IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

LIJYASU KANDEKORE,

Respondent.
_____/

Supreme Court Case
No. 87,538

ON PETITION FOR REVIEW

INITIAL BRIEF OF COMPLAINANT

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INTRODUCTION

For the purposes of this brief, The Florida Bar will be referred to as "The Florida Bar", "the Bar" or "Complainant". Lijyasu Kandekore will be referred to as "Respondent" or "Mr. Kandekore" or "Lijyasu Kandekore".

Abbreviations utilized in this brief are as follows: "TR" will be used to refer to the transcript of the final hearing held on July 26, 1996. "A" will be used to refer to the appendix.

As to the Appendix:

"A-1" will be used to refer to the complaint of The Florida Bar filed on March 8, 1996.

"A-2" will be used to refer to the order of disbarment of the New York Court dated December 19, 1995.

"A-3" will be used to refer to the referee's order dated August 2, 1996.

STATEMENT OF THE CASE AND OF THE FACTS

On March 8, 1996, The Florida Bar filed its complaint charging the respondent with having been found guilty by a jury in the State of New York of a felony of assault of the second degree and the misdemeanor charges of resisting arrest and driving while ability impaired. The complaint alleged that the New York Bar, of which the respondent was a member, sought and obtained respondent's disbarment from the Appellate Division of the Supreme Court of New York on December 19, 1995 as a result of the felony conviction. (A-1) The Florida Bar's complaint was filed pursuant to Rule 3-7.2(j)(2)of The Rules Regulating The Florida Bar which provides that the adjudication by a court or other disciplinary jurisdiction of misconduct shall be sufficient basis for the filing of a complaint and appointment of a referee without a finding of probable cause.

On August 9, 1995, The Florida Bar had filed its Notice of Determination of Guilt. On August 17, 1995, the respondent had filed his Petition to Terminate or Modify Suspension. On November 1, 1995 this Honorable Court issued its order granting the Petition to Terminate or Modify Suspension pending the disposition of the respondent's convictions.(Supreme Court Case No. 86,224). The complaint filed in the instant matter made reference to the

proceedings in regard to The Florida Bar's endeavor to obtain respondent's suspension pursuant to the conviction of a felony. (A-1, p. 3, fn. 1)

On March 15, 1996, this court issued its order to the chief judge of the eleventh judicial circuit requiring the appointment of a referee. Pursuant to said order, the Honorable Thomas M. Carney, Circuit Judge was appointed on March 20, 1996.

A final hearing was held before Judge Carney on July 26, 1996. The Florida Bar introduced the judgment of the New York Court disbarring the respondent, as well as a response by the court to Mr. Kandekore's objection to the automatic disbarment rule in the State of New York. The court stated that the issue had been litigated and decided against the respondent.(TR 18, The Florida Bar Ex. 2) The next item introduced into evidence by The Florida Bar was the sentencing commitment which provided that as to count I, assault, time served and five years of probation; as to count II, resisting arrest, was concurrent and that the respondent lost his driver's license for ninety (90) days and was fined $400.00.(TR 18-19, The Florida Bar Ex. 2) The Florida Bar submitted the indictment into evidence. It alleged that on October 30, 1993, the respondent with the intent to prevent a police officer from performing a lawful duty caused physical injury to a police

officer. (TR 19-20, The Florida Bar Ex. 3) The next item introduced was the testimony at Mr. Kandekore's criminal trial of Officer Wagman, the law enforcement officer the respondent was found to have assaulted. (TR 30, The Florida Bar Ex.4) The Florida Bar read several portions of the testimony into the record. They included the following:

