent's financial dealings with First Bank, a minority-owned bank respondent had helped found in Cleveland, Ohio. (Tr. - 26) (Respondent's Exhibit 4).

During the pre-indictment investigation of respondent, Mr. Clarke felt the investigation being conducted by the FBI was not impartial. He wrote letters to the Attorney General for the United States asking the Attorney General to look into the investigation. (Respondent's Exhibit One). After the Attorney General's Office determined there were no improprieties in the investigation, Mr. Clarke recommended to respondent that he enter a plea, but respondent refused to do so. (Tr. - 33). According to Mr. Clarke, respondent rejected a proposed plea agreement at that time because "he was innocent of any criminal conduct in the procurement of the challenged loans or in the adequacy of their collateral or in his bona fide intention to pay the loans when required." (Respondent's Exhibit One - affidavit of Charles Clarke, para. 2).

Mr. Clarke also testified as to respondent's reputation in the legal community in

Cleveland, Ohio. According to Mr. Clarke, respondent is respected and is recognized as a good and careful lawyer. (Tr. - 43).

After Judge Manos' ruling granting a new trial was affirmed on appeal, Mr. Clarke was replaced as respondent's counsel by Clarence D. Rogers, Jr. Mr. Rogers represented respondent at the time respondent entered into the plea agreement with the U. S. Attorney's Office for the Northern District of Ohio. Mr. Rogers also represented respondent's son, Andre, who had been indicted and who had gone to trial with respondent. The trial court granted a judgment of acquittal for Andre Bustamante. (Tr. - 64).

At some point either before or after the final ruling from the Court of Appeals for the Sixth Circuit, the government begin to further investigate respondent. According to Mr. Rogers, the government was looking at other matters not related to the pending case, including an effort to implicate another of respondent's sons, Tuan Bustamante. (Tr. - 68). In addition to the pressure of fearing that his son Tuan might be indicted, respondent suffered the blow of the suicide of his youngest son. According to Mr. Rogers, respondent was "devastated" by this tragic death. (Tr. - 73). All of these factors had a great deal to do with respondent's decision to enter a plea of guilty. (Tr. - 74).

Mr. Rogers also testified as to respondent's reputation in the legal community in Cleveland, Ohio. According to Mr. Rogers, respondent enjoys a reputation among his peers as one of the leaders of the Bar in the City of Cleveland and in the State of Ohio. "His reputation as a lawyer is impeccable." (Tr. - 79).

The testimony of respondent also reveals the extreme pressures brought to bear upon him which resulted in his entry of a plea of guilty to the one count of the indictment. According to respondent, when the case was remanded from the Sixth Circuit Court of Appeals, his oldest daughter was in the hospital. Then one Sunday morning on his way to church a man drove in front of him and respondent lost control of his car and hit a building. Respondent suffered a broken nose, broken ribs and injury to his eye and knee. (Tr. - 203-204). This occurred during July 1992.

As indicated in the following excerpt from the transcript, the death of respondent's

youngest son completely destroyed his will to keep fighting to clear his good name:

> So on the nineteenth of January of 1993, he took a gun to his head after he came home from school and killed himself.
>
> Q: And how did that affect you?
>
> A: Oh, I almost died from it myself. (Tr. - 204-205).
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> - -
>
> A: He killed himself. And then I just sort of went aloose then myself.
>
> Q: You mentioned that this was January 19, 1993?
>
> A: Ninety-two. Ninety-three. Yes.
>
> Q: And how -- how long after that did the government begin to --
>
> A: As soon as it was in the newspaper --
>
> Q: -- serve subpoenas on you?
>
> A: As soon as it was in the newspaper in Cleveland, about the third day after his death, they were there with more subpoenas and all. Everything that you did, they would get it and ascribe some criminal conduct to it if they could figure out a way to do it.
>
> So we lived through my son's situation. Then we were preparing for trial. And they offered this plea agreement, and I would not accept it in its first form. Then they said: Okay. Your two sons are officers of this corporation. We will dismiss the indictment against you and indict all three of you. (Tr. - 204-206).

At this point, respondent "gave in to the situation" in order to save his family from any further indictments. (Tr. - 207). Respondent also insisted that the plea agreement contain language that the United States Attorney's Office would not bring any additional charges against respondent or any member of his family. (Tr. - 208) (Bar's Exhibit B).

Finally, respondent indicated how the pressures being put upon his family and upon his health were too great. He decided he couldn't take anymore and agreed to enter the plea. (Tr. - 214).

