STATE OF MICHIGAN

Attorney Discipline Board

In the Matter of the Reinstatement Petition of
Basil W. Brown, P 11261,

Petitioner/Appellee,

v
Grievance Administrator,

Appellant.

90-123-RP

Decided: July 8, 1992

MAJORITY BOARD OPINION

John F. Burns, Linda S. Hotchkiss, M.D., Miles A. Hurwitz and Theodore P. Zegouras

The Grievance Administrator seeks review of a hearing panel's decision to grant reinstatement subject to certain conditions. The decision to grant reinstatement is affirmed, subject to conditions Imposed by the Board requiring the suspension of petitioner's license to practice law in the event of his incarceration.

The petitioner, Basil W. Brown, was suspended for a period of thirty months effective November 30, 1987. The petitioner's suspension was based upon his conviction in Ingham County Circuit Court of the offenses of delivery of less than fifty grams of cocaine and delivery of marijuana. In the criminal proceeding, the petitioner was sentenced to probation for a period of five years, with the first six months to be served in the Ingham County Jail. However, the petitioner reserved the right to contest the conviction on the grounds that he was entrapped. At the time this petition for review was argued to the Board, the petitioner's contesting of that issue had not been concluded and the sentence in the criminal case had not been served.

The hearing panel below concluded that the petitioner had satisfied the criteria described in MCR 9-123(B) and was therefore eligible for reinstatement. In recognition of the possibility that he could serve all or part of the six month jail sentence if his appeal is unsuccessful, the Order of Reinstatement directed that if the petitioner is incarcerated for any period of time as the result of that conviction, his license to practice law should be surrendered to the director of the Attorney Discipline Board and that petitioner should refrain from the practice of law during his incarceration.

I.

The petition for review filed by the Grievance Administrator is based in part upon a claim that the hearing panel erred in its refusal to allow

the admission into evidence of certain tape recordings made during

the investigation which led to the petitioner's arrest in 1985. The tapes in question were recorded by a concealed device worn by an undercover police informant. In offering the tapes to the panel, the Grievance Administrator's counsel acknowledged that neither the tapes nor the transcripts had been provided to the hearing panel which imposed discipline based upon the petitioner's conviction. Counsel conceded that MCR 9.123(B)(5) focuses attention on the petitioner's conduct since the order of discipline, but argued that the tapes would show what his character was at the time of the recordings, and should be considered by the panel to ascertain his present character. As paraphrased by the panel's vice chairperson, “You want to know how deep the hole was as to how far he has crawled out - - .” (T 95).

The hearing panel requested briefs from the parties on the admissibility of these recordings. A separate opinion was issued by the panel explaining its ruling that the tape recordings and transcripts should not be admitted. The panel ruled that evidence purporting to show the petitioner's poor moral character prior to his conviction and suspension should not be introduced in a reinstatement proceeding in which the focus of MCR 9-123(B) is upon the petitioner's character and fitness since the order of discipline. Saying that admission of the tapes and transcripts in this case would be analogous to double jeopardy, the panel noted that the petitioner was entitled to protection from successive prosecution and multiple punishment for the same offense.

We affirm the panel's ruling to exclude the tapes and transcripts. This evidence of petitioner's character and conduct at the time of his arrest in 1985 was available to the Grievance Administrator at the discipline proceedings conducted in 1988. The tapes were not offered as exhibits during those proceedings. Even if the tapes and transcripts were relevant as to the issue of the character of the petitioner in these reinstatement proceedings, MRE 403 would exclude their admissibility. The prejudice to petitioner Brown resulting from the use of the tapes and transcripts would not be outweighed by their probative value.

II.

Having ruled that the petitioner had otherwise satisfied the criteria of MCR 9.123(B) and was eligible for reinstatement, the hearing panel rejected the Grievance Administrator's suggestion that the possibility of imprisonment was sufficient grounds to deny reinstatement. However, the panel endorsed the position that an attorney should not be allowed to practice law while actually incarcerated. To deal with that possibility in this case, the panel directed that if the petitioner is eventually incarcerated as the result of his 1987 conviction, his license to practice law should be surrendered to the Executive Director of the Attorney Discipline Board, who would then hold the petitioner's license as a “custodian” until the petitioner was released.

No authority has been cited to the panel or the Board in support of the argument that the mere possibility of incarceration at some unspecified time in the future renders a person unfit to practice law and should preclude reinstatement. That argument is rejected in this case.

