IN THE SUPREME COURT OF FLORIDA

Supreme Court Case
No. 90,022

IN RE: PETITION FOR REINSTATEMENT
OF GAIL ANNE ROBERTS
/

The Florida Bar File
No. 97-71,317(MRE-16B)

The Florida Bar's Initial Brief

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STATEMENT OF THE CASE AND OF THE FACTS

Respondent Gail Anne Roberts served a petition for reinstatement on March 3, 1997, subsequent to a three year suspension. She had been conditionally admitted to The Florida Bar in December of 1986. The admission required both monthly and random urinanalysis testing for drugs.

In early 1990, eleven days after petitioner's conditional admission had ended, The Bar filed a petition for order to show cause as to why she should not be found in contempt. The Bar's petition was based upon her failure to fully comply with the testing requirements. The Bar and petitioner entered into an agreement whereby the conditional admission was extended for three years and The Bar's petition was voluntarily dismissed.

In May, 1990, Petitioner was arrested for attempting to purchase cocaine from an undercover officer. She pled no contest to the charge. A disciplinary proceeding was initiated by The Bar. At the conclusion of a hearing, the referee recommended a three year suspension, which included enhancement due to petitioner's conditional admission. This Court approved that recommendation in The Florida Bar v. Roberts, 626 So.2d 658 (Fla.1993).

Petitioner is now seeking reinstatement. At the

reinstatement hearing before Referee Tom Wilson, whose recommendation is the subject of this appeal, petitioner offered an explanation of both the conditional admission and the felony arrest. In regard to the conditional admission, she asserted that she was being fully candid and truthful regarding some experimentation with drugs while in college.(T.51,52). In regard to the arrest, she claimed that she only agreed to buy the cocaine to get rid of the persistent undercover officer.(T.73)

Sharon Ramirez, a judicial assistant, testified in behalf of petitioner. Ms. Ramirez testified that had not heard of anything which reflected negatively on petitioner's character, moral standing, or fitness as a lawyer.(T.13,14). However, the witness also testified that she had not seen her perform in a courtroom.(T.12). Ed Horan, a Key West attorney, testified that petitioner's reputation for character was favorable(T.19) and that she carried out her professional tasks in a thorough and competent manner.(T.19-20).

The sworn affidavits of Richard Rummell and William Vanderveer were admitted into evidence (petitioner's Exhibits 4&5)[1] despite The Bar's objections. Each one had a favorable impression of petitioner's legal skills.

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[1]The labels available for Exhibits at the hearing were "Plaintiff" used by petitioner, and "Defendant", used by The Bar.

Sean Mc Donald, the father of petitioner's child, testified favorably regarding petitioner's moral character.(T.39-45). He had seen no evidence of drug use during the years that they lived together.(T.15).

Carlos Ruga, staff auditor of The Florida Bar, testified as to his review of petitioner's checking account. His report identified 192 instances wherein checks were returned for insufficient funds between 1993 and 1997.(T.142). Fees alone, for returned checks totaled $ 7,481.50 during that period of time.(T.143).

Ruga also testified that checks were returned 13 more times between the date of the filing of the petition for reinstatement, March 3, 1997, and March 26,1997,(T.149). Eighteen more checks were returned between March, 1997 and January, 1998.(T.150).

The referee recommended reinstatement. It is that recommendation which is appealed herein.

SUMMARY OF ARGUMENT

The burden of proof in a reinstatement hearing is upon the petitioner. It was her obligation to prove good moral character of an unimpeachable nature, proof of intention to act in an exemplary fashion, and strict compliance with prior disciplinary orders. Petitioner failed to meet that burden.

The uncontradicted evidence is that the petitioner issued worthless checks which were returned for insufficient funds 192 times during a six year period. Some of those worthless checks were issued after the petition for reinstatement was filed, and bank records reviewed within months of the final hearing revealed the issuance of more worthless checks. In view of the uncontradicted evidence of worthless checks, the referee should have denied reinstatement to the petitioner.

Reinstatement should also have been denied based upon pre-suspension conduct and the conduct which led to the suspension, and the fact that petitioner was a conditional admittee. Petitioner had pled nolo contendere to a felony drug charge. Petitioner also missed required drug testing. Evidence of that conduct was uncontradicted. In view of all these circumstances reinstatement should not have been recommended by the referee.

ARGUMENT

THE REFEREE ERRED AS A MATTER OF LAW BY RECOMMENDING REINSTATEMENT

In a reinstatement proceeding the burden is upon the petitioner to prove that she is entitled to resume the privilege of practicing law without restrictions. The Florida Bar v. Dawson, 131 So.2d 472 (Fla. 1961). Petitioner Roberts has failed as a matter of law to meet that burden.