A review of several prior opinions of this court shows the recommended sanction of disbarment is not appropriate in the present case. Most recently, this court issued a three year

suspension in the case of *The Florida Bar v. Lawrence J. Smith*, 20 FLW S93 (February 23, 1995). The respondent in *Smith*, as in the present case, had plead guilty to felony charges in federal court. Significantly, the respondent in *Smith* had plead guilty to *two* felony charges and was sentenced to three months in prison. *Id.* Also, the respondent in *Smith* had committed some of the offenses while serving as an elected member of Congress. Unlike respondent in the present case, the respondent in *Smith* had a prior disciplinary record. *Id.* Despite the serious nature of the offenses committed by the respondent in *Smith* and the position of public trust he had held and abused, this court did not hesitate to impose a three year suspension.

As this court has noted on numerous occasions, each case must be viewed solely on its merits. *The Florida Bar v. Jahn*, 509 So. 2d. 285, 286 (Fla. 1987). This court has also consistently rejected the contention that a conviction alone necessarily requires disbarment. *The Florida Bar v. Pavlick*, 504 So. 2d. 1231, 1235 (Fla. 1987).

In *Pavlick*, the attorney entered an *Alford* plea. Unfortunately, respondent was unable to do so in his case because the court would not allow such a plea. (Tr. - 83). Nevertheless, in a disbarment proceeding the accused lawyer shall be given a full opportunity to explain the circumstances and otherwise offer testimony in excuse or in mitigation of the penalty. *The Florida Bar v. Pavlick* at 1234, citing *State ex rel. Florida Bar v. Evans*, 94 So. 2d. 730, 735 (Fla. 1957). Respondent offered both an explanation of the circumstances which led to the entry of his plea of guilty and mitigating evidence. The referee ignored all this testimony and all of respondent's exhibits.

Numerous other cases support the imposition of a suspension in the present case. In *The Florida Bar v. Kennedy*, 439 So. 2d. 215 (Fla. 1983), the respondent, while serving as vice-president of a savings and loan, transferred funds belonging to the savings and loan into an account he established under a fictitious name. The respondent claimed he did this because he felt he was entitled to reimbursement for extra services he provided. He was then indicted for devising a scheme to obtain money by false and fraudulent pretenses. The respondent plead guilty and was placed on three years probation. This court imposed a suspension on the respondent in *Kennedy*. *Id.*, at 216.

The respondent in *The Florida Bar v. Stahl*, 500 So. 2d. 540 (Fla. 1987), was charged with corruptly influencing, obstructing and impeding justice by filing false documents with a federal grand jury. *Id.*, at 541. The respondent in *Stahl* plead guilty and admitted to the referee he prepared a document which contained a false date and that he had in his possession other documents which were false and which were produced to the grand jury. This court imposed a suspension upon the respondent in *Stahl*. *Id.*, at 542.

In *The Florida Bar v. Marcus*, 616 So. 2d. 975 (Fla. 1993), the respondent systematically and repeatedly misappropriated client funds while employed as an associate in a law firm. *Id.* The respondent also lied to the firm's client about the size of settlements and then pocketed the difference by depositing the settlement checks in an account that was not maintained by the law firm. The respondent in *Marcus* was suspended from the practice of law. *Id.*, at 975.

After one trial, two appeals to the Court of Appeals for the Sixth Circuit, the tragic death of his youngest son, and other personal problems, respondent plead guilty to one count out of the initial twelve which had been charged. In a case in which the respondent was found guilty of *six* counts of mail and wire fraud, this court imposed a suspension. *The Florida Bar v. Diamond*, 548 So. 2d. 1107(Fla. 1989). The referee in *Diamond* found numerous mitigating factors which are also applicable to the present case. Among those factors are the age of the respondent (65); his years of service to his clients, his community, his bar and his country (42 years as a member of The Florida Bar); the testimony of leaders of the community with respect to the respondent's integrity, trustworthiness, and ability to be rehabilitated; other personal hardships incurred by respondent, including loss of professional esteem and acute personal embarrassment; the respondent's good reputation in the community, notwithstanding the charges against him (Respondent's Exhibit 3); the unblemished record of respondent, exclusive of these charges, and that the stigma of disbarment is a burden on respondent which is not necessary to encourage reformation or rehabilitation of respondent and would not result in any greater protection of the public than would a suspension. *Id.*, at 1108.

G. CONCLUSION

For the reasons stated above, respondent submits this court should reject the referee's recommended discipline of disbarment and impose a period of suspension upon respondent.

Respectfully submitted,

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H. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail/Hand Delivery to James N. Watson, Jr., Bar Counsel, The Florida Bar and John A. Boggs, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 21st day of April, 1995.

R. A. G.

RICHARD A. GREENBERG