IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MARIO A. RUIZ DE LA TORRE,
a/k/a MARIO COSTA

Respondent.
_____/

Supreme Court Case
No. SC07-1633

The Florida Bar File No.
2008-70,010(11H-MFC)

INITIAL BRIEF OF THE FLORIDA BAR

BARNABY LEE MIN
Bar Counsel
Florida Bar No. 385719
The Florida Bar
444 Brickell Avenue, Suite M-100
Miami, Florida 33131
(305) 377-4445

KENNETH LAWRENCE MARVIN
Staff Counsel
Florida Bar No. 200999
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600

JOHN F. HARKNESS, JR.
Executive Director
Florida Bar No. 123390
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: **PAGE**

OTHER AUTHORITIES:

SYMBOLS AND REFERENCES

For the purpose of this brief, The Florida Bar will be referred to as "The Bar." Mario A. Ruiz de la Torre will be referred to as "Respondent." References to the transcript of the Final Hearing held on November 9, 2007 will be referred to as "TR" followed by the referenced page number(s). References to the Report of Referee will be referred to as "ROR" followed by the page number.

STATEMENT OF THE CASE AND OF THE FACTS

On or about August 31, 2007, The Florida Bar filed a Notice of Determination of Guilt based on a plea of nolo contendere by Respondent to one felony count of Battery on a Law Enforcement Officer, one misdemeanor count of Resisting an Officer Without Violence, one felony count of Possession of Cocaine, one misdemeanor count of Unlawful Possession of Cannabis, and one misdemeanor count of Possession of Drug Paraphernalia entered on or about March 10, 2000, in the Eleventh Judicial Circuit Court of Florida, Case No. F99-38473. (ROR 2). The court withheld adjudication as to all counts and placed Respondent on probation for 18 months.[1] (ROR 2).

As a result of the Notice of Determination of Guilt filed by The Florida Bar, this Court felony suspended Respondent and referred the matter to a referee to determine the appropriate sanction for Respondent's misconduct. (ROR 1). A final hearing in the matter was conducted on November 9, 2007. The evidence at the final hearing revealed that when Respondent was first arrested for the criminal conduct, he provided a false name to the arresting officer. (ROR 6; Appendix B). The police report, other documents relating to the arrest, the court docket, and pleadings within the court file all reflected that the arrestee's name was Mario Costa, the name of Respondent's former brother-in-law. (TR 90; Appendix B).

[1] Although Respondent received a withhold of adjudication, for purposes of this brief, his determination of guilt will be referred to as a conviction.

Respondent denied that he had given a false name to anyone. Instead, he stated that he had a printout of Mr. Costa's driving record in his car on the night of his arrest and that the officer must have assumed that Respondent's name was Mario Costa. (TR 90, 121). The evidence at the final hearing revealed, however, that Respondent had a suspended driver's license and two outstanding bench warrants for his arrest when the officer pulled him over. (TR 106).

Further, the evidence revealed that Respondent did not notify The Florida Bar of his conviction when it occurred, nor did he notify The Bar when it was brought to his attention by an opposing counsel in litigation that was pending in May 2007, nearly seven years later. (ROR 5). Moreover, Respondent did not report his conviction to The Bar even after being notified by The Bar that the conviction had been brought to The Bar's attention. (ROR 5, 6). Respondent finally met his obligation pursuant to Rule 3-7.2 of the Rules of Discipline when he reported his conviction to The Bar in his response to a letter from The Florida Bar in August 2007. (TR 103).

When Respondent was provided with a copy of Rule 3-7.2 as it was written in 2000, he acknowledged that he did not find any part of the rule to be particularly confusing. (TR 114). In explanation for failing to report his conviction, Respondent asserted that he did not know he had pleaded to felony charges until he looked in the file and did some research to write his answer to The Bar's initial

letter. (TR 104). Respondent asserted that he thought he had pleaded only to misdemeanor charges and, therefore, did not have an obligation to report his conviction to The Bar. (TR 104).

Finally, Respondent presented considerable evidence of his present good character and reputation by calling eight witnesses to testify on his behalf. (ROR 7; TR 7-68). Thereafter, Respondent testified about his family, his personal life, and the events leading up to his arrest. (TR 69). Respondent also attempted to explain the circumstances leading up to his arrest. (TR 87-89, 112-113; Appendix B).

