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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Complainant,

v.

GARY G. GRAHAM,

Respondent.
_____/

CASE NO: 84,897

ANSWER BRIEF

GARY G. GRAHAM
Florida Bar Number 307-505
407 Courthouse Square
Inverness, Florida 34450
(904) 637-2637

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

-vs-

SUPREME COURT CASE NO: 84,897
(93-31,809(09E) & 94-30,110(09E)

GARY G. GRAHAM,

Respondent.

ORDER DISMISSING COUNTS I THROUGH XIII WITH PREJUDICE

THIS CAUSE came to be heard upon the complaint filed by THE FLORIDA BAR against Respondent GARY G. GRAHAM. The first thirteen counts of THE FLORIDA BAR's complaint pertain to acts allegedly committed by Respondent acting in his capacity as county court judge for Citrus County, Florida. These thirteen counts are summarized below.

In Count I, THE FLORIDA BAR alleges that Respondent grossly abused his judicial power by increasing the sentence he imposed upon a defendant from a six month suspension of defendant's driver's license to a nine month suspension, and finally to a one year suspension, merely because the defendant questioned the fairness of the sentences. (Complaint ¶¶ 10-16).

In Count II, THE FLORIDA BAR alleges that Respondent, upon learning that a defendant standing before the court was a shrimper, stated in open court that shrimpers were unsavory characters that tended to be in trouble. It is further alleged that Respondent ordered the defendant not to associate with anyone engaged in the

business of shrimping. He then changed his order and placed defendant on probation with the special condition that she find alternative employment. The Respondent's order did not have any relation to the crime for which the defendant was charged. (Complaint ¶¶ 17-21).

In Count III, THE FLORIDA BAR alleges that Respondent sentenced a defendant to probation and as part of the sentence, ordered the defendant to perform 40 hours of community service for the state attorney's office. It is further alleged that Respondent stated he would suspend ten hours of the community service if the defendant washed the State Attorney's car with the t-shirt defendant was wearing in court. (Complaint ¶¶ 22-27).

In Count IV, THE FLORIDA BAR alleges that when the mother of one defendant in a case before Respondent questioned the fairness of the sentence he imposed, the Respondent stated to the mother in open court, "You know what his problem is, his problem is you. It is not me. It is you. I can tell by the way you are defending him." It is further alleged that Respondent then engaged courtroom personnel and spectators in a speech designed to further embarrass the defendant's mother and, in so doing, needlessly utilized vulgar and highly inappropriate language. (Complaint ¶¶ 28-32).

In Count V, THE FLORIDA BAR alleges that Respondent was the presiding judge in a case where a defendant was charged with misdemeanor battery on his estranged wife. It is further alleged that as a condition of probation, the Respondent prohibited the

defendant from having any contact with his children and that such condition had no relation to the crime for which defendant was charged. (Complaint ¶¶ 33-36).

In Count VI, THE FLORIDA BAR alleges that the Respondent was the presiding judge in two cases involving misdemeanor possession of marijuana. In one case, Respondent ordered as a condition of the sentence, that the defendant assist the Citrus County Sheriff's Office in "two buys and two sells." In the other case, Respondent ordered the defendant to "assist the state attorney's office in catching a drug dealer" as a condition of his sentence of probation. It is further alleged that the Respondent had insufficient evidence to determine whether the defendants were suitable to participate in such transactions and whether the Citrus County Sheriff's Office or the state attorney's office desired the defendants' assistance. (Complaint ¶¶ 37-43).

In Count VII, THE FLORIDA BAR alleges that Respondent, in open court and without factual basis, accused an assistant public defender and a defendant of deliberately falsifying a transcript used in the defendant's appeal. (Complaint ¶¶ 44-47).

In Count VIII, THE FLORIDA BAR alleges that Respondent, without a factual basis, accused a captain and investigator of the Citrus County Sheriff's Office of improperly releasing a defendant on his own recognizance and "trading official actions for other beneficial acts by the defendant." The respondent sentenced defendant to 90 days in the county jail as punishment for his

"improper" release, stating in open court that a ten day sentence would have otherwise been appropriate. In refusing to mitigate the sentence, Respondent directed the defendant to "tell your friends that's what you get for trading favors to get out of the Citrus County Jail." (Complaint ¶¶ 48-54).

