047

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ROBERT PETER McKEEVER, JR.,

Respondent.
_____/

Case No. 94,561

TFB File No. 99-00425-4A

INITIAL BRIEF

James N. Watson, Jr., Bar Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(850) 561-5845
Florida Bar No. 144587

John Anthony Boggs, Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 253847

John F. Harkness, Jr.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 123390

CERTIFICATE OF TYPE, SIZE AND STYLE

Undersigned counsel does hereby certify that the Initial Brief of Complainant is submitted in 12 point Courier New, a font that is not proportionately spaced.

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PRELIMINARY STATEMENT

Appellant, **Robert Peter McKeever, Jr.**, will be referred to as Respondent, or as Mr. McKeever throughout this brief. The appellee, **The Florida Bar**, will be referred to as such, or as the Bar.

References to the Report of Referee shall be by the symbol **RR** followed by the appropriate page number.

References to the transcript of the hearing before the Referee on May 11, 1999, shall be by the symbol **TR** followed by the appropriate page number.

References to specific pleadings will be made by title.

STATEMENT OF THE CASE AND FACTS

Respondent was arrested and charged with sixteen felony charges in June of 1997. On April 17, 1998, Respondent entered a guilty plea to five counts of aggravated child abuse in violation of Section 827.03(2), Florida Statutes. Respondent was sentenced to a term of six years imprisonment followed by eight (8) years on probation to run concurrent for each count to which he pled guilty. As a result of his conviction, Respondent was suspended from the Bar on July 14, 1998, pursuant to Rule 3-7.2(e) of the Rules of Discipline of The Florida Bar. Subsequent to Respondent's suspension, a formal complaint was filed by the Bar based upon Respondent's convictions.

As set forth in the criminal information, Respondent admitted to the following acts contained in Counts 3, 5, 6, 11 and 16 in Case No. 97-6329-CF-A, Circuit Court, Fourth Judicial Circuit:

> Count 3 – Between the dates of May 9 and May 10, 1997, Respondent bound and blindfolded A B a person under the age of 18, and beat his naked body with a strap.
>
> Count 5 – On May 16, 1997, Respondent bound and blindfolded A B , a person under the age of 18, and beat him about his naked body with a strap.
>
> Count 6 – On or between February 1 and March 22, 1997, Respondent bound and blindfolded C L , a person under the age of 18, and beat him about his naked body with a strap.

Count 11 – On or between January 1 and March 22, 1997, Respondent bound and blindfolded J W , a person under the age of 18, and beat him about his naked body with a strap.

Count 16 – On or between May 9 and May 10. 1997, Respondent bound and blindfolded J W , a person under the age of 18, and beat him about his naked body with a strap.

The beatings administered by Respondent were videotaped (TR 19) and the acts of binding the victims and undressing them was without parental knowledge (TR 19).

Respondent was matched to one of the victims through the Big Brothers Program while the others were friends of the first (Respondent's Trial Brief, pg. 2).

The formal complaint was referred to Judge Edwin P. B. Sanders, Circuit Judge, as Referee. A formal hearing was held May 11, 1999. On June 10, 1999, the Referee filed a Report of Referee wherein the Referee found Respondent guilty of violating Rule 3-4.3 of the Rules of Discipline of The Florida Bar and Rule 4-8.4(b) of the Rules of Professional Conduct of The Florida Bar, and recommended Respondent be suspended indefinitely until Respondent pays the costs assessed, regains his civil rights and shows proof of rehabilitation.

A Petition for Review was filed August 25, 1999.

SUMMARY OF ARGUMENT

The actions of Respondent in regards to his criminal misconduct against the minors over which he had custodial control requires Respondent be disbarred.

The Referee's reliance upon certain mitigating factors was in error in light of statements made by Respondent in his pleadings and while testifying at the final hearing.

Respondent argues that he is remorseful for what he did to his charges but continues to argue that what he did was not criminal conduct, was justified by the conduct of the minors involved, and such actions are acceptable in other societies. In light of such statements, any argument that Respondent is truly remorseful must fail.

The appropriate discipline in this matter should be disbarment. The mitigating factors argued by Respondent, at most, would allow only that any disbarment relate back in time to his felony suspension.

