IN THE MATTER OF EDWIN B. UGOROWSKI
A Member of the State Bar of Michigan,
Respondent.
File No. 35246-A

Decided: November 20, 1981

OPINION OF THE BOARD

Respondent was charged with misconduct in 1979. He entered into two stipulations for discipline by consent, the second of which was approved by the Board. Claiming duress, Respondent then moved to set aside the approved stipulation. We granted his motion. Represented by new counsel, Respondent reached a third agreement for consent discipline, accompanied by representations that he entered the stipulation freely and voluntarily. The Board approved. Respondent again moved to set aside the consent order. We denied the motion. He asked for reconsideration. We have reconsidered our decision, and it is affirmed.

Mr. Ugorowski's first stipulation for consent discipline was filed February 12, 1980. It called for a suspension of one year. As part of the agreement, he admitted one count of the Formal Complaint; the other two counts were considered dismissed.[1] Before the Board could rule on the consent discipline, Respondents entered into a second stipulation, dated May 30, 1980, calling for a suspension of fifteen months. This had been demanded by the Grievance Administrator because several grievances had been filed against Respondent since the first stipulation. This second agreement was completed, submitted to the Board and, on June 24, 1980, approved.

On June 27, 1980, Respondent moved to set aside the stipulation and assign the matter to a hearing panel. He had become dissatisfied with the representation of the attorney who had negotiated the stipulation. The Board set aside the consent discipline on October 7, 1980, and assigned the matter to a hearing panel. Before panel proceedings could begin, Respondent, through new counsel, entered into a third consent discipline agreement, calling for a suspension of nine months and dismissal of various grievances not in the Complaint,[2] in exchange for Respondent's admission to all three counts of the Formal Complaint. This stipulation, filed December 2, 1980, was accompanied by a written waiver in which Respondent acknowledged the voluntary nature of the agreement.[3] Mr. Ugorowski also made recorded oral statements to the same effect.[4] The Board approved this stipulation April 7, 1981, and an order was entered suspending Respondent for nine months.

On April 27, 1981 Respondent, now having retained a third new attorney, moved to set aside the third consent discipline order, asked for a stay of discipline, and requested that the matter be reassigned for hearing. The basis of this motion was “newly discovered evidence.” The Board considered Respondent's motion at its meeting of April 29, 1981. On April 30, 1981, Respondent filed a Motion for Immediate Consideration of his previous motion. The Motion for Immediate Consideration was, of course, moot, the matter having been given immediate consideration the previous day.[5] An order denying the Motion to Set Aside was issued May 11, 1981.

Respondent's attorney, through a letter to the Board's General Counsel dated May 14, 1981, moved for reconsideration. This motion essentially repeated the statements made in the previous Motion to Set Aside. Arguments were heard and we now grant reconsideration, but again deny the principal motion. The ground raised is still that of "newly discovered evidence."

Respondents are permitted by the Supreme Court, under GCR 1963, 964,6 (e), to "admit the allegations of the complaint * * * in exchange for a stated form of discipline and on the condition it is accepted by the board."

> "The public is Immediately protected from further misconduct by the lawyer, who otherwise might continue to practice until a formal proceeding is concluded. The [Grievance Commission] is relieved of the time-consuming and expensive necessity of prosecuting a formal proceeding." Standards for Lawyer Discipline and Disability Proceedings, American Bar Association, Commentary to Standard 11.1 at 76.

If the consent discipline is analogized to a stipulation, it is clear that as a favored mode of resolving conflicts such compromises generally will not be disturbed in the absence of fraud or mutual mistake. Smith, Hinchman & Grylls Associates, Inc. v Wayne County Board of Road Commissioners, 59 Mich App 117, 229 NW2d 338 (1975). An attorney ordinarily has the authority to stipulate on behalf of his or her client, and the failure of the client to object to the stipulation for a considerable period after it is entered into, militates against a court approving its withdrawal. In re Estate of McNamara, 154 Mich 671, 118 NW 598 (1908).

The stipulation which is the subject of this appeal was filed December 2, 1980. It was not until 20 days after Board approval that Respondent moved to set it aside. However, since the agreement was not effective until It had received Board approval, we can not say that Respondent's request to vacate was not timely.