Dawson summarizes the basic elements which "should be covered in the showing to be made by the petitioner."(p.474). Among the elements are:

> (2) evidence of unimpeachable character and moral standing in the community. (Emphasis supplied)
> .....
> .....and(5)...personal assurances, supported by corroborating evidence, revealing a sense of repentance, as well as a desire and intention of petitioner to conduct himself in an exemplary fashion in the future.

This Court expanded the elements set forth in Dawson to not only encompass good moral character, but personal integrity and general fitness for a position of trust and confidence. The Florida Bar v. Grusmark, 662 So.2d 1235 (Fla. 1995).

The uncontradicted evidence should have resulted in denial

of reinstatement as a matter of law. The evidence did not establish impeccable character, proof of intention to act in an exemplary manner in the future, good moral character, personal integrity and general fitness for a position of trust and character. Rather, undisputed evidence established the opposite, and mandated denial of reinstatement in view of prior rulings of this Court.

First, the foregoing conclusion is correct in respect to the uncontradicted testimony of The Bar's auditor, Carlos Ruga. Ruga testified that petitioner has issued checks which were returned for insufficient funds 192 times during the time period 1993-1997.(T.142). Bank fees, alone, for the issuance of the checks with insufficient funds totaled $ 7,481.50.(T.143). Even during the month that the petitioner filed for reinstatement, March of 1997, checks were issued which were returned thirteen times for insufficient funds. Checks were returned on eighteen more occasions as of January 1998,(T.150) the last date of review of the bank records. The final hearing commenced just two months later on April 3, 1998.

The law regarding the issuance of worthless checks by an attorney is clear:

"Issuing a worthless check ...constitutes

> unethical conduct and subjects the attorney to professional discipline. The Florida Bar v. Solomon, 589 So.2d 286,287 (Fla.1991), quoting The Florida Bar v. Davis, 361 So.2d 159 (Fla. 1978). (Emphasis supplied).

While this case is a reinstatement case rather than a disciplinary case, the same rule should apply. In fact, it should be applied with greater vigor to an attorney who has been suspended previously. Such an attorney has a "heavy burden", to justify the return of the privilege to practice law, in the face of the overriding goal of The Bar to protect the public. Petition of Wolfe, 257 So.2d 547,548 (Fla.1972).

Petitioner offered as an alleged legal excuse the unsubstantiated claim that she had provided restitution in regard to all of the bad checks. Even if true, this court has categorically rejected the claim that restitution excuses the offense. In The Florida Bar v. Lopez,[2] 545 So.2d 835,837 (Fla.1989), this Court stated:

> Petitioner's bank statements for the two-year period of January 1986-88 show that petitioner issued 444 checks on his account at Ocean Bank. Of these, 199 created overdrafts on the account, of which 48 were returned for nonsufficient funds. Petitioner testified that the returned checks were immediately made

[2] Compare The Florida Bar v. Yanks, 690 So.2d 1270(Fla.1997)

good, that he had an overdraft agreement with the bank, and the bank erred in returning the 48 checks. In support, the president of the bank testified he had an oral overdraft agreement with the petitioner whereby petitioner would call when he wished to make an overdraft and, normally that he, the president, would approve the overdraft. Neither the president nor the petitioner offered any explanation for the high number, 48, of "errors." Petitioner's basic position, which the referee apparently accepted, is that the overdraft agreement and the petitioner's testimony that he immediately made the checks good is an adequate explanation and that the returned checks were the responsibility of the bank. We disagree. The burden of showing fitness to resume the practice of law was on petitioner. Routinely writing bad checks, even if eventually made good burdens the recipients and is fundamentally dishonest. It brings disrepute on the writer and the profession. It is inconsistent with fitness to practice law.

Even if this were a disciplinary proceeding against the petitioner, without reference to his previous suspensions, it is clear that he would be subject to suspension or other discipline. In the context of a petition for reinstatement, petitioner has completely failed to demonstrate his fitness to resume the practice of law. The facts of the case are essentially undisputed. However. The referee's recommendation for reinstatement lacks support in the record and is disapproved. We dismiss the petition for reinstatement in accordance with rule 3-7.9(K)

(Emphasis supplied)

This court has held that discipline for issuing worthless

checks is appropriate even when alcoholism contributed to the conduct. The Florida Bar, In Re Ray Hill, 298 So.2d 161 (Fla.1974), and even when the attorney was found to be not guilty of criminal worthless check charges by virtue of insanity. The Florida Bar v. Parsons, 238 So.2d 644 (Fla.1970). The foregoing defenses and/or mitigating factors are certainly more substantial than the petitioner's amorphous defense of a dramatic decrease in income subsequent to her suspension,(T.75), combined with the birth of her child and the existence of stress(T.75).

