

6-24-90

~~CONFIDENTIAL~~

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Supreme Court Case

No. 74,051

v.

JOHN E. KIRKPATRICK,

CONFIDENTIAL

Respondent.

On Petition to Review

BRIEF OF RESPONDENT

(Handwritten signature)

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ABBREVIATIONS

In this Brief, The Florida Bar will be referred to as "**Complainant.**" John E. Kirkpatrick will be referred to as "**Mr. Kirkpatrick.**"

Abbreviations utilized in this Brief are as follows: "**Tr**" will refer to the transcript of proceedings of November 9, 1989.

In the interest of brevity the appeal and the cross-appeal will be addressed jointly.

INTRODUCTION

The grievance brought by Complainant did not relate to Mr. Kirkpatrick's practice of law. Instead, the events which gave rise to this grievance were a speeding ticket, an argument with a police officer, and a plea of no contest under which Mr. Kirkpatrick agreed to attend civics classes. Mr. Kirkpatrick has fulfilled all obligations associated with his no contest plea.

Mr. Kirkpatrick appeals the finding that he violated a disciplinary rule and that he should be disciplined. Mr. Kirkpatrick did not engage in conduct prejudicial to the administration of justice as that term has been defined by this Court. See The Florida Bar v. Pettie, 424 So.2d 734 (Fla. 1982). The uncontradicted evidence establishes that Mr. Kirkpatrick did not knowingly violate the rules of any tribunal. The charges have no basis in the facts alleged in the grievance and are without support in the record.

This Court should reject the findings of the Referee and hold that Mr. Kirkpatrick violated no disciplinary rule and should not be disciplined. This Court should also disregard Complainant's unreasonable request that Mr. Kirkpatrick be publicly reprimanded.

STATEMENT OF THE CASE AND OF THE FACTS

Mr. Kirkpatrick is a thirty-two-year-old attorney in good standing, with no history of disciplinary charges. The Complainant introduced no evidence regarding Mr. Kirkpatrick's behavior other than his no contest plea and the alleged failure to appear for hearing that he had never received notice of.

At the time of the events in question, Mr. Kirkpatrick was an associate at the Miami law firm of Tew, Jordan & Schulte. (Tr. 24). Mr. Kirkpatrick routinely handled many court hearings without any complaints that he failed to appear in court when so required by his practice. (Tr. 25).

The grievance did not relate to the practice of law. Instead, it arose out of Mr. Kirkpatrick's misdemeanor arrest for resisting arrest without violence and the course of action resulting in his completion of his obligations to the trial court. While the Complainant's and the Referee's statement of the facts are not wholly inaccurate, they are incomplete and therefore, paint a misleading picture; that statement of the facts was, in fact, drafted by the Complainant, *not* the Referee. Therefore, Mr. Kirkpatrick respectfully supplements the statement of the facts with uncontradicted evidence from the record.

Complainant implies that Mr. Kirkpatrick was guilty of resisting arrest. ("The fact that Mr. Kirkpatrick was arrested for resisting arrest is quite **serious.**") There is no finding

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that Mr. Kirkpatrick resisted arrest. Mr. Kirkpatrick categorically denied that he committed the misdemeanor. (Tr. 31). The only evidence in the record on this issue is Mr. Kirkpatrick's denial and his explanation of the circumstances as follows:

Q. **As** to this exhibit which details an incident that occurred on Key Biscayne and resulted in the charges to which you pled not guilty and no lo contendere, before entering the Advocate Program, did you commit any of the acts that the officer alleged to be resisting arrest without violence?

A. Absolutely not. I was actually physically abused by the police officer....

Q. Why don't you briefly explain what happened that day?

A. I was speeding on the Rickenbacker Causeway, going, I think, seventeen or eighteen miles over the speed limit. I was stopped by an Officer Guerra, I believe this name is, who approached the car.

I was dressed in a suit. I had been out to dinner with clients that night.

I did not have my driver's license with me or my car registration.

I got out of the car. The officer, who is a very big, muscular fellow, squared off at me and said, "All right. If you want to swing at me, swing at me. I want to fight with you."

I said, "Officer, I have no intention of getting involved in a fracas with you whatsoever."

The officer then said, "Tell me what your name is."

I said, "John Evron Kirkpatrick."

He said, "Spell the word Evron."

I said, "E-V-R-O-N."

He asked me to repeat it five times. He was very, very aggressive with me.

At that point, I said to him and it was probably unwise in the context -- I told him that if he didn't treat me reasonably politely, that I would file a complaint against him with the Key Biscayne Police Department that weekend, at which point, he grabbed me,

threw me against the car, bruised my right arm, in fact, visibly bruised it

--

Q. Was this incident reported to any authority?

A. Yes it was.

Q. Was any action taken that you know of?

A. My understanding is that Officer Guerra was transferred off of Key Biscayne down to South Dade.

(Tr. 31-4). Complainant introduced no evidence to impeach, rebut, or contradict Mr. Kirkpatrick's testimony.