In Count IX, THE FLORIDA BAR alleges that Respondent, during a hearing in open court, accused the state attorney's office of routinely lessening DUI (driving under the influence) offenses for lawyers and doctors to reckless driving, and specifically accused State Attorney Brad King of favoritism in the disposition of DUI cases while Brad King was an assistant state attorney. Respondent repeatedly demanded that the Chief Assistant State Attorney explain the exercise of discretion by the state attorney's office in charging the case before him as a misdemeanor rather than a felony so that Respondent could ascertain whether the decision was the result of politics and favoritism. (Complaint. ¶¶ 55-60).

In Count X, THE FLORIDA BAR alleges that Respondent called an attorney who had been waiting for a hearing into his chambers. Respondent berated the attorney for being improperly dressed for court. The attorney in question was wearing a leather sports coat with matching pants and tie. While berating the attorney, Respondent poked the attorney in the chest with his finger.

The attorney advised Respondent that he had worn the coat in approximately 35 state and federal courts in Florida without incident and that he did not believe the coat was inappropriate

courtroom attire. However, the attorney apologized and informed Respondent that he would not wear the coat in Respondent's courtroom again.

Respondent rejected the attorney's explanation and apology as "not good enough" and required the attorney to wear the Respondent's coat back into the courtroom. Respondent's coat was several sizes too small for the attorney and he was greeted with laughter by courtroom spectators. The attorney described this incident as unnecessary and demeaning. (Complaint ¶¶ 61-67).

In Count XI, THE FLORIDA BAR alleges that Respondent was designated as Acting Circuit Court Judge for Citrus County due to the temporary absence of the circuit judge normally assigned to the county's criminal docket. In carrying out his duties, Respondent improperly conducted closed proceedings in a high profile murder case. (Complaint ¶¶ 69-75).

In Count XII, THE FLORIDA BAR alleges that Respondent, in open court, accused State Attorney Brad King and by implication, Chief Circuit Court Judge William T. Swigert, of ex parte communication which Respondent claimed resulted in the "improper" revocation of his appointment as Acting Circuit Court Judge. Respondent further accused Brad King of seeking Respondent's revocation because Brad King was displeased with Respondent's recent decisions in a circuit court case.

In Count XIII, THE FLORIDA BAR alleges that Respondent made disparaging and insulting remarks about Citrus County attorneys

while interviewed by a reporter from a local Citrus County newspaper. The Respondent ultimately issued a statement in the nature of an apology for his remarks, but later stated in pleadings before the Judicial Qualifications Commission that the only ethical mistake he made as a judge was to issue said apology.

These thirteen counts allege conduct almost identical to the conduct for which Respondent was removed from office as county court judge for Citrus County.[1] Although the allegations, if taken as true, reveal a serious lack of judicial temperament on the part of Respondent, nothing in the allegations indicate that Respondent is dishonest, venal, or guilty of moral turpitude.

In fact, the Florida Supreme Court in explaining Respondent's conduct noted that:

> As a county judge, Graham made what he perceived to be a valiant effort at ridding Citrus County of political favoritism and corruption that caused the demise of his predecessor. His zealous pursuit of a pure society apparently clouded his ability to impartially adjudicate the matters before him. His motives are acceptable, but his methods are not. . . . We recognize that Graham is not dishonest, venal, or guilty of moral turpitude. In Re Graham, 620 So. 2d 1273, 1275 (Fla. 1993).

The issue before this Court is whether such conduct can form the basis of a disciplinary proceeding against Respondent as an attorney, notwithstanding the proceedings already completed to remove him as a judge.

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[1] See Inquiry Concerning a Judge, No. 91-415, Florida Judicial Qualifications Commission, Findings of Fact, Conclusions of Law and Recommendation of Removal, Case No. 80,273, approved by the Florida Supreme Court in In Re Graham, 620 So. 2d 1273 (Fla. 1993).

The Florida Supreme Court first addressed the issue of whether an attorney may be disciplined for acts committed by him in his official capacity as a judge in The Florida Bar v. McCain, 330 So. 2d 712 (Fla. 1976). In holding that judicial acts may form the basis of attorney discipline, the Court cited to decisions from other jurisdictions which found almost unanimously that a judge who is no longer sitting may be disciplined as an attorney for judicial misconduct.

