No. SC00-256

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant/Appellee,

v.

ALAN I. KARTEN,

Respondent/Appellant.

On Petition For Review of the Report of the Referee
For the Eleventh Judicial Circuit

REPLY BRIEF OF THE APPELLANT

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Introduction

After an unsuccessful attempt to distract the Court from the central issues in this case by moving to strike undersigned counsel's initial brief for allegedly presenting incomplete and overly "argumentative" Statements of the Case and Facts, the Florida Bar does not even attempt to present a full and accurate rendition of the procedural history and evidence. Instead, the Bar asks this Court to disbar Respondent Karten based on an allegation that was not even made in the Complaint -- that Karten falsely denied receiving a $24,000 "profit" from the sale of four automobiles. The Bar treats the allegations that are actually in its Complaint -- *i.e.*, that Karten violated the Criminal Justice Act ("CJA") by accepting compensation for his court-appointed representation of Loynaz and that Karten defrauded Loynaz of the automobiles to begin with -- as an afterthought.

In this reply, we return to the allegations of the Complaint. Part I demonstrates that there is no factual or legal basis to uphold the Referee's finding that Karten violated the CJA. Part II demonstrates that there is likewise an insufficient basis to find that Karten defrauded Loynaz of his property and that the Referee's credibility findings are clearly erroneous on this record. Although this case should end there, since the Bar has devoted the bulk of its brief to its "concealed profit" theory, Part III

demonstrates that it would violate Karten's right to due process by disbarring him for an allegation not made in the Complaint. Part III further demonstrates that, in any event, Loynaz had already started accusing Karten of fraud by the time any "profit" was realized (if, indeed, it ever was realized) and that Karten, therefore, no longer had a contractual duty to share any profit with Loynaz. Finally, Part III demonstrates that the Bar has mis-stated the evidence concerning the alleged profit and Karten's testimony concerning it.

I. THE ALLEGED CJA VIOLATION

The Bar devotes less than half a page to its accusation that Karten violated the CJA. The Bar asserts, without any factual discussion or legal analysis, that Karten "clearly" violated the CJA. The Florida Bar's Answer Brief, at p. 23. Under 18 U.S.C. § 3006(A)(f), however, an appointed counsel only violates the CJA if he accepts a payment "for representing a defendant." It is not a violation of the CJA for an appointed counsel to enter into a collateral business relationship with a client, so long as there is no *quid pro quo* for the criminal "representation."

Loynaz himself acknowledged that Karten's CJA appointment ended upon his sentencing on August 27, 1997. (T. 86.) It is likewise undisputed that the negotiations Karten undertook with the federal prosecutors to buy-back the forfeited automobiles

took place in the context of the ***civil***, post-plea, ancillary forfeiture proceedings,[1/] that culminated in the Stipulation signed by Loynaz on September 23, 1997 -- *i.e.*, after Karten's appointed was over. There is no evidence that Karten's appointment covered that representation and, indeed, no evidence that Loynaz even had the right to appointed counsel in those proceedings. On the contrary, the district court declined to reimburse Karten for efforts he made to retrieve the automobiles while his appointment was still ongoing. (T. 252-253; Karten Exhibit 8.) In short, while Karten and Loynaz dispute the meaning of the Stipulation, the Stipulation had no relationship to any "representation" Karten was required to provide, or did provide, to Loynaz under the CJA.[2/] Karten did not violate the CJA Act, because his dealings with Loynaz and federal prosecutors post-dated his appointment and had nothing to do with his "representation" of Loynaz under that appointment.

[1/] In its Motion to Strike, Bar counsel claimed that the nature of the proceedings was a contested, factual issue. *See* Motion To Strike, at p. 2. The Bar's brief then ignores the issue entirely. As counsel correctly noted in his brief, the civil nature of the proceedings is an issue of law that is beyond dispute. *See United States v. Gilbert*, 244 F.3d 888 (11th Cir. 2001); *United States v. Douglas*, 55 F.3d 584 (11th Cir. 1995).