In fact, her claim of a dramatic decrease of income was unsubstantiated. Petitioner testified that she earned approximately $ 25,000.00 per year prior to her suspension. (T.74). Thereafter, while her income tax returns portrayed income ranging from $ 11,000.00 to $ 20,000.00 between 1993-1996, her deposits, as reflected in her bank statements, revealed totals ranging from $ 30,000.00 to $ 48,000.00 for those same years.(Bar Exh.#5). The Petitioner testified that, in addition to her income from employment as a paralegal, she received funds from Sean McDonald, the father of her child, from her parents, and from week-end employment at her parent's businesses.(T.81,82).

Even if restitution did constitute a defense, it could not

apply here, since petitioner did not provide any proof of restitution, nor did her accountant, who did not attempt to verify it.(T.59). Furthermore, the claim that she knew that everyone had been repaid seems to be contradicted by the fact that petitioner felt the need to take out general advertisements asking creditors to contact her.(T.79). Clearly, the large number of worthless checks issued over a period of several years cannot be ignored.

In addition, the underlying offense which resulted in suspension was appropriately considered by the referee. Wolfe, supra. However, he apparently arrived at the wrong conclusion based upon petitioner's attempt to explain away her felony conviction. Petitioner testified that she agreed to buy cocaine to get rid of the seller.(T.73).[3] This is a somewhat tenuous claim insofar as she agreed to meet the seller after the original contact, and returned to meet him (while inebriated).(T.72). Petitioner's account of what took place sounds highly improbable:

> "I was out drinking with a couple friends of mine, a fireman and his wife. And we had some drinks at happy hour. I had an argument with my boyfriend. I was very upset. I went out

[3] Petitioner's explanation was not explicitly accepted or rejected by this court in the suspension hearing. Roberts, supra. A three year suspension was approved nevertheless.

> later then by myself, and I had run into a friend who I agreed to meet later. Meanwhile, this confidential informant, John, approached me, actually stopped me on the street for no reason. He said that he was going to this nice restaurant in Naples later on, and would I meet him there, and did I want to party. I said sure, 'I will meet you there.' And we went --meanwhile, as the night progressed, I changed my mind about that, and decided not to go to the restaurant. But I had to drop a friend off. So--"(T.72).....
> .....
> .."So I finally went back to the restaurant. I saw John, who was the --I mean Roy, I believe his name is, who was the confidential informant. And he told me that--you know, he started trying to pressure me into purchasing this half a gram of cocaine. I kept telling him no. Then finally, like I said in my deposition, just to get rid of him, I just said, 'All right, whatever.' And I pulled my car over, and that's when the transaction and arrest occurred."(T.72,73).

Petitioner was convicted based upon a nolo contendere plea. Apparently, no defense was submitted in the criminal proceedings, including no claim that she was pressured so greatly that she felt compelled to do it. Most important is the fact that petitioner's story, if true, would not constitute proof of good moral character, etc. How many law abiding individuals would agree to buy cocaine because the seller was persistent? No authority is offered to support the claim that a high pressure cocaine salesman relieves one of responsibility for one's

conduct.

Petitioner was also obligated to meet the burden of providing "strict compliance" with the specific conditions of the disciplinary order. Dawson; Grusmark, supra.; The Florida Bar v. Janssen, 643 So.2d 1065 (Fla.1994). This rule should certainly apply to the terms of the conditional admission as well.

Petitioner admitted her failure to be tested for several months.(T.65). While all other tests were negative, the outcome of the missed tests can never be known. This failure, without consulting with The Bar regarding any alleged reason for the omissions, should not have been overlooked. Petitioner's statement that the tests were expensive(T.65) offers no justification for violating the testing requirements.

Documents offered by the petitioner also established that petitioner had a poor record of complying with drug testing, particularly during the first three years of her conditional admittance to The Bar. A representative of The Bar wrote to her on February 7, 1989 (P. Exh.#2) stating in part:

> "I have received eight monthly reports since you have been on probation. As of December of last year, I should have received 24 reports."

The February letter was followed by an August 1, 1989 letter

which stated: "...your reporting has not been anything other than sporadic." (P. Exh.#1).

In addition, petitioner did not obtain a final evaluation from a Florida Lawyers' Assistance, Inc. (FLA,Inc.) approved doctor as required by the suspension order. Rather, she and her attorney selected a doctor without consulting with The Florida Bar.(T.125).

Dawson, supra.,requires "strict compliance" with the disciplinary order..." Petitioner has failed to strictly comply*

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the referee's recommendation to reinstate the petitioner is erroneous as a matter of law, and reinstatement should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of this The Florida Bar's Initial Brief was forwarded Via Airborne Express **to Sid J. White,** Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927 and that a true and correct copy was mailed to **Michael R. Barnes,** attorney for petitioner, at 801 Whitehead Street, Key West, Florida 33040, and a copy was mailed to **John Anthony Boggs,** Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 on this 26th day of June, 1998.

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