Upon conclusion of the final hearing, the Referee made factual findings. With respect to Respondent's testimony at the final hearing, the Referee found Respondent's statement that he believed he was pleading only to misdemeanors lacked credibility. (ROR 5). Additionally, the Referee found that Respondent tried to marginalize the seriousness of the events that led to his arrest and that he refused to take responsibility for the more serious charges to which he pleaded. (ROR 6). Specifically, during his testimony, Respondent attempted to marginalize his conviction for the battery on a police officer by explaining that it was simply a technical battery or technical touch. (ROR 6; TR 85-86). Further, the Referee found Respondent's explanation as to the event leading up to Respondent's arrest lacked credibility. (ROR 6).

Based upon the evidence presented at the final hearing, the Referee found

that Respondent had in fact committed ethical misconduct and should be disciplined. (ROR 3). The Referee also found a number of aggravating factors. (ROR 5-6). Specifically, the Referee found that Respondent was dishonest during his testimony at the final hearing concerning Respondent's confusion about the charges he pleaded to and his responsibility to report his conviction to The Bar. (ROR 5). The Referee also found that Respondent engaged in a pattern of misconduct and attempted to obstruct the disciplinary proceeding in his attempt to hide his conviction from The Bar for a period of seven years. (ROR 5-6). Further confirming Respondent's practice of being deceptive, the Referee found that Respondent submitted false evidence, false statements, or other deceptive practices by giving a false name to the police. (ROR 6). The Referee also found as aggravating factors Respondent's refusal to acknowledge the wrongful nature of his conduct and Respondent's substantial experience in the practice of law. (ROR 6).

The Referee also made findings of fact concerning mitigating factors. (ROR 7-8). Specifically, the Referee found that Respondent had an absence of a prior disciplinary record, had personal or emotional problems at the time of the criminal conduct, had good character and reputation, had gone through interim rehabilitation, and had other penalties and sanctions imposed. (ROR 7-8).

Based upon all of his factual findings, the Referee recommended that

Respondent be suspended from the practice of law for a period of 90 days followed by three years of probation with an evaluation by Florida Lawyer's Assistance, Inc. (hereinafter, "FLA") and enter into a contract with FLA if necessary. (ROR 3-4).

SUMMARY OF THE ARGUMENT

The Referee's recommendation that Respondent be suspended from the practice of law for 90 days fails to provide the appropriate discipline for Respondent's actions. A 90-day suspension sends the wrong message to other members of The Bar by allowing noncompliance with the Rules to be met with a light sanction. The discipline recommended by the Referee essentially encourages concealment of one's crimes and discourages compliance with an attorney's duty to report felony convictions to The Bar. Respondent's felony convictions, together with the host of aggravating circumstances, warrant a one-year suspension from the practice of law.

ARGUMENT I

THE REFEREE ERRED BY FAILING TO RECOMMEND A ONE-YEAR SUSPENSION BASED ON RESPONDENT'S MISCONDUCT AS WELL AS THE AGGRAVATING FACTORS.

Generally, "this Court will not second-guess the referee's recommended discipline as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions." The Florida Bar v. Greene, 926 So. 2d 1195, 1200-1201 (Fla. 2006). Additionally, "a referee's recommendation on discipline is afforded a presumption of correctness unless the recommendation is clearly erroneous or not supported by the evidence." The Florida Bar v. Niles, 644 So. 2d 504, 506-507 (Fla. 1994). But "[u]nlike the referee's findings of fact and conclusions as to guilt, the determination of the appropriate discipline is peculiarly in the province of this Court's authority." The Florida Bar v. O'Connor, 945 So. 2d 1113, 1120 (Fla. 2006). In the instant case, the Referee's recommended 90-day suspension is inadequate because it does not have a reasonable basis in existing case law and is not supported by the evidence.

In The Florida Bar v. Finkelstein, 522 So. 2d 372 (Fla. 1988), the Court held that felony possession of illegal drugs, along with a misdemeanor offense of driving under the influence, warrants a one-year suspension from the practice of law. See id. at 373. Like Respondent, the attorney in Finkelstein pleaded nolo contendere to felony possession of illegal drugs and adjudication of guilt was

withheld. See id. The Court stated that "Rule 3-4.3 makes clear that a judgment or determination of guilt of a felony is a ground for the serious disciplinary sanction of suspension." Id. The serious disciplinary sanction imposed by the Court in Finkelstein was not a mere 90-day suspension, but rather a one-year rehabilitative suspension. See id. In the case at bar, Respondent's felony convictions warrant a fair but equally serious one-year suspension from the practice of law.

Similarly, in The Florida Bar v. Schram, 355 So. 2d 788 (Fla. 1978), the Court held that felony possession of marijuana and misdemeanor possession of paraphernalia warrant a one-year suspension. See id. at 789. The attorney admitted guilt to the above-referenced crimes and adjudication of guilt was withheld. See id. at 788. Here, again, the Court determined that the attorney's serious felony conviction called for an equally serious one-year rehabilitative suspension. See id.