[2/] Furthermore, there has never been a finding by a federal court that Karten violated the CJA. When, based on Loynaz' accusations, federal prosecutors brought the issue before Magistrate Judge Turnoff, he declined to find a violation and openly questioned Loynaz' credibility. (FB Exhibit 13, p. 5, n. 2.)

II. LOYNAZ' ALLEGATIONS OF FRAUD

The Bar's Complaint against Karten centered on Loynaz' accusation that he never gave Karten permission to buy back and sell the cars. In response, Karten has consistently maintained that he agreed to post the $30,000 demanded by the federal prosecutors in exchange for Loynaz' agreement to either reimburse him within 30 days or "[i]f Mr. Loynaz could not reimburse and tender the money within 30 days, the vehicles would be sold to reimburse the money and the profits, if any, would be shared equally." Alan Karten's Response To the Defendant Nelson Loynaz Jr.'s Motion For Return of Property, June 1998, FB Exhibit 3. The Referee adopted Loynaz' version of the agreement, or lack thereof. Although Referees are "in a unique position" to assess "the credibility" and demeanor of witnesses, *The Florida Bar v. Fredericks*, 731 So.2d 1249, 1251 (Fla. 1999), the Referee in this case did not base his decision on findings concerning the demeanor of the witnesses before him but upon his clearly erroneous construction of the testimony and documentary evidence.

An order of disbarment cannot be sustained based upon the testimony of a disgruntled former client "`unless such witness is corroborated to some extent either by facts or circumstances.'" *Fredericks*, 731 So.2d at 1251, *quoting The Florida Bar v. Rayman*, 238 So.2d 594, 597 (Fla. 1970). *Accord State ex rel. Florida Bar v.*

Junkin, 89 So.2d 481 (Fla. 1956). The Referee accepted Loynaz' version, because he found that Loynaz: (A) himself gave "credible testimony ... that he purposefully masked his ownership in the vehicles to avoid their seizure and forfeiture in the event of his arrest on drug charges"; (B) had "no discernible motive ... to testify untruthfully"; and (C) gave testimony that was "corroborated by the other evidence introduced at the hearing." Report of the Referee, at ¶¶ 9, 12. All three reasons given are clearly erroneous.

A. Loynaz' Testimony About Ownership of the Vehicles

The Referee's finding that Loynaz gave "credible testimony" that "he purposefully masked his ownership in the vehicles to avoid their seizure and forfeiture in the event of his arrest on drug charges" is clearly erroneous for the obvious reason that ***Loynaz gave no such testimony***. Loynaz claimed that he and he alone owned the 4 cars and that he bought them in either 1992 or 1993 from a drug trafficker named Horacio Sardinas for $150,000 in cash. (T. 30, 62, 65-67.) He further claimed that all the titles were "reassigned" to Tropikar in **1993** for legitimate reasons. (T. 66-69, 80-81.)

Loynaz' testimony, however, was incredible and contradicted by: (1) the titles to the vehicles themselves, one of which, on its face, indicated that Tropikar obtained title in **1989**; (2) the testimony of Loynaz' own wife, who stated that Loynaz

purchased the cars sometime after **1996** (T. 145); (3) the affidavit Karten submitted from Manny Fernandez in which Fernandez swore that he was, in fact, the true owner of the vehicles (T. 312; FB Exhibit 2, attachment); and (4) the testimony of FBI Special Agent Scott Wiegmann, who stated that during Loynaz' debriefing Loynaz maintained that "did not own the vehicles" and that "the actual owner" was Manny Fernandez." (T. 367-368; 373-374.)

The only testimony about anyone possibly "masking" ownership came, not from Loynaz, but from Florida Bar Investigator James Crowley who, during an overnight break in the proceedings, claimed to have had a telephone conversation with Loynaz' trial prosecutor, Assistant United States Attorney ("AUSA") John Roth. According to Mr. Crowley, AUSA Roth expressed the generalized opinion that "in most of his experience, convicted drug dealers don't have cars in their own name. They'll have them in other people's name[s] so that they're not forfeited when they get arrested." (T. 194.)