The petitioner has completed the thirty month term of suspension ordered which was determined to be the appropriate discipline for the criminal conduct to which he pled guilty, subject to his right to appeal on the issue of entrapment. The petitioner has exercised his right to appeal his criminal conviction. The position taken by the Grievance Administrator would penalize the petitioner for exercising that right.

The Board is more receptive to the Administrator's position that an attorney should not engage in the practice of law while actually imprisoned. The claim that "[I]t is well settled law that an attorney who is in prison should not have a license to practice law," is unaccompanied in this record by a citation to any legal authority. However, the Board itself has recently stated that "[I]t is not in the interest of the public, the legal profession or the courts of our State to broaden the term 'jailhouse lawyer' to include the active practice of law by an attorney serving time in a federal correctional facility." Matter of Elbert L. Hatchett, 91-10-JC, ADB Opinion February 14, 1992, p 2. For purposes of this decision, we see no significant difference between a federal prison or a county jail in terms of the public's perception of an attorney who is fully licensed as an officer of the court while he or she is, literally, behind bars. We caution, however, that the law in this area is not so "well settled" that the Board may not continue to address this issue on a case by case basis.

It is argued, however, that even if it is agreed that the petitioner should be reinstated with conditions preventing him from practicing law while incarcerated, such an order is not contemplated by MCR 9-124(C). We are asked to rule that the panel exceeded its authority by entering an order of reinstatement which contained a condition other than those specifically authorized by MCR 9.123(B)(8) [recertification] or MCR 9.123(B)(9) [reimbursement to the State Bar Client Security Fund].

Reviewing the hearing panels' power to reinstate attorneys in light of the requirement of MCR 9-102(A) that these rules are to be liberally construed for the protection of the public, the courts and the legal profession, we believe that a hearing panel has inherent authority to issue an order of reinstatement containing other conditions where the inclusion of such conditions is clearly consistent with the goals of these proceedings. For example, in a case involving an attorney's drug or alcohol addiction at the time of the misconduct, accompanied by clear and convincing evidence of rehabilitation, we can envision an order of reinstatement conditioned upon further monitoring of the attorney's continued sobriety.

Because a license to practice law in Michigan is not embodied exclusively in a card or certificate which must be displayed whenever a person undertakes to talk, think or act like a lawyer, the panel's order that the petitioner "surrender" his license in the event of incarceration presents obvious problems of enforcement. We therefore modify the panel's order by affirming the decision to grant reinstatement but with a modification. In the event the petitioner is incarcerated for any period of time as the result of the November 30, 1987 conviction, the petitioner shall be suspended from the practice of law commencing on the date of incarceration for a period of 119

days or the term of incarceration, whichever is shorter, subject to the condition that the petitioner may not file the affidavit for automatic reinstatement described in MCR 9.123(A) until his release from incarceration. We adopt those provisions in the panel's order requiring that petitioner notify his active clients of his change in status. We also adopt the panel's definition of "incarceration" which does not include a community correction center, a halfway house or an equivalent facility.

By limiting the petitioner's potential suspension to the lesser of the term of his incarceration or 119 days, the Board specifically affirms the panel's conclusion that the petitioner should not be subject to reinstatement proceedings for a second time in this case.

The rules governing reinstatement allow an attorney suspended for 119 days or less to gain readmission by filing an affidavit. (MCR 9.123(A)). It is not until an attorney has been suspended for more than 119 days or has been disbarred that reinstatement proceedings under MCR 9.123(B) are required. Under that rule, the filing of a petition for reinstatement triggers a months long process which includes publication of a notice in the Michigan Bar Journal, a transcribed interview at the office of the Attorney Grievance Commission and a public hearing before a new panel appointed by the Board.

The passage of 120 days or more without a license to practice law does not automatically raise questions requiring further scrutiny of an individual's character. Attorneys who have been suspended for more than 119 days for non-payment of their dues to the State Bar or for non-payment of costs assessed in a disciplinary case are not required to petition for reinstatement. Attorneys who are eligible for automatic reinstatement under MCR 9.123(A) but who fail to file the required affidavit within 119 days are not required to petition for reinstatement. In fact, an attorney in Michigan may go on inactive status for up to three years and may return to active practice simply by paying his or her state bar dues.

The division between suspensions of 119 days and 120 days is significant only because it is the length of time fixed by the Supreme Court to differentiate between relatively minor infractions which do not cast serious doubts upon an attorney's character and more egregious misconduct. The hearing panel which assessed discipline against this petitioner determined that a thirty-month suspension followed by reinstatement was appropriate. Petitioner Brown has satisfied the reinstatement criteria of MCR 9.123(B).

