IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

TARYN XENIA TEMMER,

Respondent.
_____/

Case No. 93,886

T.F.B. No. 97-11,265(13E)

INITIAL BRIEF
OF
THE FLORIDA BAR

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SYMBOLS AND REFERENCES

In this Brief, The Florida Bar, Petitioner, will be referred to as **"The Florida Bar"** or **"The Bar"**. The Respondent, Taryn Xenia Temmer, will be referred to as **"Respondent"**.

"TR" will refer to the transcript of the final hearing before the Referee in Supreme Court Case No. 93,886 held on March 1, 1999.

The Report of Referee dated April 23, 1999, will be referred to as **"RR"**.

"TFB Exh." will refer to exhibits presented by The Florida Bar and **"R. Exh."** will refer to exhibits presented by the Respondent at the final hearing before the Referee in Supreme Court Case No. 93,886.

"Rule" or **"Rules"** will refer to the Rules Regulating The Florida Bar.

"Standard" or **"Standards"** will refer to Florida Standards for Imposing Lawyer Sanctions.

"Stip." will refer to the Joint Stipulation to Factual Basis and Admission of Guilt agreed to by the parties in the instant case, Supreme Court Case No. 93,886.

STATEMENT OF THE FACTS AND OF THE CASE

STATEMENT OF THE FACTS

Supreme Court Case No. 93,886

On the night of December 27, 1996, Respondent's vehicle was subject to a traffic stop conducted by Tampa police officer Jeffrey McGrath. The stop was conducted pursuant to information provided to officer McGrath by fellow officers conducting drug surveillance at a nearby location. A search of Respondent's vehicle revealed a piece of rock cocaine in the center console. (Stip. para. 4). A subsequent search of Respondent's purse revealed an additional piece of rock cocaine, a plastic bag containing 2.8 grams of marijuana, rolling papers, and a glass stem pipe which tested positive for cocaine. (Stip. para. 5). All the alleged narcotics valtox tested positive for narcotics. (Stip. para. 6). Respondent was arrested and charged with Possession of Cocaine, Possession of Marijuana, Possession of Drug Paraphernalia, and Possession of Valium. (Stip. para. 7). On or about January 24, 1997, a Criminal Information against Respondent was filed with the Circuit Court of the Thirteenth Judicial Circuit in and for the County of Hillsborough, State of Florida, Tampa District. (Stip. para. 9). The Information charged Respondent with unlawful and felonious possession of cocaine in violation of Florida Statute §893.13(6); unlawful possession of medicinal drug without prescription, in violation of Florida Statute

§499.03; unlawful possession of Cannabis in violation of Florida Statute §893.13(6)(b); and unlawful possession of drug paraphernalia in violation of Florida Statute §893.147. (Stip. para. 10). On or about February 5, 1997, Respondent plead not guilty in the matter. (Stip. Para. 11) On or about July 9, 1997, Respondent filed a Motion to Suppress Evidence Resulting from an Unlawful Stop, Arrest, Search and Seizure and Statement Obtained as Result of Same. (Stip. Para. 12). On or about July 10, 1997, Respondent's Motion to Suppress was heard and the court orally granted Respondent's motion. (Stip. para. 13). On or about September 19, 1997, the court issued a written order granting the motion to suppress. (Stip. para. 15). The state filed a Notice of Appeal with the Second District Court of Appeals, and subsequently filed a Notice of Voluntary Dismissal of the appeal and the charges were dismissed. (Stip. paras. 14 and 16).

At the time of her arrest, Respondent was on disciplinary probation from the Florida Bar for her previous use of controlled substances. This three-year probation followed a ninety (90) day suspension imposed by this Court in The Florida Bar v. Temmer, 632 So.2d 1359 (Fla. 1994).