If the Referee meant to credit Mr. Crowley's hearsay testimony as suggesting that Loynaz had followed the pattern, then Loynaz lied to AUSA Roth and FBI Wiegman during the debriefing required by Loynaz' plea agreement[3/] and again during

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[3/] False statements to prosecutors and federal agents are federal felonies under 18 U.S.C. § 1001.

the hearings before the Referee. Such a pattern of deceit hardly supported the Referee's claim that Loynaz was "credible."

B. Loynaz' "Discernible Motives ... To Testify Untruthfully"

The Referee's belief that Loynaz had no motive to fabricate his accusations against Karten was likewise belied by the record. Loynaz had an enormous monetary incentive to make up his story. The Bar sought restitution as a sanction, and Loynaz was threatening Karten with a civil damage lawsuit. (T. 21; FB Exhibit 5, p. 6.) Loynaz' wife conceded that she anticipated a financial benefit from the litigation. (T. 144.) Magistrate Judge Turnoff also recognized that Loynaz may have been contemplating a challenge to his plea and/or sentence, based on ineffective assistance of counsel. (FB Exhibit 13, p. 5, n. 2.) The proffered testimony of Elena Garcia further indicated that Loynaz held a grudge against Karten for his inability to obtain a sentencing reduction for him under U.S.S.G. § 5K1.1. Loynaz told Garcia that he fired Karten "because he didn't get his 5k." (T. 592-593.)

C. The Incredible Nature of Loynaz' Testimony

The Referee's finding that Loynaz' testimony was actually "corroborated by the other evidence introduced at the hearing" is inexplicable. As discussed above, Loynaz' story about his ownership of the vehicles was contradicted by documents, his own wife and the testimony of FBI Agent Wiegmann. A review of Loynaz' testimony as a whole demonstrates that he gave repeated and demonstrably false testimony about virtually every material issue in the case:

< Loynaz claimed that, despite his guilty plea, he "wasn't guilty" at all of the underlying federal criminal charges (T. 87)[4/];

< Loynaz claimed that he only agreed to forfeit 2 of the 4 cars (T. 32-34), while the written plea agreement itself and testimony of FBI Agent Wiegmann indicated that the plea agreement included all 4 cars;

< Loynaz claimed that Karten was never going to pay $30,000 to the government, that he never talked to Karten about such a plan and even that the Stipulation, which he himself signed, did ***not*** require Karten to post the $30,000 (T. 101-102, 114, 119, 123), while the written Stipulation itself expressly provided, on the same page as Loynaz' signature, that Karten was paying the $30,000;

< Loynaz claimed that Karten dodged his calls, especially after Karten retrieved the cars, and "never returned any calls" to Loynaz in prison (T. 43-44, 47), despite telephone records showing numerous, lengthy calls to Karten's office, testimony from Karten's secretary that Karten spoke to Loynaz 70 percent of the time he called (T. 570, 558-562; Karten Exhibits A-C), and the undisputed fact that telephone calls cannot be "returned" to an inmate of a federal prison.

[4/] In federal criminal cases, a defendant is required to acknowledge both his guilt and the accuracy of a factual basis for the guilty plea on the record and under oath. *See* Fed. R. Crim. P. 11.

Loynaz also claimed that a friend of his named Manuel Mesa was supposed to take a $30,000 check to Karten for $30,000 for use in paying the government. (T. 103, 105, 117-118.) Contrary to the Referee, this allegation was not corroborated at the hearing. Mesa did not testify; the alleged $30,000 check was never produced; and Loynaz conceded that he had never seen such the check and had no correspondence with Mesa to corroborate his story. (T. 110, 121.)

The Bar contends that Loynaz' version of the events was corroborated by (1) the Stipulation itself and (2) Mr. Crowley's hearsay testimony about what AUSA Roth told him. The Florida Bar's Answer Brief, at pp. 18, 27. Neither piece of evidence, in fact, corroborated Loynaz. The Stipulation was ambiguous. While it indicated that the cars would be returned "to the defendant," it also expressly predicated the return on ***Karten*** paying the government $30,000. The Stipulation, however, says nothing about any collateral agreements there might have been between Loynaz and Karten to explain why Karten had agreed to post the money. And, Loynaz had no credible explanation why Karten would do so, unless it had something to do with the cars.

