

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

**Supreme Court Case
Complainant/Appellant, No. SC04-1418**

v.

DAVID MARSHALL BROWN

**The Florida Bar File
No. 2004-50, 654(17C)**

Respondent/Appellee.

THE FLORIDA BAR'S INITIAL BRIEF ON APPEAL

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PRELIMINARY STATEMENT

Throughout this Initial Brief on Appeal, The Florida Bar will refer to specific parts of the record as follows: The Report of Referee will be designated as RR ____ (indicating the referenced page number). The transcript of the Final Hearing held on January 20, 2005, will be designated as TT ____, (indicating the referenced page number).

THE FLORIDA BAR'S STATEMENT OF THE CASE AND THE FACTS

The Florida Bar's Complaint in this matter was filed on July 16, 2004. The Florida Bar alleged that on or about July 10, 2003, after a traffic stop, Respondent was arrested for driving under the influence, possession of cocaine, reckless driving, failure to maintain a single lane, and speeding. On or about July 24, 2003, in the case styled State v. David Marshall Brown, Case No. 03-11418CF10A, in the Seventeenth Judicial Circuit in and for Broward County, Florida, Respondent was charged with possession of cocaine in violation of Florida Statutes Section 893.13(2), and Driving Under the Influence in violation of Florida Statutes Section 316.193(1) . In or about August of 2003, Respondent admitted that he was in possession of cocaine at his arrest on July 10, 2003. Respondent's drug offenses were then transferred to Drug Court, a pre-trial intervention program presided over by the Honorable Marcia Beach. Respondent successfully completed this pre-trial intervention program. However, Respondent remains the subject of a misdemeanor charge for driving under the influence, which is pending before the Honorable Fred J. Berman, Seventeenth Judicial Case No. 04-7404-MM-10A.

The Respondent was charged with violations of Rules Regulating The Florida Bar 3-4.2 [Violation of the Rules of Professional Conduct as adopted by the rules governing The Florida Bar is a cause for discipline]; 3-4.3 [The commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise, whether committed within

or outside the State of Florida, and whether or not the act is a felony or misdemeanor may constitute a cause for discipline], and 4-8.4(b) [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.]

On August 12, 2004, the Honorable Roger B. Colton was appointed as Referee in these proceedings. On January 20, 2005, Respondent executed an Unconditional Guilty Plea to the allegations and rule violations contained in The Bar's complaint. The Referee conducted a Final Hearing on January 20, 2005, to hear testimony in order to make a recommendation as to the appropriate sanction to be imposed. The Referee heard testimony from the following individuals: Respondent, Gary J. Rotella, Esq., a friend and colleague of Respondent, and Melissa Moseley, Respondent's secretary. Respondent has been a member of The Florida Bar since 1994 and has no prior disciplinary history. Additionally, Respondent is and has been a member of the State Bar of Georgia since 1989. After hearing this testimony, the Referee recommended that Respondent be found guilty of R. Regulating Fla. Bar 3-4.2, 3-4.3, and 4-8.4(b). (RR 5-6) The Referee recommended that Respondent be sanctioned by imposition of a twenty (20) day suspension from the practice of law, that he be placed on a three (3) year period of probation with the following conditions: Execution of a rehabilitation contract with Florida Lawyers Assistance, Inc., active participation in Florida Lawyers Assistance, Inc., including attendance at NA/AA meetings, attorney support meetings, and random

urinalysis screenings. Additionally, the Referee recommended that Respondent refrain from the use of alcohol, and the use, possession, and sale of illegal drugs and controlled substances except those prescribed by a physician, payment of the costs of participation and monitoring by Florida Lawyers Assistance, Inc., and payment of The Bar's costs for prosecution of this matter. (RR 6-7) .

It is from this Report of Referee that the Complainant appeals the length of the recommended suspension.

SUMMARY OF THE ARGUMENT

The Referee's recommended discipline of a suspension of twenty (20) days is insufficient based upon the facts of the case, The Florida Standards for Imposing Lawyer Sanctions, and relevant case law. The discipline recommended by the Referee is insufficient to deter others from the same misconduct. Respondent possessed cocaine and was arrested for driving under the influence of alcohol. While Respondent is remorseful for his conduct, he has not proved rehabilitation. Respondent should receive a ninety-one (91) day suspension and should be required to prove rehabilitation before being reinstated to the practice of law.

ARGUMENT

A NINETY-ONE (91) DAY SUSPENSION IS THE APPROPRIATE SANCTION FOR RESPONDENT'S POSSESSION OF COCAINE AND ARREST FOR DRIVING UNDER THE INFLUENCE OF ALCHAOL BASED ON THE RECORD, CASE LAW, AND STANDARDS FOR IMPOSING LAWYER SANCTIONS.