Complainant also incorrectly states that Mr. Kirkpatrick knowingly failed to appear at his initial arraignment and at two subsequent hearings. ("The fact that as a result of his failure to appear in Court three bench warrants for his arrest were issued aggravates the existence of the arrest.") In fact, this statement contains two unwarranted inferences: that the arrest constituted an offense (discussed elsewhere), and that Mr. Kirkpatrick's failure to receive actual notice of hearing, and resulting failure to appear, constitute a violation of a disciplinary rule.

The Complainant has ignored the facts surrounding Mr. Kirkpatrick's alleged failure to appear at three hearings. Mr.

Kirkpatrick did not receive notice of the hearings and did not appear because he did not know of the hearings. (Tr. 8, 23, 26). That is undisputed. Address changes -- Mr. Kirkpatrick moved three times and his law firm changed business addresses once during the twelve months in issue -- may have been the reason Mr. Kirkpatrick did not receive notices. (Tr. 28). That is also undisputed. Complainant introduced no evidence that Mr. Kirkpatrick received notice of the hearings.

It is uncontradicted that Mr. Kirkpatrick immediately followed through when he received actual notice of hearings or obligations. Immediately upon receiving notice of the pendency of bench warrants for his failure to appear, Mr. Kirkpatrick appeared in court and explained his non appearance to the satisfaction of the trial court. (Tr. 11, 12, 26). The trial court set aside the bench warrants with no bond requirements. (Tr. 26). These facts belie Complainant's contention that Mr. Kirkpatrick "utterly and blatantly disregarded the entire judicial system."

Complainant incorrectly implies that Mr. Kirkpatrick failed to pay court costs in a timely fashion. The uncontradicted facts establish, however, that the costs were paid by check and that when Mr. Kirkpatrick was informed that the check had not been negotiated by the Clerk's office, he "immediately went to the Dade County Courthouse, paid in cash, and received a receipt." (Tr. 11).

Complainant then opines that Mr. Kirkpatrick's completion

of his probation after the final hearing exacerbates its complaint. ("The fact that he did not fulfill his probationary responsibilities until after the final hearing exacerbates the **foregoing.**") In fact, however, Mr. Kirkpatrick's actions were in compliance with the court's orders, at least in the opinion of the judge.

Indeed, the uncontradicted evidence establishes that Mr. Kirkpatrick believed that he had completed his obligations until was notified of the grievance by Ms. Lazarus. (Tr. 22). At that time, Mr. Kirkpatrick immediately appeared before Judge Klein, "and informed Judge Klein that there was an outstanding bench warrant [related to a discrepancy in the records as to whether Mr. Kirkpatrick had] missed one session of the Advocate Program and that the fee in full had not yet been paid," (Tr. 15). Judge Klein set aside the bench warrant and entered an order permitting Mr. Kirkpatrick to reenter the program and complete it to the satisfaction of the Advocate Program. (Tr. 15, 16).

The only other witness, Blas Lugones, testified that the only reason that Mr. Kirkpatrick had been unable to complete the Advocate Program was that the program had not yet received a copy of the trial court's written order. Any delay that occurred was not the result of any indifference to the legal system by Mr. Kirkpatrick. Instead, the evidence reflects the administrative delays in communications between the bench and the Advocate Program.

Complainant, at the hearing, unsuccessfully tried to create the inference that Mr. Kirkpatrick did not take his obligations to the judicial system seriously. Complainant asked Mr. Kirkpatrick whether he would advise clients "to just disregard the orderly process of administration...." Mr. Kirkpatrick answered "Absolutely **not.**" (Tr. 20). Complainant asked if Mr. Kirkpatrick took his obligations seriously. (Tr. 20). Mr. Kirkpatrick answered, "**It** was a matter I did take **seriously.**" (Tr. 21). There was no evidence whatsoever to suggest that Mr. Kirkpatrick does not have a profound respect for the law and for our judicial system.

Complainant charged Mr. Kirkpatrick with minor misconduct based upon a misdemeanor charge of resisting arrest without violence, Mr. Kirkpatrick's plea of no contest to the charges, and Mr. Kirkpatrick's completion of his obligations under his plea agreement. The complaint was heard by a Referee on November 9, 1989 at which time the Complainant called only two witnesses -- Mr. Kirkpatrick and Blas Lugones, an officer of the Advocate Program. No other testimony was heard regarding Mr. Kirkpatrick's character. There was no testimony contradicting those witnesses and, thus, there are no contested issues of material fact.