> That the officer asked the respondent to return to his car. The respondent told the officer he had no right and began punching the officer in the chest and in the side of the head. (TR 21)
>
> That the officer pushed the respondent to the ground, advised him to remain there and that he was under arrest. The respondent ignored the officer and attacked him again and was again pushed to the ground and advised he was under arrest. The respondent got up again, grabbed the officer around his legs, lifted him up and body slammed him head first into the pavement. (TR 22)
>
> That while the officer was on the ground, the respondent was punching, kneeing and kicking the officer. The officer said he was fighting for his life. (TR 23)
>
> That when another officer arrived on the scene both tried to handcuff the respondent. The respondent resisted and caused the handcuffs to rip the officer's hand wide open between the index finger and the thumb. (TR 25-26)
>
> That the officer continues to have blurriness in his right eye and constant headaches. The officer at times can take two tylenol every four or five hours. When that does not work he takes Midrin, which is effective but puts him to sleep. (TR 27-29)

The final composite exhibit introduced by The Florida Bar

were two judgments out of the civil courts of New York.(TR 32, The Florida Bar Ex. 5) One involved a lawsuit brought by the officer and his wife against the respondent. The officer received a summary judgment as to liability for assault, battery, and negligence finding that the jury in the criminal case necessarily discredited the respondent's position that he never hit the officer by their verdict. (TR 30-31) The other lawsuit was one brought by the respondent against the Town of Greenburgh and the two police officers and dismissed by the court. In so doing the court stated that the jury by their verdict necessarily credited the police testimony and found they were acting lawfully and that the arrest was authorized. (TR 31-32) The Florida Bar rested its case after presenting case law and references to the Florida Standards for Imposing Lawyer Sanctions as a basis for the referee to impose disbarment as a disciplinary sanction.

The respondent then argued that The Florida Bar had not presented other testimony from the criminal trial which the respondent believed established that the officer suffered no injuries.(TR 38). The respondent contended that the civil judgments introduced were irrelevant. (TR 39) The respondent presented no evidence and sought a continuance to do so. The request was denied.(TR 41)

Thereafter, the referee made the following findings of fact.

> THE REFEREE: All right. Let me just set out some findings for the record here.
>
> Firstly, it's apparent to the Court that Mr. Kandekore was convicted of a felony in the State of New York previously. That is still pending on appeal.
>
> Under theory of what I guess you'd call the rules of reciprocal discipline, the Bar now seeks for me to recommend that the Respondent be disbarred because he was disbarred previously in New York. That's the second track issue here.
>
> Now, the Supreme Court of Florida has previously granted something in the nature of an injunctive relief allowing the Defendant or Respondent a respite from proceedings to disbar him until the resolution of the appeal in New York.
>
> Now, a petition for rehearing in the case which is 86-224 -- that's the Florida Supreme Court number -- the petition was denied without explanation, which to me indicates that the injunctive relief that they granted is still viable, is still alive. So I'm going to recommend that in this case, this case be stayed until such time as the resolution of the appeal in New York.
>
> If the appeal is affirmed, the Court will alternatively now recommend that he be disbarred. If it is reversed, that he be retained as a Florida in lawyer in good standing.
>
> That's it.

(TR 43-44)

On August 2, 1996, the referee forwarded written findings which stated:

FINDINGS OF FACT

1. Respondent was convicted of a felony in the State of New York.

2. Respondent has appealed that conviction and it is presently pending.

3. Respondent has been disbarred in New York pursuant to the above conviction.

4. In a prior disbarment proceeding in Florida based on the same felony conviction, Respondent obtained a stay from the Florida Supreme Court. Case No. 86-224.

5. Said stay remains in force until the disposition of Respondent's appeal of the New York conviction.

RECOMMENDATION

1. That this case be dismissed pursuant to the Order of the Florida Supreme Court in Case No. 86-224 dated November 1, 1995.

2. That the Florida Bar's grounds of "reciprocal discipline" be denied because;

   a) New York's disbarment is, by operation of law, an automatic proceeding that follows the Respondent's conviction without any hearing whatsoever.

   b) Respondent is entitled to the benefit of the prior ruling of

the Florida Supreme Court.

3. That after notification of the results of the appeal, Case No. 86-224 be reopened.

(A-3)

As a result, The Florida Bar filed a motion for rehearing. The motion was denied on August 15, 1996. This appeal follows.