Unlike the above-referenced cases, in The Florida Bar v. West, 550 So. 2d 462 (Fla. 1989), the Court imposed a more stringent 18-month suspension for the attorney's conviction of possession of cocaine. See id. at 463. While The Bar is not requesting the Court to impose an 18-month suspension in the instant case, The Bar does acknowledge that an 18-month suspension is more appropriate than the Referee's recommended sanction. Additionally, the Referee's 90-day non-rehabilitative suspension sends the wrong message to members of The Bar by

encouraging concealment of crimes and discouraging compliance with The Bar's reporting requirements for felony convictions. See The Florida Bar v. Gross, 896 So. 2d 742, 745 (Fla. 2005) citing The Florida Bar v. Lord, 433 So. 2d 983, 986 (Fla. 1983) (stating that discipline must be fair to society, fair to the respondent, and severe enough to deter others from committing similar violations). Simply put, by affirming the Referee's recommended discipline, the Court would essentially reward Respondent for concealing his felony convictions from The Bar for seven years, conduct that is clearly dishonest and inappropriate for any member of this profession.

In addition to the case law that supports a one-year suspension for the misconduct Respondent committed, Florida Standard for Imposing Lawyer Sanctions 3.0 states that when imposing a sanction for misconduct, the existence of aggravating factors must be considered. '"[A]ggravating circumstances . . . justify an increase in the degree of discipline to be imposed.'" The Florida Bar v. Kelly, 813 So. 2d 85, 90 (Fla. 2002) citing Fla. Stds. Imposing Law. Sancs. § 9.21.

This Court has consistently increased the sanction when aggravating factors exist. In The Florida Bar v. Fortunato, 788 So. 2d 201 (Fla. 2001), the referee initially recommended that the attorney receive a public reprimand for the misconduct he committed. See id. at 202. This Court, however, was concerned about the aggravating factor found by the referee that the attorney submitted "false

evidence and statements and engaged in other deceptive practices during the disciplinary process." Id. citing The Florida Bar v. Arango, 720 So. 2d 248 (Fla. 1998). This Court increased the recommended sanction to a 90-day suspension based on that aggravating factor as well as other aggravating factors found by the referee. See id. at 203. This Court also stated that it is "intolerant of attorneys . . . who have provided false testimony before a referee during a disciplinary proceeding." Id. (citations omitted).

Like Fortunato, the Referee in the case at bar found that there were a number of aggravating factors, including the submission of false statements, false evidence, and other deceptive practices during the disciplinary proceeding. (ROR 5-6). Specifically, the Referee found that Respondent engaged in a pattern of misconduct and engaged in bad faith obstruction of the disciplinary proceeding by failing to comply with the Rules Regulating The Florida Bar. (ROR 5-6). The Referee found that Respondent began his role of deception the moment the police stopped him and the deception continued throughout the final hearing. All documents relating to Respondent's arrest indicated that the police had arrested Mario Costa. (TR 90; Appendix B). When the officer pulled him over, Respondent knew that his driver's license was suspended, knew that he had two outstanding bench warrants, and knew that he would be arrested immediately if he gave the officer his correct name. (TR 106). Had Respondent not been aware of

these facts, the arrest record would have reflected that Mario A. Ruiz de la Torre had been arrested. Whenever a driver is pulled over and cannot produce a license, the officer seeks other identifying information such as the driver's date of birth, home address, and possibly a social security number in an effort to confirm that the driver is who he or she claims to be. Here, Respondent expects this Court to believe that, through no fault of his own, the officer misidentified Respondent as Respondent's former brother-in-law and, subsequently, arrested Respondent without any further inquiry into the matter. To explain how the officer obtained the name Mario Costa, Respondent claimed that he had a printout of his former brother-in-law's driving record inside his car on the night of his arrest and that the officer must have assumed that his name was Mario Costa. In short, Respondent provided a false name to the arresting officer and an implausible explanation to the Referee as to why he was arrested under his former brother-in-law's name.

Further, even after the conviction, Respondent had numerous opportunities to inform The Florida Bar of his felony convictions but failed to do so for seven years in an attempt to hide his misconduct. Respondent only reported his convictions to The Bar after The Bar wrote Respondent a letter. (TR 103). Even then, Respondent waited over a month after receiving the letter to report his conviction to The Bar. (TR 103). Had The Bar not received an anonymous letter concerning Respondent's concealment of his convictions from The Bar,

Respondent would have avoided detection and been successful in hiding his crimes from The Bar, the legal community, and his clients. (TR 103).