STATEMENT OF THE CASE

The Thirteenth Judicial Circuit Grievance Committee "E" found probable cause on May 20, 1998 for violation of Rules Regulating The Florida Bar, Rules 3-4.3 (Misconduct and Minor Misconduct); 3-4.4(Criminal Misconduct); 4-8.4(a)(A lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist another to do so, or do so through acts of another; and 4-8.4(b)(A lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects). On September 8, 1998, The Florida Bar filed a Complaint in this matter. By order dated September 24, 1998, Judge Anthony Rondolino was appointed Referee. Prior to the final hearing, the parties entered a Joint Stipulation to Factual Basis and Admission of Guilt to the above referenced violations of the Rules Regulating The Florida Bar.

A discipline hearing in this matter was held on March 1, 1999. On March 23, 1999, the Referee issued a Report of Referee recommending that the Respondent be suspended from the practice of law for ninety (90) days and placed on probation for a period of three (3) years. (ROR p.4). In addition, the Referee recommended that Respondent continue treatment with Florida Lawyers Assistance, Inc.; comply with the terms of the Florida Lawyers Assistance, Inc. Rehabilitation Contract (Dual Diagnosis); and pay a monitoring fee of one hundred ($100) a month to The Florida

Bar's headquarters office and assessed costs against the Respondent. (RR p. 4).

The Referee found that Respondent's prior disciplinary record was an aggravating factor. The Referee found the following mitigating factors: personal or emotional problems; full and free disclosure to the disciplinary board or cooperative attitude towards proceedings; physical or mental disability or impairment; interim rehabilitation; and remorse.

The Referee's Report was considered by the Board of Governor's of The Florida Bar at its meeting which ended April 10, 1999, at which time the Board voted to file a petition for review of the Referee's report and seek a ninety-one (91) day suspension. The Florida Bar filed a Petition for Review of Referee's Report with this Court on or about April 19, 1999.

SUMMARY OF ARGUMENT

The Referee's recommended discipline of ninety (90) days is insufficient based upon the facts of the case, The Florida Standards for Imposing Lawyer Sanctions, and relevant case law. The discipline recommended by the Referee is not sufficient to deter others from the same conduct. Respondent possessed and used illegal drugs while on disciplinary probation for the possession and use of illegal drugs. Clearly, Respondent's previous ninety (90) day suspension and probation did not deter her from repeating her misconduct. Furthermore, Respondent has not proved rehabilitation. The ninety (90) day suspension recommended by the Referee is insufficient in light of this cumulative misconduct and is insufficient to deter others lawyers from engaging in similar misconduct. Respondent should receive a ninety-one (91) day suspension and should be required to prove rehabilitation before being reinstated to the practice of law.

ARGUMENT

I. A NINETY-ONE (91) DAY SUSPENSION IS THE APPROPRIATE SANCTION FOR RESPONDENT'S POSSESSION AND USE OF CRACK COCAINE AND MARIJUANA WHILE ON DISCIPLINARY PROBATION FOR THE SAME OFFENSE BASED ON THE RECORD, CASE LAW, AND STANDARDS FOR LAWYER SANCTIONS.

In The Florida Bar v. Lord, 433 So.2d 983 (Fla.1983), this Court defined the objectives of Bar discipline as follows:

> Discipline for unethical conduct by a member of The Florida Bar 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* a 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*." (Court's emphasis)

(Id. at 986).

The Florida Bar submits that the Referee's recommended discipline of a ninety (90) day suspension will not serve to protect the public or the legal system, is not

sufficient punishment for the breach of ethics committed, nor will it serve to deter Respondent or other attorneys from engaging in similar misconduct in the future. This Court should suspend Respondent for ninety-one days based on the serious nature of Respondent's misconduct, The Florida Standards for Imposing Lawyer Sanctions and relevant case law. A ninety-one day suspension in this case is fair to society, fair to Respondent and severe enough to punish for the breach of ethics and deter Respondent and other attorneys from engaging in similar misconduct, but would also encourage rehabilitation.