SUMMARY OF ARGUMENT

The Respondent, formerly a member of the New York Bar, was disbarred in that state as a result of being convicted by a jury of a second degree violent felony, assault on a police officer. The Florida Bar filed its complaint on that basis. Previously this Court had stayed The Florida Bar's request to felony suspend the respondent as a result of respondent's argument that he was a victim of racial discrimination. The parties were requested to advise this tribunal when the appellate court in New York rendered its decision regarding Mr. Kandekore's appeal of his felony conviction.

The appointed referee dismissed the case on the basis of the stay imposed by this court in the felony suspension case as well as the referee's inferred disagreement with the New York procedure of automatically disbarring any attorney convicted of a felony.

The Florida Bar posits that the respondent has failed to meet his burden of establishing an infirmity in the New York procedure. Further, the New York Court in its opinion specifically addressed respondent's contention that their procedure of automatic disbarment constituted a deprivation of Mr. Kandekore's rights by pointing out that their procedure had been previously adjudicated constitutional.

The Florida Bar further contends that given the type of crime

committed, disbarment is mandated by case law and the Florida Standards for Imposing Lawyer Sanctions.

POINTS ON APPEAL

I

WHETHER THE REFEREE'S RECOMMENDATION TO DISMISS THE CASE WAS ERRONEOUS?

II

WHETHER DISBARMENT IS THE APPROPRIATE LEVEL OF DISCIPLINE?

I

THE REFEREE'S RECOMMENDATION TO DISMISS THE CASE WAS ERRONEOUS

Rule 3-4.6 of the Rules Regulating The Florida Bar provides:

> A final adjudication in a disciplinary proceeding by a court or other authorized disciplinary agency of another jurisdiction, state or federal, that an attorney licensed to practice in that jurisdiction is guilty of misconduct justifying disciplinary action shall be considered as conclusive proof of such misconduct in a disciplinary proceeding under this rule.

The introduction in evidence of a properly authenticated judgment by a sister state shall constitute conclusive proof of guilt of the acts of misconduct. The Florida Bar v. Wilkes, 179 So.2d 193 (Fla. 1965). The referee is to decide what discipline shall be appropriate. In Re Question of law certified to the Supreme Court of Florida by the Florida Board of Bar Examiners, 265 So.2d 1, 2 (Fla. 1972). In the case at hand, The Florida Bar introduced the judgment of the State of New York disbarring the respondent. (TR 18)

Wilkes, supra went on to state:

> Nevertheless, right and justice require that when the accused attorney shows that the proceeding in the foreign state was so deficient or lacking in notice or opportunity

> to be heard, that there was such a paucity of proof, or that there was some other grave reason which would make it unjust to accept the foreign judgment as conclusive proof of guilt of the misconduct involved Florida can elect not to be bound thereby. We should note here that the burden of showing why a foreign judgment should not operate as conclusive proof of guilt in a Florida disciplinary proceeding is on the accused attorney.
>
> Wilkes, at 198.

Mr. Kandekore had the burden of establishing "a paucity of proof" or some other "grave reason" why the judgment of the New York Court should not operate as conclusive proof. He made no showing whatsoever. In fact, The Florida Bar introduced the testimony of the assaulted officer for the purpose of establishing the egregious set of circumstances and injuries to the officer for consideration toward the level of discipline to be imposed. The respondent did not seek to introduce any portion of the criminal trial.

In The Florida Bar v. Friedman, 646 So.2d 188 (Fla. 1994), that attorney was prosecuted by the New York Bar. The New York Court ordered an indefinite suspension. This Court held that it was Mr. Friedman's burden to demonstrate why the foreign judgment is not valid or why Florida should not accept it. In finding that Mr. Friedman had failed to meet his burden, this Court pointed out

that Mr. Friedman was given ample opportunity to demonstrate any inadequacies.

