FILED
SID J. WHITE
APR 29 1999
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

6/3

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

LIJYASU KANDEKORE,

Respondent.
_____/

The Florida Bar Case
Case No. 96-70,553(11A)

Supreme Court Case
No.87,538

RESPONDENT'S PETITION FOR REVIEW OF REFEREE'S FINDINGS OF FACT AND RECOMMENDATION

LIJYASU KANDEKORE, ESQ.
On his own behalf
18350 N.W. ~~183rd Street~~ 2nd Ave
5th Floor
Miami, FL 33169
(305) 651-3080
FBN 968374.

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

LIJYASU KANDEKORE,

Respondent.
_____/

The Florida Bar Case
Case No. 96-70,553(11A)

Supreme Court Case
No.87,538

RESPONDENT'S PETITION FOR REVIEW OF REFEREE'S FINDINGS OF FACT AND RECOMMENDATION

COMES NOW the Respondent, **Lijyasu Kandekore, Esq.,** on his own behalf and files this his petition for review of the Referee's findings of fact and recommendations and can show as follows:

1. That the respondent acknowledges receipt of the referee's supplemental findings of fact and recommendation herein dated March 29, 1999.

2. That by the complaint filed herein the complainant pursuant to Rule 3-7.2(j) (2) requested that the respondent be "appropriately disciplined" because he "...has violated Rule 4-8.4(b)..." of the Rules of Professional Conduct, to wit, (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).

3. That it is to be observed that the complaint herein was filed subsequent to a previous complaint in Supreme Court Case No. 86,224 and refers to the same set of facts. Whereas the first complaint (Supreme Court Case

No. 86,224) seeks suspension pursuant to Rule 3-7.2(e) based upon the fact of a conviction by the respondent the second complaint (Supreme Court Case No. 87,538) seeks "appropriate discipline" based upon the discipline imposed by the State of New York which discipline is itself based upon the fact of the conviction and for which there was no fact finding hearing.

4. This Court ordered a stay in the first case pending the outcome of the appeal in New York and this Court has now acted upon that decision although a copy of the Court's order has not been served upon the respondent and this Court has been advised of that fact.

5. That the complaint herein which is the second case is therefore violative of double jeopardy protections provided by law and the constitutions of the United States and of the State of Florida.

6. That the second complaint is based upon the fact that the respondent was the subject of disciplinary proceedings in the state of New York and concedes that this court had already dealt with the matter under another provision by granting the respondent's motion to terminate or modify suspension of any disciplinary proceedings. (Complaint, para. 7).

7. That a referee was duly appointed pursuant to the complaint filed herein and a partial hearing was held (no hearing was held in the first case) during which the complainant presented a partial transcript of the evidence taken at the trial of the respondent in New York and which contained only part of the complainant police officer's testimony at the

trial but failed to disclose to the referee the following relevant and crucial materials:

a. The testimony given by the said police officer under cross examination at the trial;

b. His testimony before the grand jury;

c. His testimony before a Hearing Officer;

d. The respondent's testimony at the trial;

e. The testimony of the doctor at trial;

f. The medical records of the complainant police officer; and

g. The work record of the police officer.

8. That at the hearing before the referee the respondent pointed out this disparity to the referee and sought an adjournment to introduce these materials. (Transcript, 40-41).

9. The referee denied the motion (Tr. 41) and recommended that,

a. the complainant's case herein be dismissed; and that

b. the complainant's grounds for "reciprocal discipline" be denied. (Referee's Recommendation, p.2).

10. That this Court accepted the referee's findings of fact but declined to act upon his recommendation to dismiss the charges and instead ordered a stay of the proceedings pending the outcome of the appeal in New York.

11. That by order of this court the referee was subsequently directed to submit a supplemental report (in the second case) as to discipline and once again the respondent sought a resumption of the fact finding hearing

to present his side of the story and the documentary evidence referred to above. (*See* Record Extracts 1 & 2 submitted herewith).

12. That the referee made no response to the respondent's request and did not resume the adjourned hearing but instead made a supplemental report which made no additional findings of fact. It repeated his previous findings by incorporation and made a recommendation "...based upon the testimony and evidence taken [at the previously held partial hearing].

13. The referee recommended that the respondent be disbarred. (Supplemental Report of Referee as to Discipline).

14. That if the referee had the materials referred to above he would have made different findings of fact and made a different recommendation.