This Court has stated that the review of the discipline recommendation does not receive the same deference as the guilt recommendation because this Court has the ultimate authority to determine the appropriate sanction. The Florida Bar v. Grief, 701 So. 2d 555 (Fla. 1997) and The Florida Bar v. Wilson, 643 So. 2d 1063 (Fla. 1994). This Court has further stated that it will not second guess a Referee's recommended discipline if it has a reasonable basis in law and in the standards for imposing lawyer sanctions. The Florida Bar v. Feinberg, 760 So. 2d 933 (Fla. 2000), The Florida Bar v. Sweeney, 730 So. 2d 1269 (Fla. 1998), The Florida Bar v. Lecznar, 690 So. 2d 1284 (Fla. 1997).

The Florida Bar submits that the Referee's recommended discipline of a twenty (20) day suspension is inconsistent with current case law. Moreover, such a brief suspension will not serve to protect the public or the legal system, is not sufficient punishment for the ethical breach committee, nor will it serve as a deterrent to Respondent other attorneys from engaging in similar misconduct.

In The Florida Bar v. Weintraub, 528 So. 2d 367 (Fla. 1988), this Court approved the Referee's findings and imposed a ninety (90) day suspension for misconduct involving the possession of a controlled substance. Weintraub pled nolo contendere and the adjudication of guilt was withheld subject to successful completion of the terms of his probation. During the course of Weintraub's negotiations with The Bar, he contacted Florida Lawyers Assistance, Inc. In recommending a ninety (90) day suspension rather than a ninety-one (91) day suspension, the Referee considered expert testimony and an evaluation completed by Florida Lawyer's Assistance, Inc., which determined that Weintraub was not an addict with need for a systematic program of treatment. Respondent's participation in Florida Lawyers Assistance, Inc.'s counseling sessions were considered as part of mitigation.

Similarly in The Florida Bar v. Temmer, 632 So. 2d 1359(Fla. 1994), citing The Florida Bar v. Weintraub, the Court upheld a recommendation of a ninety (90) day suspension instead of a ninety-one (91) day suspension, noting an absence of a prior disciplinary history and active efforts to seek professional assistance for substance abuse. In determining whether Temmer merited a suspension that did not require rehabilitation, the court heard testimony that Temmer sought the assistance of a mental health counselor to deal with abusive relationships, contacted Florida Lawyers Assistance, Inc., the assistance of a psychiatrist specializing in addictionology, as well as a licensed clinical social worker. The Florida Lawyers Assistance, Inc., evaluation and psychiatrist's report

concluded that there did not appear to be sufficient evidence upon which to infer a substance abuse problem. Four random urine screens were conducted after The Bar's involvement in the investigation of Temmer's conduct. The urine screens were negative.

Respondent's misconduct in this case is deserving of a rehabilitative suspension. His criminal charges before Judge Berman are pending. Irrespective of the outcome of the disposition of the misdemeanor driving under the influence charges, Respondent possessed cocaine and was driving while under the influence. In The Florida Bar v. Schram, 355 So. 2d 788 (Fla. 1978), Schram entered a guilty plea for consent judgment admitting to possession of paraphernalia, a misdemeanor, and admitted guilt to possession of marijuana, for which adjudication was withheld. Schram received a one (1) year suspension from the practice of law.

This Court in The Florida Bar v. Thompson, 500 So. 2d 1335 (Fla. 1987) upheld a Referee's recommendation of a ninety-one (91) day suspension requiring rehabilitation as a result of Respondent's no contest plea to charges of possession of cocaine, possession of a controlled substance, disorderly intoxication, and leaving the scene of an accident. Thompson challenged the ninety-one day suspension as unduly harsh. This Court, citing The Florida Bar v. Ruskin, 126 So.2d 142 (Fla. 1961), determined that a ninety-one (91) day suspension accompanying proof of rehabilitation was appropriate as "[A] mere suspension for a fixed period of time, with the assurance of automatic reinstatement as the end of the proscribed period, does not impose upon the lawyer the responsibility of

taking affirmative action during the period of suspension in order to gain readmittance at the end of the period.” Ruskin at 144.

Similarly in The Florida Bar v. West, 550 So.2d 462(Fla. 1989), West pled guilty to possession of cocaine. The trial court placed him on probation for three years, required him to complete a drug treatment program, and fined him \$5,000. This Court affirmed an eighteen (18) month suspension requiring reinstatement despite finding that West cooperated with the Bar, was remorseful, and was compliant with a treatment program that included alcohol counseling.

In the instant case, the Referee found mitigation. Respondent was admitted to The Florida Bar on January 21, 1994, has no prior disciplinary history, and has been a member of the Georgia Bar since 1989. The Referee found in mitigation: Absence of a prior disciplinary history [9.32(a)] ; Personal or emotional problems [9.32(c)]; Full and free disclosure to disciplinary board and cooperative attitude [9.32(e)]; Good character or reputation [9.32(g)]; Interim rehabilitation [9.32(j)]; Imposition of other penalties or sanctions [9.32(k)]; and Remorse [9.32 (l)]. The Referee found no aggravating factors (RR 8).