The Florida Standards for Imposing Lawyer Sanctions provide a format for Bar Counsel, referees, and the Supreme Court to determine the appropriate sanction in attorney disciplinary matters. Standard 10.0 provides the standards for imposing lawyer sanctions in cases involving personal use and/or possession of controlled substances when no criminal conviction is obtained. Standard 10.2 provides that:

> [a]bsent aggravating and mitigating circumstances, a 91-day suspension followed by probation is appropriate when a lawyer engages in misdemeanor conduct involving controlled substances, regardless of the jurisdiction where such conduct occurs and regardless of whether or not the lawyer is formally prosecuted or convicted concerning said conduct.

Standard 10.3 provides that:

> *[a]bsent the existence of aggravating factors,* the

> appropriate discipline for an attorney found guilty of felonious conduct as defined by Florida State law involving the personal use and/or possession of a controlled substance who has sought and obtained assistance from F.L.A., Inc., or a treatment program approved by F.L.A., Inc., ...would be as follows: (a) a suspension from the practice of law for a period of 91 days or 90 days if rehabilitation has been proven; and (b) a three year period of probation subject to possible early termination or extension of said probation, with a condition that the attorney enter into a rehabilitation contract with F.L.A., Inc., prior to reinstatement.
> (emphasis added)

The ninety (90) day suspension Respondent received in her prior disciplinary case involving the possession and use of illegal drugs conforms with the discipline recommended by Standard 10.3.

However, the standards suggest that a second offense should be treated by a more severe sanction. Standard 10.4 provides that the provisions of discipline enumerated in Standard 10.2 and 10.3 would not be applicable to an accused attorney where aggravating factors as provided in Standard 12.1 are found to exist. Standard 9.22 provides a list of aggravating factors which may justify the increase or decrease in the degree of discipline to be imposed. This list is not exclusive. Most significant to the instant case is the first aggravating factor, Standard 9.22(a) prior disciplinary offenses. In fact, Respondent was on probation for the same misconduct involving the use of controlled substances when she was arrested for possession and use of

cocaine and marijuana, the subject of the instant case. Another aggravating factor that may apply is Respondent's previous experience as an assistant state attorney, a position that carries a duty to uphold the law and set an example for the public. Under Standard 10.4, the presence of aggravating factors precludes the application of the Standard 10.3 and the 90 day suspension recommended therein.

Standard 8.0 provides that in cases involving prior discipline, absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, disbarment is appropriate when a lawyer "has been suspended for the same or similar misconduct, and intentionally engages in further similar acts of misconduct." Standard 3.0 states that the following factors should be considered in imposing sanctions after a finding of misconduct:

(a) the duty violated;
(b) the lawyer's mental state;
(c) the potential or actual injury caused by the lawyer;'s misconduct; and
(d) the existence of aggravating or mitigating factors.

In The Florida Bar v. Weintraub, 528 So.2d 367 (Fla. 1988), this Court approved the referee's findings and imposed a ninety (90) day suspension for misconduct involving the possession and delivery of a controlled substance. In imposing a ninety (90) day suspension rather than a ninety-one (91) day suspension, the referee considered the fact that Weintraub had no prior convictions or bar

disciplinary record. (Weintraub at 369). This is not true in the instant case. Respondent has a prior disciplinary record for similiar misconduct involving the use of controlled substances. A prior disciplinary record is an aggravating factor under Standard 9.22 and warrants a more severe sanction than that imposed in Weintraub.

In The Florida Bar v. Blau, 630 So.2d (Fla. 1994), this Court upheld the referee's recommendation of a sixty (60) day suspension for the use of controlled substances. However, as was the case in Weintraub, the fact that Blau had no prior disciplinary record was considered in mitigation. (Blau at 1086).

In The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1982), this Court stated that

> [i]n rendering discipline, this Court considers the respondent's previous disciplinary history and increases the discipline where appropriate. The Court deals more harshly with cumulative misconduct than it does with isolated misconduct. Additionally, cumulative misconduct of a similar nature should warrant an even more severe discipline than might dissimilar misconduct.

(Bern at 528),(citations omitted).