15. That in light of the foregoing it is clear that the respondent was denied a full and fair hearing and an opportunity to present evidence in mitigation all in violation of due process. State ex rel. The Fla. Bar v. Evans, 94 So.2d 730, 735 (Fla. 1957) cited with approval in The Florida Bar v. Schreiber, 631 So.2d 1081, 1082 (Fla. 1994).

16. That the reciprocal discipline that the complainant seeks to enforce is from a state which imposed that discipline without a hearing as recognized by the referee (Referee's Findings of Fact). In those circumstances it is critical that a proper fact finding be held before taking any action on the mere fact of that disciplinary action in New York. Additionally this court has maintained that "traditional concepts of due process" require that the attorney be given notice and an opportunity to

be heard and to present evidence in mitigation of penalty. The Florida Bar v. Schreiber, 631 So.2d 1081, 1082 (Fla. 1994) *citing* State ex rel.The Fla. Bar v. Evans, 94 So.2d 730, 735 (Fla. 1957); The Florida Bar v. Wilson, 643 So.2d 1063, 1064 (Fla. 1994) *citing* The Fla. Bar v. Jahn, 509 So.2d 285 (Fla. 1987).

17. The fact of a felony conviction is not conclusive on the ultimate disciplinary action to be taken. The Florida Bar v. Fussell, 179 So.2d 852, 854 (1965), 179 So.2d 852, appeal after remand 189 So.2d 881.

18. That the recommended discipline of disbarment is clearly erroneous and is not supported by the evidence. The referee has failed to state any reasons for his recommendation and has applied an "automatic" disbarment standard contrary to law.

19. That this court has maintained that a felony conviction does not automatically require disbarment. The Florida Bar v. Wilson, 643 So.2d 1063, 1064 (Fla. 1994) *citing* The Fla. Bar v. Jahn, 509 So.2d 285 (Fla. 1987).

20. That the referee has failed to take into consideration the respondent's impeccable record both as a lawyer and as a civilian who has never had any disciplinary measures directed at him as an attorney or in his non-professional capacity and this is so both before the New York incident as well as since that incident which occurred almost six years ago. The respondent was not given an opportunity to call witness to testify as to his character. This would have been feasible had the referee resumed

the hearing as he proposed in his previous recommendation and upon which the respondent relied to his detriment. (Transcript 40-41). This court has held that when imposing sanction in attorney discipline case it is appropriate to consider the attorney's disciplinary history. The Florida Bar v. Wasserman, 654 So.2d 905 (1995). There this Court said that "a bar disciplinary action must serve three purposes: the judgment must be fair to society, it must be fair to the attorney, and it must be sufficient to deter other attorneys from similar misconduct. *See, e.g.,* The Florida Bar v.Poplack, 599 So.2d 116, 118 (Fla. 1992); The Fla. Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970)."

21. That it is respectfully submitted that the recommendation of the referee fails to satisfy any of those purposes. The full set of circumstances surrounding the conviction has not been aired and the respondent has been deprived an opportunity to present his side of the story or to call witness to testify as to his character. The relevant conduct does not touch or concern the practice of law and occurred in the privacy of the respondent's home and was precipitated by unlawful police conduct. No member of the public was hurt nor was the police injured. No weapon was used. The police admitted that he knocked the respondent to the ground several times and that he lied when he presented an affidavit saying that the respondent was drunk. The respondent has an impeccable record both as an attorney and as a private citizen and has never been subjected to disciplinary action in any jurisdiction.

22. That cases dealing with disbarment have show that such discipline is applied to serious cases of dishonesty or fraud perpetrated against the public or clients. Wilson, *supra*.

23. That the relevant rule [R. 4-8.4(b)] contemplates a violation not for a conviction **of *any crime*** but ***a crime which reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.*** It is self evident that the relevant rule proscribes crimes which involve the absence of honesty or breach of trust or similar traits. The relevant conviction does not involve such features being assault and resisting arrest.

24. That the proceedings herein are accusatory in nature and is akin to criminal proceedings. Accordingly it is respectfully submitted that the complainant has the responsibility to present a fair case and not to conceal evidence from the referee for the purpose of obtaining a decision unfavorable to the respondent. The complainant has failed so to do.