SUMMARY OF THE ARGUMENT

The Referee erred in ruling that Mr. Kirkpatrick violated disciplinary rules prohibiting conduct prejudicial to the administration of justice and knowing violation of the rules of a tribunal.

Mr. Kirkpatrick did not engage in conduct prejudicial to the administration of justice, a term which includes bribery of jurors, subornation of perjury and similar offenses. Indeed, Complainant did not even charge Mr. Kirkpatrick of engaging in such actions.

Neither did Mr. Kirkpatrick knowingly violate the rules of any tribunal. The uncontradicted evidence establishes that Mr. Kirkpatrick successfully completed all of his obligations to the trial court and should not be further penalized.

The uncontroverted evidence before the Referee showed that Mr. Kirkpatrick had not committed any offense, and that, once he was actually notified, he attended all hearings and otherwise performed his obligation to the satisfaction of the trial court.

Accordingly, this Court should reject the Referee's recommendation and hold that Mr. Kirkpatrick violated no disciplinary rule; this Court should not publicly or privately reprimand Mr. Kirkpatrick.

ARGUMENT

POINT I

MR. KIRKPATRICK DID NOT VIOLATE A DISCIPLINARY RULE

Neither Complainant nor the Referee cites any authority supporting the finding that Mr. Kirkpatrick violated a disciplinary rule. Aside from the fact that the evidence below does not support the violations charged, the cited cases each involve much more serious charges including felonies, drug trafficking, dishonesty and misrepresentation, or occurrences arising out of the practice of law.

The recommendation of the Referee and Complainant's appeal rest on two unfounded assumptions: one, that a rebutted plea of no contest to a misdemeanor charge is grounds for discipline; and two, that Mr. Kirkpatrick does not respect the law nor value the privilege of practicing law. The first assumption is a matter of law and the law does not support Complainant's charge. The second is a matter of fact concerning Mr. Kirkpatrick's character which is contradicted by Mr. Kirkpatrick's lifetime of respect for law and *the* judicial system and his deep commitment to his profession and its standards. It is also entirely without basis in the record.

A. Mr. Kirkpatrick's Conduct Manifestly Does Not Constitute Conduct Prejudicial to the Administration of Justice as this Term Has Been Defined by the Florida Supreme Court.

No ambiguity surrounds the nature of the offense charged. This Court has itself defined conduct prejudicial to the administration of justice not to include all illegal conduct "but rather those activities, for example, more directly associated with 'bribery of jurors, subornation of perjury misrepresentations to a court, or any other conduct which undermines the legitimacy of the judicial process.'" The Florida Bar v. Pettie, 424 So.2d 734, 737-8 (Fla. 1982). Manifestly, the conduct of which Mr. Kirkpatrick is accused is not of this nature.

The cornerstone of the Referee's report is that Mr. Kirkpatrick was arrested for a misdemeanor and that he pled no contest to the charges. The uncontradicted evidence, however, conclusively establishes that Mr. Kirkpatrick did not violate the law. The only evidence introduced by Complainant is that Mr. Kirkpatrick entered a plea of no contest. Rule 3-7.2(i)(2) expressly provides a no contest plea to a misdemeanor, without an adjudication of guilt, merely creates a rebuttable inference.

Consistent with the Rule, in The Florida Bar v. Lancaster, 448 So.2d 1019 (Fla. 1984), this Court ruled that in cases involving no contest pleas the accused must "be given full opportunity to explain the circumstances and otherwise offer testimony in excuse or in mitigation of the penalty," [and] "the accused must be given a chance to explain the circumstances surrounding his plea of no lo contendere and

otherwise contest the inference that he engaged in illegal **conduct."** Lancaster, 448 So.2d at 1021. In the cases relied upon by the Bar, the Court specifically noted that the accused did not "categorically deny" that he committed the offense. Evans v. The Florida Bar, 94 So.2d 730, 735 (Fla. 1957).

In this case, the accused availed himself of his opportunity to explain and has categorically rebutted any inference that might be raised by the no contest plea. The Bar introduced no evidence to rebut, impeach, or contradict the testimony of the Mr. Kirkpatrick. Accordingly, the Complainant's charge that Mr. Kirkpatrick engaged in conduct prejudicial to the administration of justice is without merit.

B. Mr. Kirkpatrick Did Not Knowingly Violate the Rules of any Tribunal.

The second offense with which Mr. Kirkpatrick is charged is knowingly violating the rules of a tribunal. The Complainant, however, has not charged or proved that Mr. Kirkpatrick knowingly violated the rules of any tribunal. The Referee's report, which was in substantial part drafted by the Complainant, does not contain any finding that Mr. Kirkpatrick knowingly violated any order. Indeed, the uncontradicted evidence introduced by Complainant established just the opposite.