In The Florida Bar v. Rolle, 661 So.2d 296 (Fla.1995), this Court applied the principle of cumulative misconduct set forth in Bern, supra. In Rolle, this Court imposed a six-month suspension for neglecting client business in the light of the fact that a "private reprimand has failed to deter Rolle from engaging in this misconduct in the past and he is presently being suspended for ninety-one days in another case

before this Court for neglecting client business." (Rolle at. 297). Likewise, Respondent's previous discipline failed to deter her from repeating the same misconduct, and like Rolle she should now receive a more severe sanction than imposed in previous proceedings.

The principle of cumulative misconduct was applied again in The Florida Bar v. Morrison, 669 So.2d 1040 (Fla. 1996). Among other violations, Morrison failed to pursue representation on behalf of a client resulting in the dismissal of the case and his failure to diligently purse the case prejudiced the client's rights. Morrison had previously received a public reprimand for similar misconduct. In light of the prior misconduct, this Court imposed a one-year suspension. (Morrison at 1042).

In The Florida Bar v. Liroff, 582 So.2d 1178 (Fla. 1991), Liroff was found in contempt of Court for failure to adhere to conditions of probation imposed in a prior disciplinary hearing. Liroff, who was a licensed dentist as well as a lawyer, became addicted to a synthetic opiate cough syrup called Hycodan. (Liroff at 1179). Liroff had been disciplined on two previous occasions. On the first occasion, Liroff received a private reprimand and was ordered to undergo treatment. When Liroff failed to fulfill the conditions of the treatment he was placed on probation for two years. Liroff was then found to have violated his probation by using Hycodan even though the violation occurred after the medication was prescribed for Liroff by a

physician. (Liroff at 1179). Liroff argued that he was no longer addicted. In response this Court noted that Liroff's argument:

> misconceives the purpose of attorney discipline in cases involving attorneys previously found to suffer a drug dependency problem. The standard in cases of this type is not merely that the attorney presently suffers no addiction. Serious impairment -perhaps resulting in serious harm to a client - can occur in a single episode, without the attorney ever actually becoming addicted again.

(Liroff at 1179).

It was argued that Respondent used cocaine and marijuana to self-medicate since she was suffering from an undiagnosed bi-polar condition. At the time of her arrest, Respondent like Liroff was under disciplinary probation. However, Respondent's violation of probation was a criminal act. The use of cocaine and marijuana as self-medication for a psychological condition should not be considered a mitigating factor, since it was a deliberate and self-indulgent violation of the law. A ninety-one (91) suspension is appropriate considering her repeated criminal misconduct. A rehabilitative suspension will help ensure that Respondent's misconduct will not be repeated and will serve to protect her client's from potential episodes of substance abuse.

In The Florida Bar v. Orta, 689 So.2d 270 (Fla. 1997), Orta committed multiple offenses involving dishonesty while under suspension for similar misconduct. In Orta,

this Court considered mitigating evidence including recent rehabilitation but was "unable to overcome the fact that Orta's current multiple violations all took place while he was under suspension for past similar misconduct involving dishonesty -- a time when he should have been conducting himself in the most upstanding manner." (Orta at 273). This Court followed the principle of cumulative misconduct set forth in Bern, supra, and disbarred Orta for his repeated misconduct.

Respondent was on disciplinary probation for the use of crack cocaine and marijuana when she was arrested for possession of these same controlled substances. As was the case in Orta, supra, this should have been a time for Respondent to conduct herself in the most upstanding manner. Instead, she chose to break the law, even though she was on disciplinary probation for the same misconduct.

In The Florida Bar v. Laing, 695 So.2d 299 (Fla. 1997), this Court again upheld the principle that cumulative misconduct warrants greater discipline and proof of rehabilitation. In Laing, this Court imposed a ninety-one (91) day suspension rather than the ninety (90) days recommended by the referee. (Laing at 304). Laing had a prior disciplinary record which included a sixty (60) day suspension and a private reprimand. In making their finding this Court noted that "this is Laing's third disciplinary proceeding--his third strike at the ball, so to speak--proof of rehabilitation is due." (Laing at 303).