The Referee also ignored the testimony of FBI Agent Wiegmann, who testified that "[f]rom the meeting" over the Stipulation, it was "my understanding that the vehicles that we would return ***would be returned to Mr. Karten, yes***." (T. 371; emphasis added.) Agent Wiegmann's understanding was consistent with federal

forfeiture law, which expressly prohibited the prosecutors from allowing Loynaz to re-purchase his forfeited vehicles. *See* 21 U.S.C. § 853(h). For the Court to accept Loynaz' (and the Bar's) version of the Stipulation, the Court would have to conclude that the federal prosecutors and agents (and the federal court that ratified the Stipulation) were knowingly flouting federal law.

Instead of crediting Agent Wiegmann's in-court testimony, the Bar cites to Mr. Crowley's out-of-court and uncrossexaminable conversation with AUSA Roth, who allegedly told Mr. Crowley that there was no agreement to return the cars to Karten. *See* The Florida Bar's Answer Brief, at p. 18. The Bar fails to inform this Court, however, that AUSA Roth had received a promotion by the time the Stipulation was drafted and was no longer handling the case. The agreement was negotiated, instead, by AUSA Gerardo Simms, who did not testify at the hearing. (*See* T. 370-371; 377-378.) FBI Agent Wiegmann, who had handled the case from beginning to end, corroborated Karten. Karten's version of the agreement was later corroborated by the proffered testimony of Elena Garcia and Dennis Bruce -- testimony the Referee refused to consider. *See* Karten's Initial Brief, at pp. 25-26. Indeed, Karten's testimony concerning the meaning of the Stipulation and his agreement with Loynaz was the only credible version of the events and the only one consistent with federal forfeiture law.

Loynaz was broke and, in any event, barred by Section 853(h) from buying back his forfeited vehicles. Karten agreed to do so and posted the $30,000. Unfortunately, Karten never reduced the agreement to writing. Loynaz, unhappy with his sentence, blamed Karten for it and for the government's refusal to reduce it. Like the career criminal he was, he saw a golden opportunity to exploit the situation. By accusing Karten of stealing the vehicles without his authority, Loynaz could simultaneously get his revenge against Karten, potentially reap a financial windfall and lay the foundation for a collateral attack against his conviction. So far, Loynaz' plans are working to perfection. This Court, however, should put a halt to them and reject the Report of the Referee.

III. THE BAR'S BELATED "PROFIT" ACCUSATIONS

The Bar's attempt to disbar Karten based on its post-Complaint accusations about Karten's receipt of a profit from his sale of the cars should be rejected for three reasons.

First, the Bar's arguments are barred by due process. "Bar disciplinary proceedings are quasi-criminal in nature" and, therefore, require that "attorneys ... know the charges they face before proceedings commence." *The Florida Bar v. Vernell*, 721 So.2d 705, 707 (Fla. 1998). "The absence of fair notice as to the reach of the procedure deprives the attorney of due process." *Vernell*, 721 So.2d at 707. The Bar

thus cannot seek an attorney's disbarment based upon information gleaned during the proceedings themselves. *See citing In re Buffalo,* 390 U.S. 544, 552, 20 L.E.2d 117, 88 S.Ct. 1222 (1968) (attorney denied due process where he was disbarred, in part, based on new charge added based on testimony obtained during the proceedings). Nor can an attorney's own testimony in his defense be used as the basis for his disbarment. *See The Florida Bar v. Price*, 478 So.2d 812 (Fla. 1985). "Such matters may only be prosecuted after notice and due process concerns are met such as by a new proceeding." *Vernell*, 721 So.2d at 707. The Bar contends that it learned about Karten's profit from discovery and testimony it obtained during the instant proceedings, *i.e.*, ***after*** the Complaint was filed. *See* The Florida Bar's Answer Brief, at p. 8. Accordingly, even if the Bar's accusations had any merit, they are not properly part of these proceedings and should be disregarded for that reason.