The Referee also found that Respondent exhibited a dishonest or selfish motive by not reporting his felony convictions to The Florida Bar at the time he entered his plea agreement. In an effort to excuse his failure to comply with Rule 3-7.2(c) of the Rules of Discipline, Respondent essentially stated that he did not think he was required to report his convictions because it was his understanding that he had pleaded only to misdemeanors, not felonies. (TR 104). As stated in his report, the Referee noted that the transcript of the plea clearly indicated that the presiding judge had informed Respondent that both the charges of Battery on a Police Officer and Possession of Cocaine carried a maximum of five years imprisonment. (ROR 5; Exhibit C). Despite any uncertainty as to what constitutes a misdemeanor or a felony, Respondent should have known that any charge that carries up to five years imprisonment was unquestionably a felony.

Further, throughout the final hearing, Respondent refused to acknowledge the wrongful nature of his conduct. Although he claimed to be remorseful for his unlawful acts, Respondent attempted to marginalize the conduct underlying his felony convictions. More specifically, Respondent attempted to show that the acts for which he was arrested somehow fell short of the conduct prohibited by statute. (TR 85-86).

Despite his contention, the criminal court accepted Respondent's plea and found a factual basis for the plea. Respondent cannot dispute the facts. When the officer performed a pat down, Respondent grabbed the officer's hand and pulled it away from his front pocket. Plain and simple, Respondent committed battery on a law enforcement officer and, thereafter, entered a plea of nolo contendere for his felonious conduct. Respondent's attempt to lessen the seriousness of his felony battery by referring to it as a technical battery or a technical touch demonstrates his lack of remorse.

Similarly, the criminal court accepted Respondent's plea and found a factual basis in support of Respondent's plea to Possession of Cocaine. While Respondent denied that the cocaine was his, he pleaded to this felony charge, as well, and cannot deny the facts. The arresting officer discovered cocaine on Respondent's person during a pat down of Respondent's right front pant's pocket. Respondent's explanation as to how the cocaine ended up in his pocket does not minimize or excuse the serious charge and subsequent felony conviction. In brief, Respondent's refusal to acknowledge the wrongful nature of his conduct indicates that he is just sorry that he was caught and that disciplinary proceedings were initiated against him, not that he is sorry that he committed the actual crime. Finally, the Referee found that Respondent had substantial experience in the practice of law.

Based upon all of these aggravating factors found by the Referee, the Referee's recommendation of a 90-day suspension is insufficient. Case law alone justifies a harsher sanction and the conduct combined with the numerous aggravating factors warrant a one-year suspension from the practice of law.

CONCLUSION

If a practicing attorney has doubts as to what the Rules of Discipline require, he or she has a duty to investigate the matter further—that is what lawyers are trained to do and obligated to do. The facts indicate that Respondent knew he had pleaded to two felonies, that he made a choice to disregard his duty to report his felony convictions to The Bar, and that he took the steps necessary to conceal his criminal conduct from The Bar. For the reasons set forth in this brief, the Court should suspend Respondent from the practice of law for a period of one-year.

Respectfully submitted,

BARNABY LEE MIN
Bar Counsel
Florida Bar No. 385719
The Florida Bar
444 Brickell Avenue, Suite M-100
Miami, Florida 33131
(305) 377-4445

KENNETH LAWRENCE MARVIN
Staff Counsel
Florida Bar No. 200999
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
Tel: (850) 56l-5600

JOHN F. HARKNESS, JR.
Executive Director
Florida Bar No. 0123390
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
Tel: (850) 56l-5600

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Initial Brief of The Florida Bar were forwarded via Federal Express Mail, Tracking No. 809685806440, to the Honorable Thomas Dale Hall, Clerk, at the Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida, 32399; and a true and correct copy was mailed to Kevin P. Tynan, Attorney for the Respondent, at 8142 North University Drive, Tamarac, Florida 33321; and to Kenneth Lawrence Marvin, Staff Counsel, at The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300 on this _____ day of February, 2008.

_____
BARNABY LEE MIN
Bar Counsel

CERTIFICATE OF TYPE, SIZE, AND STYLE

I hereby certify that the Initial Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font in Microsoft Word format.

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BARNABY LEE MIN
Bar Counsel

APPENDIX

A. Report of Referee dated December 10, 2007.

B. Sunny Isles Beach Police Department Offense Report dated November 14, 1999.

C. Transcript of Hearing in the State of Florida vs. Mario Costa de la Torre, case no. F99-038473.