Mr. Kandekore was on notice of the proceedings against him from the point that the complaint of The Florida Bar was served. It was The Florida Bar that introduced the opinion of the New York Court which specifically addressed Mr. Kandekore's contention that the New York procedure of automatic disbarment for a felony conviction was unconstitutional. The opinion set forth that the issue had previously been litigated and adjudicated and that the procedure was held constitutional. (A-2)

It is well established that if there is record support for a referee's findings, this Court will not substitute their judgment for that of the referee. The Florida Bar v. Segal, 663 So.2d 618 (Fla. 1995). In the case sub judice, the referee found in part:

> 4. In a prior disbarment proceeding in Florida based on the same felony conviction, Respondent obtained a stay from the Florida Supreme Court. Case No. 86-224.
>
> (A-3)

In fact, however, the case referenced was not a disbarment proceeding but rather a proceeding to obtain respondent's suspension pursuant to Rule 3-7.2(b)(1) of the Rules Regulating The Florida Bar, commonly referred to as a felony suspension. Thus,

there is not "record support" for the referee's finding. This finding is most significant since the remaining conclusions by the referee necessarily flow from a faulty premise.

Clearly, the referee has deduced that The Florida Bar is attempting two bites at the same apple. Not only has The Florida Bar not sought a second bite, but the fruit is completely different. First, the proceeding to obtain respondent's "felony suspension" constitutes temporary relief rather than permanent discipline. In this instance, the respondent was not suspended. Second, on August 9, 1995, at the time the felony suspension was sought, the respondent had not been disbarred by the New York Court. Third, the instant complaint filed by The Florida Bar was filed pursuant to the respondent's disbarment in the State of New York. That proceeding is final and is not subject to a further appeal. In fact, in the referee's report, he states the following:

That The Florida Bar's grounds of "reciprocal discipline" be denied because:

> a) New York's disbarment is, by operation of law, an automatic proceeding that follows the respondent's conviction without any hearing whatsoever.
>
> (A-3)

Clearly, the referee was offended at the lack of a hearing in the State of New York to obtain respondent's disbarment pursuant to

his felony conviction. The New York Court addressed this issue in their order, as follows:

> Here, respondent was convicted after a jury trial in the Supreme Court of the State of New York, Westchester County, of Assault in the Second Degree, in violation of Penal Law §120.05[3], Resisting Arrest, in violation of Penal Law §205.30, and Driving While Ability Impaired, in violation of Vehicle and Traffic Law §1192. Respondent was sentenced for these offenses on April 28, 1995. Although the latter two offenses are non-felonies, Assault in the Second Degree is a Class "D" violent felony under the New York Penal Law. Thus, respondent ceased to be an attorney by operation of law upon his conviction of this crime (Judiciary Law §90[4][a]). Respondent's claim that the automatic disbarment provision of Judiciary Law §90(4)(a) is unconstitutional has previously been rejected by the Court of Appeals and this Court (Matter of Mitchell, 40 NY2d 153, 156; Matter of Simon, 146 AD2d 393, 395) and we are unpersuaded that those holdings require reexamination.
>
> (A-2)

Essentially, the referee as a result of his own personal distaste of the current state of the law in New York chose to ignore it, rather than give it the weight of stare decisis. Since the referee could not affect the New York proceeding, the referee instead used it against The Florida Bar in his ruling. In State ex rel. Florida Bar v. Bass, 106 So.2d 77 (Fla. 1958) this tribunal held that the power to discipline an attorney should be exercised on clear proof and not with passion or prejudice. By the same token, a referee's decision making in a disciplinary matter should not be influenced by passion without clear proof. Such occurred

here since the referee's ruling without any evidentiary support was based on a personal opinion.

In Greer's Refuse Service, Inc. v. Browning-Ferris Industries of Delaware, 843 F.2d 443 (11 Cir.Ct.App. 1986) the Eleventh Circuit Court of Appeals held that the district court erred in failing to give intrinsic consideration to the records of an attorney's suspension and disbarment in Florida and New York respectively.