Although the instant case is Respondent's second bar disciplinary proceeding, she has turned to illicit drugs on more than two occasion. In her prior disciplinary case, The Florida Bar v. Temmer, 632 So.2d (Fla. 1994), it was revealed that there were at least two prior episodes of drug use, first in April through July of 1991 and again in November of 1991 to January 1992. (Temmer at 1359-60).

In light of the findings in Respondent's prior disciplinary case, the instant case is already Respondent's third strike with respect to the criminal use and possession of cocaine. Even if the Respondent's instant case is not a "third strike", Bar disciplinary proceedings are not governed by rules which require waiting for a third instance of criminal misconduct and/or substance abuse before requiring proof of rehabilitation. Respondent should be suspended for ninety-one (91) days and be required to prove rehabilitation before there is an opportunity for a third strike. If Respondent is given the opportunity to continue to practice law before proving rehabilitation, the risk of injury to a client or the public will remain.

The Referee in the instant case found interim rehabilitation of Respondent. However, evidence presented at the final hearing did not sufficiently demonstrate rehabilitation. Essentially, Respondent blamed her substance abuse on a previously undiagnosed bi-polar condition and that substance abuse was not a present problem. However, when specifically questioned regarding his prognosis concerning her future

drug use, Respondent's witness, Dr. James Adams, testified that "it will depend on her ability to surrender to her disease and to cooperate with the program, which I don't think anybody can necessarily predict. But if she cooperates with the program and the people in the program feel a genuine response to it, I think her prognosis can be good. Predicting it is murky." (TR. p. 25, lines 13-19). Furthermore, Dr. Adams did not review records concerning Respondent's prior substance abuse problems and instead relied upon Respondent's own reported history of her prior substance abuse. (TR. p. 26).

Ms. Judith Rushlow, Assistant Director of Florida Lawyers Assistance, Inc., (hereinafter "FLA") testified at the Final Hearing and admitted that FLA. Inc. would not know whether she was successful in her rehabilitation until she complied with the contract for a period of time. (TR. p. 47). Respondent signed the contract with FLA, Inc. on February 26, 1999, only three days before the final hearing. Furthermore, with the exception of Robert Fraser, Esq., who attended a single Brandon Bar Association Christmas party which Respondent also attended (TR. p. 53), character witnesses called by Respondent did not provide any testimony as to her behavior outside the context of professional relationships.

In Summary, Respondent violated her previous disciplinary probation. She has not yet successfully completed her FLA, Inc. contract, which was entered only three

(3) days prior to the disciplinary hearing. Her alleged rehabilitation is based on little more than her own assertion that she will remain on her medication. This is Respondent's second appearance before this Court relating to her substance abuse problems. Under the principle of cumulative misconduct, discipline should be more severe for a second offense. Therefore, this time, Respondent should receive a ninety-one (91) day suspension and prove rehabilitation before she is reinstated to the practice of law.

CONCLUSION

Pursuant to the foregoing facts and evidence, including the Stipulation, the applicable Standards for Imposing Lawyer Sanctions, and the pertinent case law, Respondent should be suspended from the practice of law in Florida for ninety-one (91) days, followed by three years of probation upon reinstatement to the practice of law. In addition, Respondent should be required to comply with the terms of her Florida Lawyers Assistance, Inc. Rehabilitation contract, pay a monitoring fee of one hundred dollars ($100) a month to The Florida Bar headquarters, and should be assessed The Florida Bar's costs in these disciplinary proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven (7) copies of The Florida Bar's Initial Brief has been furnished by Airborne Express to Debbie Causseaux, Acting Clerk, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, FL 32399-1927; a true and correct copy by regular U.S. Mail to Counsel for Respondent, Scott K. Tozian at 109 North Brush Street, Suite 150, Tampa, Florida 33602 ; and a copy by regular U. S. Mail to John Anthony Boggs, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, all this _____ day of _____, 1999.

CERTIFICATION OF FONT SIZE AND STYLE

I HEREBY CERTIFY that this brief has been written in font size Times New Roman 14 pt.

_____
Monica Ann Frost
Assistant Staff Counsel