Second, the Bar's discussion of the "profit" issue is misleading. As previously noted, Karten has always acknowledged that his agreement with Loynaz was to sell the 4 cars and split any profits (after reimbursing himself for the $30,000 outlay) with Loynaz. *See* p. 4 *supra*. Once Karten obtained the vehicles from the government, he immediately sold them to Robert Woltin for the same amount, $30,000. (T. 157.) Accordingly, when Karten wrote Bar counsel on June 18, 1998, that "the vehicles were titled to me, by the State of Florida, and ***those titles*** delivered to the ultimate buyer

[Woltin] ***at no profit to me***," *see* FB Exhibit 3 (emphasis added), that statement was accurate.

The evidence is likewise undisputed that Loynaz fired Karten in a letter dated **March 9, 1998** and, shortly thereafter, began accusing him of theft, fraud and CJA violations first in federal court and then with the Bar. (T. 130, 271, 309.)[5/] Woltin did not sell the 1966 Corvette to Thomas Duncan, however, until March 13, 1998, and the $24,000 check to Karten (*i.e.*, the "profit" the Bar contends Karten realized) was not deposited into the restaurant account until **March 16, 1998**. (T. 168-169, 301; FB Exhibit 9; Karmin Deposition, pp. 8-9.) At that point, Loynaz' false accusations relieved Karten of his contractual obligations to Loynaz. "When a nonbreaching party to a contract is confronted with a breach by the other party, the nonbreaching party may stop performance, treating the breach as a discharge of its contractual liability." *Toyota Tsusho American Inc. v. Crittenden*, 732 So.2d 472, 477 (Fla. 5th DCA 1999). Thus, at least until Loynaz' accusations were resolved, Karten had no continuing duty to share any profit with him.

Third, the record is incomplete about whether Karten truly realized any "profit." Contrary to the Bar's brief, Karten readily acknowledged receiving a $24,000 check and that the check was deposited into the restaurant account. (T. 294-296, 299-301.)

[5/] Loynaz filed his first complaint with the Bar on April 2, 1998. (FB Exhibit 5, p. 6, ¶ 12.)

Although his memory was dim, Woltin testified that he deposited the $24,000 check into the restaurant account and credited it to Karten as a "capital contribution." (T. 162-163.) Thereafter, however, both Woltin and Karmin testified that they kicked Karten out of the restaurant. (T. 164; Karmin Deposition, at pp. 19, 25.) Karten denied realizing a "profit" from car sale, ***because*** his partners threw him out of the business. (T. 297, 301, 347.) The Bar's brief accuses Karten of perjury when he denied making a profit, ignoring both his testimony about receiving the $28,000 and his explanation for his testimony.

Moreover, the whole issue of whether Karten obtained a profit was collateral to Loynaz' accusations, the Complaint and the hearings before the Referee, and, not surprisingly, the current status of Karten's investment is uncertain on this record. Indeed, the Referee himself finally indicated that he did not see the relevance of the testimony concerning Karten's restaurant investment and threatened to "shut ... down" the testimony on the subject. (T. 302.) "I don't want to know about it." (T. 302.) When Karten was then asked about the current status of the investment, the Referee sustained the Bar's objections, precluding the testimony. (T. 302-304.) The Bar now wants Karten disbarred based on conclusions about a subject it successfully eliminated from the proceedings.

CONCLUSION

Accordingly, for all of the foregoing reasons, as well as those set forth in Karten's initial brief, the Court should reject the Bar's attempt to turn this case into an inquiry about whether Karten realized a profit from the sale of the cars. That was never Loynaz' complaint. Nor was it the basis of the Bar's Complaint. The subject was cut off during the hearings, based on the Bar's own objections. And, the Bar has misrepresented the limited facts in the record. The Referee's Report should be reversed for insufficient evidence.

Respectfully submitted,

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