The Florida Standards for Imposing Lawyer Sanctions provided a format for Bar Counsel, Referees, and the Supreme Court to determine the appropriate sanction in attorney disciplinary matters. Standard 10.0 [Standards For Imposing Lawyer Sanctions in Drug Cases] provides the standards for imposing lawyer sanctions in cases involving

personal use and/or possession of controlled substances when no criminal conviction is obtained. Standard 10.2 provides that:

“[A]bsent aggravating and mitigating circumstances, a 91-day suspension followed by probation is appropriate when a lawyer engages in misdemeanor conduct involving controlled substances, regardless of the jurisdiction where such conduct offices and regardless of whether or not the lawyer is formally prosecuted or convicted concerning said conduct.”

Standard 11.0 [Mitigating Factors] provides that:

“In addition to those matters of mitigation listed in Standard 9.32, good faith, ongoing supervised rehabilitation by the attorney, through F.L.A., Inc., and any treatment program(s) approved by F.L.A., whether or not the referral to said programs was initially made by F.L.A., Inc, occurring both before and after disciplinary proceedings have commenced may be considered as mitigation.”

The Report of Referee does not contain any finding of mitigation of Standard 11.0 because as of the Final Hearing, Respondent had not submitted to an evaluation by Florida Lawyers Assistance, Inc., nor entered into a monitoring contract for treatment. Respondent repeatedly testified at the Final Hearing that he does not have a substance abuse problem. In the instant case, Respondent offered his completion in the Broward County Drug Court program in December of 2004, as evidenced by his testimony and certificates of completion, for the proposition that he was successfully rehabilitated. Respondent offered no expert testimony to advance his position. Respondent testified that he was aware of Florida Lawyers Assistance, Inc. In fact, he saw a copy of the monitoring contract one year ago and “didn’t enter into it then because [I] didn’t want to

overlap programs. It just seemed there was just too much... and I don't know that it would have been beneficial ..." (TT 94).

When asked if he participated in any follow-up after care, counseling sessions with NA/AA, or urine screens, from December of 2004 through the present, Respondent testified that he had not. (TT 91-92). When pressed by Bar Counsel as to why he had not participated in NA/AA meetings he responded that he had not because he had other matters and expenses to attend to:

“Bar Counsel: But attendance at AA and NA meetings in general is free and open to—
Respondent: That's correct. I also just moved in to a house. I'm trying to set up my furniture; just got my phone service today. I don't have any window treatments. The house was not completed. I don't have closet doors on the closets. ” (TT 95)

Respondent testified that he does not believe that he has a substance abuse problem. (TT 96, 105). “I really don't have a substance abuse problem. Any problem I have was associated with this highly-emotional time in my life and I dealt with that.” (TT 96). Respondent has also not participated in any type of therapy or psychotherapy with an individual therapist or mental counselor since completing the Drug Court Program. (TT 97). As of the Final Hearing on January 20, 2005, there were no safeguards in place to prevent a relapse or assist in the event of one.

In summary, Respondent has not yet proven rehabilitation as evidenced by the successful completion of treatment through Florida Lawyers Assistance, Inc. His

rehabilitation is based on his assertion that he does not have a substance abuse problem. Therefore, Respondent should receive a ninety-one (91) day suspension and prove rehabilitation before he is reinstated to the practice of law.

CONCLUSION

Pursuant to the foregoing facts and evidence, including Respondent's Unconditional Guilty Plea, the Standards for Imposing Lawyer Sanctions, and the pertinent case law, Respondent should be suspended from the practice of law in Florida for ninety-one (91) days. In addition, Respondent should be required to enter into a monitoring contract with Florida Lawyer's Assistance, Inc., comply with the recommendations of the treating professionals, pay any and all fees for the cost of the program and monitoring fees, and should be assessed The Florida Bar's costs in these disciplinary proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven (7) copies of The Florida Bar's Initial Brief have been furnished by Priority U.S. Mail and e-filed to Thomas D. Hall, Clerk of The Supreme Court of Florida, 500 S. Duval Street, Tallahassee, Florida 32399-1927; true and correct copies of the foregoing have been furnished by regular mail to Michael D. Gelety, Esq., Counsel for Respondent, 1209 SE 3rd Avenue, Fort Lauderdale, Florida 33316; and to John A. Boggs, Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 on this _____ day of May, 2005.

LILLIAN ARCHBOLD

CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel hereby certifies that the brief of The Florida Bar is submitted in 14 point, proportionately spaced, Times New Roman font, and that this e-filing has been scanned and found to be free of viruses by Norton Anti-Virus for Windows.

LILLIAN ARCHBOLD