Last, respondent argued and the referee ruled that the stay imposed in the felony suspension case is transferred to the current case. The two cases, as previously set forth are different. One was the endeavor of a felony suspension pursuant to a felony conviction. The other is the result of a disbarment by a sister state. Had this Honorable Court intended the stay in the first matter to "transfer" the Court would not have requested the appointment of a referee. Should this Court agree that the stay is transferrable to the reciprocal discipline case, it should be stayed, rather than dismissed. Same would be consistent with the referee's ore tenus findings. (TR 43-44)

II

WHETHER DISBARMENT IS THE APPROPRIATE LEVEL OF DISCIPLINE

Since the referee in his written findings dismissed this matter, a written disciplinary recommendation was not made. The referee, however, at the conclusion of the final hearing announced the following from the bench:

> So I'm going to recommend that in this case, this case be stayed until such time as the resolutions of the appeal in New York.
>
> If the appeal is affirmed, the Court will alternatively now recommend that he be disbarred. If it is reversed, that he be retained as a Florida lawyer in good standing.
>
> (TR 43-44)

This Court has held that it is ultimately its task to determine the appropriate sanction. The Florida Bar v. Reed, 644 So.2d 1355 (Fla. 1994).

The respondent was convicted of a felony, designated as violent in the State of New York. The felony was the assault of a police officer. In The Florida Bar v. Eberhart, 631 So.2d 1098 (Fla. 1994) it was held that a suspension or resignation from another state warrants disbarment in this state. The Florida Bar v. Clark, 359 So.2d 863 (Fla. 1978) stood for the proposition that a lawyer who loses his or her civil rights following a felony

conviction should not be allowed to have the privilege of practicing law. In that Mr. Kandekore did lose some of his civil rights in New York as a result of that conviction, he like Mr. Clark, is not entitled to hold the privilege of a law license. New York Statute, Judiciary Law Section 510, New York statute, Election Law, Section 5-106, subsections 3 and 5[1]. See also, In Re Florida Bar of Bar Examiners, 350 So.2d 1072 (Fla. 1977).

In Kentucky, an attorney named Mr. Evans pled guilty to assault under extreme emotional distress and wanton endangerment in the first degree, and was disbarred. Mr. Evans beat up another lawyer in a courthouse and threatened a bailiff. Kentucky Bar v. Evans, 843 S.W.2d 320 (Ky. 1992).

In The Florida Bar v. Barket, 633 So.2d 19 (Fla. 1994), that attorney was convicted of the felony of lewd and lascivious assault upon a minor and was disbarred. That respondent paid his client $100.00 to have sexual intercourse with a fifteen (15) year old runaway. Although, Mr. Kandekore's assault does not involve a minor, it does involve a police officer in the exercise of his lawful authority. An attorney, as an officer of the court, should

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[1] Section 510 provides that one who has been convicted of a felony may not serve as a juror. Section 5-106 provides that one who has been convicted of a felony and sentenced to imprisonment may not vote. Mr. Kandekore was sentenced to time served.

be most cognizant and respectful of the need to obey the law, as well as the law enforcement authorities who are charged with the task of enforcing those laws.

Section 5.11 of the Florida Standards for Imposing Lawyer Sanction provides, in part:

> a. Disbarment is appropriate when a lawyer is convicted of a felony under applicable law.
>
> b. Disbarment is appropriate when a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropiration, or theft.

Both standards are applicable. First, Mr. Kandekore was convicted of a felony. Second, the assault on a police officer after a lawful arrest is most certainly serious criminal conduct which includes the interference with the administration of justice.

The foregoing cases and standards require that Mr. Kandekore be disbarred and that The Florida Bar be awarded costs for the prosecution of this matter.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully requests that this Honorable Tribunal not follow the referee's recommendation to dismiss this matter and find instead that the respondent should be disbarred and that The Florida Bar should be awarded costs.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of this complainant'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 a true and correct copy was mailed to Lijyasu Kandekore, respondent, at his record bar address of 20401 N.W. 2nd Avenue, Suite 206, Miami, Florida 33169, and to his last known address of 18350 N.W. 2nd Avenue, 5th Floor, Miami, Florida 33169, on this 1st day of November, 1996.

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