Complainant heavily relies on Mr. Kirkpatrick's failure to appear at three hearings. It is undisputed, however, that Mr.

Kirkpatrick did not receive notice of the hearings and that he promptly appeared in court and fulfilled his obligations upon learning of the hearings and the issuance of the bench warrants. It is further undisputed that neither the trial court nor the State Attorney objected to Mr. Kirkpatrick's explanation or suggested that Mr. Kirkpatrick be penalized. Complainant offered no evidence to rebut or contradict Mr. Kirkpatrick's testimony that he did not receive notice.

Complainant also tries to make much of the allegation that Mr. Kirkpatrick did not complete the Advocate program until after the final hearing. There is, however, no suggestion that Mr. Kirkpatrick's conduct was illegal or that Mr. Kirkpatrick has not successfully completed the program. The evidence clearly establishes that Mr. Kirkpatrick promptly appeared in court to explain the delay and obtained reinstatement without objection or penalty. And it is equally undisputed that the delay was based upon the error of the trial court, which failed to forward a written order to the Advocate Program.

While the Complainant has leveled the serious charges against Mr. Kirkpatrick that he knowingly violated the rules of tribunal, Complainant has not introduced any evidence that Mr. Kirkpatrick engaged in the challenged conduct. This Court therefore should reject the recommendation of the Referee and hold that Mr. Kirkpatrick violated no disciplinary rule.

POINT II.

**THERE ARE NO GROUNDS TO SUPPORT THE IMPOSITION OF
A PRIVATE OR PUBLIC REPRIMAND**

The crux of the Referee's report is the unfounded assertion that Mr. Kirkpatrick is indifferent to his legal obligations and that he does not recognize, respect, or value the privilege of practicing law.

But an opinion about Mr. Kirkpatrick's attitude to the law and his profession must take into account his lifetime relationship to the law, the judicial system, and his profession. A serious opinion also must take into account the evidence. Complainant's assertions are neither based on the evidence nor consider Mr. Kirkpatrick's lifetime record. There was no testimony or other evidence introduced below to impeach Mr. Kirkpatrick's good character or lifetime respect for the law, other than his plea of no contest to a misdemeanor charge, which he explained without rebuttal.

Complainant's suggestion that Mr. Kirkpatrick should be publicly reprimanded ignores the Florida Standards for Imposing Lawyer Sanctions promulgated by this Court. Those criteria explicitly provide that there is no basis for a public reprimand where the accused has harmed neither the public, nor a client, nor the judicial system. The standards further set forth mitigating factors directly applicable to this case, including the absence of any prior disciplinary record, a

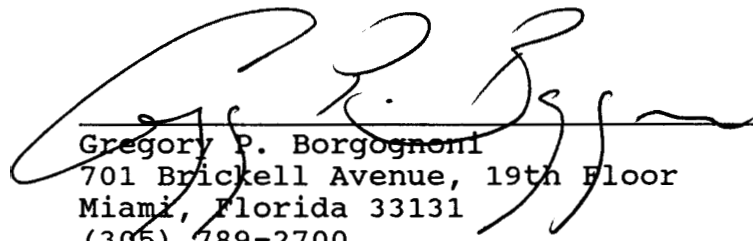
cooperative attitude toward these proceedings, the absence of a dishonest or selfish motive, and Mr. Kirkpatrick's completion of his duties to the trial court.

In this case, there is no prior disciplinary record. There is a cooperative attitude to proceedings. There is no selfish or dishonest motive. And Mr. Kirkpatrick has completed his duties to the trial court.

CONCLUSION

This Court should reject the recommendation of the Referee and rule that the undisputed evidence before the Referee established that Mr. Kirkpatrick did not violate the disciplinary rules.

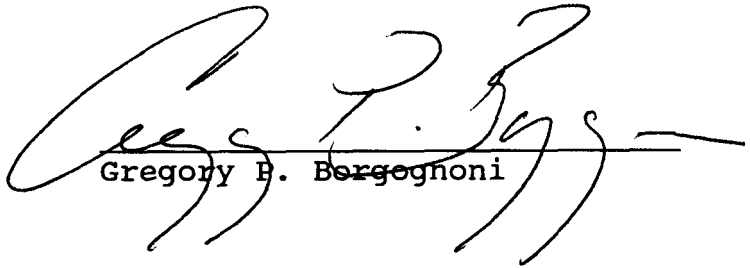
Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Randi Klayman Lazarus, Attorneys for Complainant, The Florida Bar, Suite M-100, Rivergate Plaza, 444 Brickell Avenue, Miami, FL 33131, this 30th day of May, 1990.


Gregory B. Bergegnoni

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