25. That on March 11, 1999 this Court made an order returning the file to the referee to submit a supplemental report.

26. That if the complainant had given the referee the relevant document's referred to above or if the referee had resumed the hearing and given the respondent an opportunity to present that evidence the findings of fact would reveal that the police office was the aggressor that he acted unlawfully and that the charge of passing a red light was false as demonstrated by the acquittal of the respondent of that charge. Further

the findings of fact would show that the police invaded the respondent's home because he thought the respondent being a black person entering an all-white apartment building late at night was unlawfully there and therefore contrived a rationale by falsely testifying that the respondent had passed a steady read light near the entrance to the apartment building. Additionally it would have demonstrated the admission by the complainant police officer that the document he signed accusing the respondent of being intoxicated was false; that he received no injuries and that it was the respondent in fact who was injured; that he missed no time from work and that in a subsequent medical document which the government concealed from the respondent at the trial the police admitted that his claims of headaches were false.

27. That where a lawyer who beat up his wife pleaded no contest to a battery he was suspended for 120 days Florida Bar v. Schreiber, 631 So.2d 1081 (1994). The instant case is nowhere as serious as that case and the circumstances of the offense would have revealed that it is minor because the offense is categorized as a felony in New York only because the complainant is a police officer.

28. That the conviction of the respondent is based upon fabricated testimony by white police officers that entered the respondent's home in October 1993 and beat him up. When the respondent reported the matter to his congressman and brought an action against the municipal employer of the police and the main police actors the later swore false testimony against

the respondent and admitted that the evidence was false yet a white jury convicted the respondent even though they acquitted him of the alleged violation which precipitated the entry of the respondent's home, to wit, the passing of a steady red light.

29. That the trial and conviction were both violative of federal law in many respects inclusive of but not limited to the government's hiding from the respondent exculpatory material in violation of **Brady** and which would prove conclusively that the white police officer feigned injury at the hands of the respondent. Additionally the trial judge's erroneous summation to the jury in which he removed from them the issue of whether the white police officer was in the lawful exercise of his duty when he invaded the respondent's home ostensibly to investigate the passing of a steady red light which the jury rejected by acquitting the respondent. This is in clear violation of New York law (see People v. Greene, 221 A.D.2d 559; 634 N.Y.S.2d 144 (A.D. 2 Dept. 1995). There the court said, "Whether the arrest was lawful and whether the police conduct was authorized were elements of the crime charged which should have been submitted to the jury for resolution (People v. Harewood, *supra; see also,* 2 CJI [N.Y.] PL 120.05[3] at 110A-110D ..." The intermediate appellate court nonetheless affirmed because the issue was not preserved for appeal with the unfortunate consequence that although the conviction is clearly erroneous the judgment will not be reversed and the respondent is obliged to bear the consequences of an

unlawful judgment. Further this raises constitutional issues of equal protection and due process as well as search and seizure violations of federal law.

30. That it is instructive to observe that the federal search and seizure law is the same as that of the State of Florida and this court has held that where "...the driver did not violate [the traffic law] ... he should not have been stopped." State v. Riley, 638 So.2d 507 (Fla. 1994).

31. That in the circumstances the complainant is in effect proposing that this court imports into the state's jurisprudence clear error of a sister state and to do so where the judgement in question is violative of federal law and this state's own laws.

32. That the respondent has taken steps to pursue collateral attack on the adverse judgment.

33. That by reason of the foregoing the referee's findings of fact should not be accepted and his recommendation should not be accepted.

34. That all matters of fact herein are made under penalty of perjury.

WHEREFORE the respondent respectfully requests that this Honorable Court reject the referee's report findings of fact and recommendation and dismiss the complaint or in the alternative direct that a proper fact finding hearing be held or make such other and or further order as in all the circumstances is just and proper.

Respectfully submitted,

LIJYASU KANDEKORE, ESQ.
On his own behalf

18350 N.W. 183rd Street
5th Floor
Miami, FL 33169
(305) 651-3080
FBN 968374.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was sent by mail on April 28, 1999 to the following:

The Clerk
Supreme Court of Florida
500 South Duval Street
Tallahassee, FL 32399

The Florida Bar
444 Brickell Avenue
Rivergate Plaza, Suite M-100
Miami, FL 33131

Staff Counsel
Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399

L. MONTY KANDEKORE, ESQ.