ARGUMENT

I. RESPONDENT'S MISCONDUCT WARRANTS DISBARMENT

The Florida Bar believes that the Referee's recommendation was in error. This court has stated that it is not bound by the Referee's recommendations for discipline. The Florida Bar v. Weaver, 356 So. 2d 797 (Fla. 1978). Accordingly, this Court has imposed greater discipline than that recommended by Referees when deemed appropriate. The Florida Bar v. Wilson, 425 So. 2d 2 (Fla. 1983); The Florida Bar v. Shapiro, 413 So. 2d 1184 (Fla. 1982).

In the Referee's Report, the Referee references Respondent's plea of guilty to five counts of Aggravated Child Abuse and his receiving five concurrent terms of six (6) years in prison followed by a period of eight (8) years probation. Nowhere is there a reference to the actual facts which serve as a basis for the charges against Respondent.

As set forth in the criminal information and the counts to which Respondent pled guilty, during the period from January 1, 1997, through May 15, 1997 – a period of four and one-half (4½) months – Respondent engaged in a premeditated plan of assaults on three (3) boys under the age of eighteen (18) that involved

stripping the young men naked, blindfolding them, binding their hands and beating them with a strap all the while videotaping his actions (TR 19).

This Court has established that the purpose of any discipline against a lawyer is as follows:

> 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 attorney. The judgment must be faire to the Respondent, being sufficient to punish a breach of ethics and, at the same time, encourage reformation and rehabilitation. And the judgment must be severe enough to deter others from similar violations.

The Florida Bar v. Dubbeld, 594 So. 2d 735 (Fla. 1992).

Under the guidelines contained in Florida Standards for Imposing Lawyer Sanctions, Section 5.11(a), holds that disbarment is appropriate when a lawyer is convicted of a felony under applicable law.

In The Florida Bar v. Corbin, 540 So. 2d (Fla. 1989), this Court held that a felony does not itself mandate disbarment but there is a presumption of disbarment which must be overcome. This has been echoed in other cases where this Court has held that although disbarment is presumed to be the appropriate sanction upon the conviction of a felony, it is not automatic. The Florida Bar v. Graef, 701 So. 2d 555 (Fla. 1997) and The Florida Bar v. Bustamante, 662 So. 2d 687 (Fla. 1995).

In recommending a suspension, the Referee merely stated that the Respondent had overcome the presumption that disbarment is the appropriate discipline for his felony convictions. The Referee cites to several aggravating and mitigating circumstances.

A closer look and examination of the findings of the Referee, in light of the positions still taken by Respondent, show that the recommendation of a suspension is in error.

At the hearing, Respondent still testified that what he did was not criminal (TR 19). This belies his legal training and the fact he pled guilty to five (5) felony charges. Respondent further stated that he did not think what he was doing was wrong but that it was private and gave no thought to the fact that his actions might be criminal (TR 34).

Even after having been arrested and charged with multiple felonies, Respondent again ignored his legal training by violating a court order not to attempt to have contact with any of the victims. This resulted in having his bond revoked (TR 37, 38).

The Referee found that Respondent has demonstrated remorse for his misconduct. The Bar would respectfully take exception to such a finding. During the final hearing, the Respondent addressed his actions against the three (3) boys and still argues that it was justified and acceptable.

Respondent likens what he did to what was done to a teenager in Singapore for vandalizing cars (TR 66). Respondent goes on to say that the disciplinary history of these children under his control justified what he did to them (TR 67).

What transpired with the boy in Singapore was the law of a sovereign nation and was a governmental decision. In this instance, Respondent took it upon himself to be judge, jury and disciplinarian while ignoring his training as a lawyer. He hid the total extent of what he was doing from the parents of the children because he knew it was wrong and they would not approve (TR 33, 34).

Respondent continues to argue that, but for the culture in America at this time, his actions would have been appropriate and that he is probably the only person now serving six (6) years in prison for aggravated child abuse where the victims are not even arguably hurt (TR 67).

Prior to the hearing, Respondent submitted a trial brief to the Referee wherein he argued that "upon receiving the consent of the mothers and the juveniles themselves, the Respondent disciplined the teenagers in a manner made popular by certain foreign governments" (Respondent's Trial Brief, pg. 3). Upon cross-examination, the Respondent admitted that he had not fully informed the victims' mothers of the full extent of the

discipline because he knew they would not have permitted this (TR 33).