In particular, the Court quoted approvingly from Gordon v. Clinkscales, 215 Ga. 843, 114 S.E.2d 15, 19 (1960) which held that judicial misconduct could result in disbarment of a sitting judge. However, the Gordon court qualified its holding, explaining that:

> . . . [A] judge cannot be disbarred for any official act dictated by his understanding of the law, irrespective of how erroneous his judgment might be, In order to make his conduct in office a valid ground for disbarment, it must be clearly and specifically alleged and proved that such conduct resulted solely from dishonorable motive and was not thought by him to be his duty and within his authority. This being the rule, no honest judge could ever be disbarred for judicial acts no matter how erroneous they might be. We hold that want of knowledge, unsound judgment, or bias and prejudice on the part of a judge constitute no grounds for disbarring him. That there may never be any misconstruction of this ruling, we hold further that his official acts, even showing they are contrary to law and biased or prejudicial, constitute no evidence even circumstantial of corruption or dishonesty in a disbarment proceeding against him and therefore must not be allowed either in pleadings or evidence.

Although the Gordon Court dealt with the issue of whether a sitting judge could be disbarred, its ruling is applicable to disciplinary proceedings against a former judge. In both instances, the judge's

fitness to practice as an attorney is at issue. Although with a sitting judge, disbarment may incidentally result in removal of the judge from office, in Florida, removal is effected by proceedings with the Judicial Qualifications Commission. Incidental removal is not an issue in the instant case.

Notably, Oklahoma followed the Gordon rule in determining whether a former judge could be disciplined as an attorney for judicial misconduct. State Ex Rel. Oklahoma Bar Association v. Sullivan, 596 P.2d 864 (Okla. 1979). The Oklahoma court explained that if the judiciary is to maintain its independence, an attorney cannot be disciplined for acts committed in his official capacity as judge unless such acts involve moral turpitude of a fraudulent, criminal or dishonest nature. Id.

Like the Oklahoma court, many courts have acknowledged that an attorney may be disciplined for acts performed in his capacity as a former judge, with the qualification that the judicial misconduct must have involved moral turpitude in some form. See Frank D. Wagner, Annotation, Misconduct in Capacity as Judge as a Basis for Disciplinary Action Against Attorney, 57 A.L.R. 3d 1150, 1162-1163 (1974).

Of the Florida cases this court has found involving attorney disciplinary actions against former judges, all involve some form of moral turpitude as the basis of the disciplinary action. See The Florida Bar v. McCain, 361 So. 2d 700 (Fla. 1976), The Florida Bar v. Sepe, 380 So. 2d 1040 (Fla. 1980), The Florida Bar v. Gross,

610 So. 2d 442 (Fla. 1992).

Moreover, the Florida Supreme Court has recently held that where alleged misconduct has no bearing on an attorney's ability to practice law and does not involve dishonesty, moral turpitude, immorality, deceit, or breach of trust, the alleged misconduct is not subject to discipline. The Florida Bar v. Taylor, 20 Fla. L. Weekly S20 (Fla. Jan. 5, 1995).

Similarly, this Court finds that the first thirteen counts of THE FLORIDA BAR'S complaint against Respondent do not allege conduct subject to attorney discipline. The thirteen counts of the complaint describe a pattern of conduct demonstrating a severe lack of judicial temperament on the part of Respondent. They do not, however, suggest that Respondent is unfit to practice law, nor do they suggest that Respondent is dishonest, venal, or guilty of moral turpitude.

This Court directed the parties to submit written memoranda addressing whether THE FLORIDA BAR may seek disciplinary action against a former judicial officer whose alleged misconduct are acts committed while acting as a judge, and such acts do not involve the commission of a crime, dishonesty, moral turpitude, immorality, deceit, or breach of trust. Having read the memoranda and being otherwise fully informed in the premises, the Court finds that the first thirteen counts of THE FLORIDA BAR's complaint do not allege misconduct that may form the basis for disciplinary action. Thus the Court is without jurisdiction to entertain further proceedings

pursuant to these counts. The Court further finds that these counts cannot be amended by THE FLORIDA BAR to state justiciable issues in these proceedings. Accordingly,

IT IS ADJUDGED that Counts I through XIII of the complaint are dismissed with prejudice.

DONE AND ORDERED in Chambers at Gainesville, Alachua County Florida this 24 day of March, 1995.

CHESTER B. CHANCE, CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order has been furnished by U.S. Mail, this 24 day of March, A.D., 1995, upon the following:

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