We believe that maintenance of public confidence in the legal profession requires a provision in this order of reinstatement that the petitioner be restrained from practicing law while actually incarcerated. It does not logically follow that a second reinstatement would be necessary in this case. On the contrary, a second inquiry under MCR 9.123(B) would serve only to delay the petitioner's return to the legal profession and would be primarily punitive.

CONCURRING OPINION

George E. Bushnell, Jr.

I concur in the decision of the majority to exclude the tape recordings and transcripts made at the time of the Petitioner's arrest. I also agree that the decision to reinstate should be affirmed. However, the order of reinstatement should be subject to the qualification that in the event the petitioner is ordered to be confined to a county jail as a result of the sentence imposed in People v Brown, the petitioner shall be placed on involuntary inactive status as a member of the State Bar of Michigan during the period of such confinement.

I believe that such a condition could be attached to the Order of Reinstatement, pursuant to the inherent authority of the Attorney Discipline Board. [MCR 9.110].

SEPARATE OPINION

C. Beth DunCombe and Elaine Fieldman, concurring in part and dissenting in part

We concur in the majority's decision to affirm the panel's exclusion of the tape recordings.

We would grant the Petition for Reinstatement without further conditions.

The Grievance Administrator has not challenged the panel's findings that:

a) petitioner has fully complied with the Order of Suspension;

b) petitioner's conduct has been exemplary and above reproach since his suspension;

c) petitioner currently possesses a proper understanding of his obligations to the public and the legal profession as a lawyer.

Despite the panel's conclusion that petitioner has satisfied the criteria of MCR 9.123(B) by clear and convincing evidence, the Grievance Administrator asks this Board to deny reinstatement solely because petitioner may serve six months in jail if petitioner's claim of entrapment is ultimately unsuccessful.[1]

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[1] Petitioner's guilty plea to drug offenses was conditioned on the right to litigate his entrapment defense. Petitioner's sentence was stayed pending resolution of the entrapment issue. The Michigan Supreme Court remanded the criminal case to circuit court for a second entrapment hearing. People v Brown, 439 Mich 34 (1991). As of the date that this matter was submitted to this Board, the court had not yet ruled on the entrapment issue.

The Grievance Administrator has offered no authority in support of His

argument that “if there is a jail sentence hanging over there [sic] person's head, that person is not fit to practice law.” (Review Hearing Transcript at 19). We decline to so hold.

Similarly, the Grievance Administrator has offered no authority for the proposition that an attorney who is incarcerated is unfit to practice law. In fact, the Grievance Administrator conceded that incarceration is not in and of itself misconduct. (Review Hearing Transcript at 23). And, there is no rule which states or implies that a lawyer is automatically suspended if incarcerated for any period of time. We are quite sure that there have been numerous instances of attorney confinement which have not resulted in disciplinary proceedings or suspensions. For example, it is not unusual for lawyers to be confined to jail for contempt. In such cases, lawyers are not automatically considered suspended from the practice for the duration of the incarceration.

The majority holds that in the event petitioner is incarcerated, he will receive an automatic suspension. However, there is nothing in the rules which permits this Board to impose a suspension where no misconduct has been charged. This Board has no more power to decree a future suspension in the event of incarceration for this petitioner than it would to decree that from this point forward any lawyer who finds him or herself in jail is automatically suspended. Likewise, no one would claim that this Board has the power sua sponte to decree that any lawyer who is hospitalized or otherwise incapacitated is automatically suspended because the lawyer is “unfit” to practice law. Yet, one who Is suffering from a debilitating medical condition may very well be “unfit to practice law.”

We can all agree that there is something distasteful or embarrassing about a lawyer (who has promised to uphold the law) retaining a license to practice law while incarcerated for violating the law. However unbecoming the picture of a licensed lawyer in jail, that does not give us the right to ignore the rules which guide and control our authority. Perhaps the Supreme Court should adopt a rule which would immediately place lawyers on involuntary inactive status upon and for the duration of incarceration (as Mr. Bushnell would do in this case). We do not believe that the present rule gives us that power.

The majority cites Matter of Elbert L. Hatchett, 91-10-JC. Hatchett involved the question of the appropriate term of discipline for misconduct which had been charged and proved. The Board did not self-decree discipline where there were no charges or findings of misconduct as the majority has done here. Hatchett does not apply to this case.

Petitioner has served the full term of his suspension (and more). He has satisfied the requirements of the court rules governing reinstatement. There is absolutely no reason to deny his request for reinstatement and there is no basis to impose a contingent suspension. We would grant the petition without conditions.