The actions of Respondent, in trying to still justify his beating and humiliating the boys he has expressed love and concern for, demonstrates his remorse is more for the fact that he is serving six (6) years in prison than for having acted inappropriately as a member of The Florida Bar.

While the Referee herein does not specifically cite to any particular reason for finding Respondent has overcome the presumption of disbarment for his felonious conduct, several mitigating factors are listed. Generally, these factors as listed are found in the Florida Standards for Imposing Lawyer Sanctions.

The Referee cites Respondent has acknowledged an alcohol abuse problem, marital problems and disabling back pain from a helicopter accident. (RR 3, 4(c) and (e)).

In The Florida Bar v. Horowitz, 697 So. 2d 78 (Fla. 1997), this Court was asked to reduce a recommendation for disbarment based upon the Respondent's mitigation of mental depression. In Horowitz, the Referee commented on the issue of Respondent's mental state and his testimony on how this influenced his conduct. The Referee correctly pointed out that no evidence was submitted to substantiate such statements or to show improvement of his mental state. This Court held that such evidence may be

used to explain such behavior but does not excuse it. Horowitz, p. 84.

A review of the instant record would show that the only mention of any mental problems suffered by the Respondent was contained in his unsworn trial brief. Respondent briefly refers to stress resulting from marital problems over his involvement with the victims. While his wife was present at the hearing, Respondent chose not to have her testify as to any such facts. A brief mention was made of an alcohol abuse problem, but there is no testimony as to how severe this problem was or for how long he suffered from it. There was no allegation that the beatings given to these boys were administered while he was under the influence of alcohol.

Respondent also has put a great deal of emphasis on his military record and his history of flying helicopters. Such accomplishments fly in the face of someone now asking this Court to mitigate the appropriate discipline due to alcohol abuse.

Respondent failed to present medical testimony as to his mental problems or alcohol abuse. As in Horowitz, the Court cannot consider what is not in the record.

Where this Court has given weight to the effects of marital problems and alcohol abuse, there has been testimony by others, either lay or expert witnesses, as to the effect of the problems on the conduct of the lawyer. The Florida Bar v. Poplack, 599

So. 2d 116, 117 (Fla. 1992). This Court has likewise rejected a Referee's findings of rehabilitation efforts in mitigation where no evidence was presented. The Florida Bar v. Bobbeld, 594 So. 2d 735, 737 (Fla. 1992).

In The Florida Bar v. Larkin, 420 So. 2d 1080, 81 (Fla. 1982), the Court held that where alcoholism is the underlying cause of professional misconduct and the individual is willing to cooperate in seeking rehabilitation, we should take these circumstances into account in determining the proper discipline.

In the instant matter, there is no evidence before the Court to establish that Respondent's alcohol problem was the underlying cause for his misconduct. As such, this citing of such by the Referee, as reason to mitigate the appropriate discipline for five (5) felony convictions, was in error.

Respondent also argued that this conduct was not related to the practice of law or to any of his clients (TR 29). The Referee also cited that Respondent violated not duty or trust to a client (RR 3(a)). At the hearing, Respondent testified that he had represented the victims and their mothers in a legal capacity. He argues that on one hand he should not be punished as severely because the victims were not clients and his conduct was not in the practice of law; but, on the other hand, he is quick to point out how he used his legal training to help and assist the victims and their mothers.

The Referee has also cited in mitigation that Respondent is suffering from disabling back pain (RR 4(e)). There is no testimony as to how this pain played any role in the criminal acts of the Respondent against the victims. There was no evidence independently establishing such pain or how it affected Respondent and its involvement in the misconduct. Such a finding by the Referee that this was a mitigating factor must be disallowed.

The Referee has also cited the absence of a selfish motive as mitigation and Respondent has argued the same in his trial brief. This Court has held that selfish motivation is not limited to motivation for financial gain. The Florida Bar v. Helinger, 620 So. 2d 993 (Fla. 1993). In Helinger, the Court held that self gratification could be seen as a selfish gain. In this instance, Respondent stated in his trial brief that he was having marital problems over his lack of disciplining the victims (Respondent's Trial Brief, pgs. 7, 8). Respondent goes on to state that he took these particular actions to demonstrate to his wife a more aggressive response to their behavior. The purpose of these actions was accomplished in that Respondent and his wife reconciled for a brief time. Under the holding of Helinger, the actions by Respondent can be seen to have been for a selfish motive and a finding that there was a lack thereof as mitigation is in error.

Looking at the Report of the Referee under "factors," the Referee is seen to establish that in subsection (c), pg. 3, of his report that there was no injury to the victims. This belies the fact that Respondent pled guilty to five felonies that as a part of their charge states on the particular dates Respondent undertook certain acts that caused injury. He cannot now come before this Court and ask to be heard that there was no harm or injury inflicted upon these victims.

Under aggravation, the Referee did find that Respondent had substantial experience in the practice of law but tempered this finding by stating that the conduct was outside the practice of law. Respondent's tenure as a lawyer should have provided him with the knowledge that to blindfold, bind and beat someone had to be a criminal violation. The fact that the conduct did not involve a fee paying client or involved legal proceedings should not reduce the effect of this aggravating factor.

While it is true that Respondent is currently serving five (5) concurrent six-year prison terms, this Court has held that in a case resulting from a criminal conviction, discipline is imposed in addition to the criminal penalty. The Florida Bar v. Helinger, 620 So. 2d 993, 996 (Fla. 1993).

A review of the factors considered and the mitigation factors listed by the Referee shows that only the existence of no prior discipline and Respondent's character are left fully

supported. The remaining mitigation is not fully supported by the record and cannot be relied upon to overcome the presumption of disbarment as the appropriate discipline for Respondent's convictions. The Bar would argue that the Court's holdings in The Florida Bar v. Forbes, 596 So. 2d 105 (Fla. 1992), and The Florida Bar v. Graef, 701 So. 2d 555 (Fla. 1997), are persuasive in this matter in that what mitigation remains should only allow for Respondent's disbarment to begin on the date of his felony suspension of August 14, 1998.

CONCLUSION

A review of the record below fails to support the majority of mitigating factors cited by the Referee. Respondent's actions, after pleading guilty to the five (5) felony charges of aggravated child abuse, do not demonstrate a level of remorse for his misconduct that would mitigate the presumption of disbarment.

Respondent's training as a lawyer and experience in the practice of law should have alerted him that his actions against the minors under his charge was serious criminal misconduct. The record reveals Respondent still does not accept this and continues to justify his actions based upon the behavior of the minors. This fails to establish remorse on Respondent's part.

While disbarment is the most severe discipline which this Court can impose, it will best serve the purposes of discipline as stated in Dubbeld.

The recommendation of an indefinite suspension by the Referee is not supported by the record and the appropriate sanction should be disbarment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief regarding Supreme Court Case No. 94,561, TFB File No. 99-00425-4A has been mailed by regular U.S. mail to ROBERT PETER McKEEVER, JR., Respondent, at his record alternate address of DC# J07771/M1105, Okaloosa Work Camp, 3189 Little Silver Road, Crestview, Florida 32539-6708, on this 22nd day of September, 1999.

JAMES N. WATSON, JR., Bar Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(850) 561-5845
Florida Bar No. 144587

cc: Director of Lawyer Regulation

THE FLORIDA BAR
650 APALACHEE PARKWAY
TALLAHASSEE, FL 32399-2300

JOHN F. HARKNESS, JR.
EXECUTIVE DIRECTOR

850/561-5600
WWW.FLABAR.ORG

September 22, 1999

Debbie Causseaux, Acting Clerk
Supreme Court of Florida
Supreme Court Building
Tallahassee, FL 32399

Re: Robert Peter McKeever, Jr.; Case No. 94,561
TFB File No. 99-00425-4A

Dear Ms. Causseaux:

Enclosed for filing in the above-referenced case, please find The Florida Bar's Initial Brief, with the appropriate copies.

Sincerely,

James N. Watson, Jr.
Bar Counsel

JNW:dt

Enclosure - Original Brief/Copies

cc: John Anthony Boggs, Staff Counsel
Robert Peter McKeever, Jr.