However, implicit in Respondent's claim of newly discovered evidence Is his contention that in effect, Ineffective assistance of his two prior counsel was responsible for the failure to discover this evidence. Thus, ultimately, whether the stipulation should remain untouched depends on the nature of the newly discovered evidence and whether the advice and service of both of Respondent's two preceding counsel were so ineffective as to excuse Respondent's burden to demonstrate due diligence in discovering this new evidence.

The evidence itself and not merely its materiality must be newly discovered. The evidence must not be merely cumulative, and must be such as to render a different result probable on retrial. Further, the party must show he or she could `not with reasonable diligence have discovered it and produced it at the trial. Rearden v Buck, 335 Mich 318, 55 NW2d 847 (1952); Nickel v Nickel, 29 Mich App 25, 185 NW2d 200 (1970).

The analysis holds true if validity of the subject stipulation is weighed against the stricter standards required of guilty pleas. Error of counsel alone is not ordinarily a sufficient basis to

warrant a new trial, for defendant must establish that, but for the alleged error, there would have been a reasonable likelihood of acquittal. People v Robinson, 99 Mich App 794, 299 NW2d 32 (1980); People v Hanna, 85 Mich App 516, 271 NW2d 299 (1978). See, in a civil context, Everett v Everett, 319 Mich 475, 29 NW2d 919 (1947).

To the extent that these proceedings are quasi-criminal, In re Woll, 387 Mich 154, 194 NW2d 835 (1972) (adopting some, but not all, ear marks of a criminal proceeding); In re Baluss, 28 Mich 507 (1874), we may analogize to guidelines in criminal matters. Thomas v Bufalino, No. 36508-A (Mich ADB 1981). We look therefore for guidance to the applicable standard for withdrawal of a guilty plea once Sentence is pronounced.

> "[W]here a defendant seeks to set aside a plea following conviction and sentence, his motion is addressed to the discretion of the trial court which must make a determination as to whether the defendant has shown that his prior guilty plea conviction was a miscarriage of justice."

People v Winegar, 380 Mich 719, 730-31, 158 NW2d 395 (1968) cert. den., 395 U.S. 971, 396 U.S. 946 (1969), quoting People v Lippert, 79 Mich App 730, 263 NW2d 268 (1977), leave to appeal denied.

Such a miscarriage of justice would exist if the guilty plea had been obtained through failure of counsel to investigate substantial defenses. A substantial trial defense is one which if asserted would have made a difference in the outcome of a trial. People v Foster, 77 Mich App 604, 259 NW2d 153 (1977).

Under any such test, under either the civil or criminal standard, Respondent's motion must be denied. The only specific claim of "newly discovered evidence" in his motion deals with a grievance which was to have been dismissed under the stipulation. The "evidence" was that the Grievance Administrator made a finding after the stipulation that the grievance was not worth pursuing. We assume that in effect what Respondent argues is that the Grievance Administrator did not negotiate the stipulation in good faith. Assuming arguendo this is true, the contention does not give rise to the level of newly discovered evidence which would have changed the result of a trial. Further, Respondent has not demonstrated his contention is true. The grievance, further, was dismissed after Respondent signed the stipulation.

None of Respondent's other claims involve, even arguably, "newly discovered evidence."

The stipulation involved three complainants. See note 1, supra. In the cases of the two neglected criminal appeals, Respondent suggests that since the complainants have not been irreparably damaged, and that appeals still may be perfected, he should be exculpated. In the case of the other Complainant, Respondent merely charges that the proper forum for settling the dispute is a civil court, and not the disciplinary system. Other parts of the motion deal with grievances which, under the stipulation for consent discipline, were to be dismissed in any case. At most, Respondent presents facts indicating that some of the charges against him appear weaker than he first

thought, and that some mitigation exists which might have served, had the Complaint been brought before a panel, to reduce discipline below the nine months stipulated.

This so-called new evidence is not such as would have exculpated Respondent at trial. Therefore, it is unnecessary to consider the consequence of failure to present this to the Board or a hearing panel, or whether Respondent consented to discipline because of any alleged ineffective assistance of counsel. Respondent's procedural arguments are equally groundless.

Counsel for Respondent alleged both in his letter of May 14, 1981, and in argument before the Board, that the Board could not have given full consideration to his Motion to Set Aside the Stipulation, since his Motion for Immediate Consideration did not arrive at the Board's office until after the Board had denied the principal motion. This argument is groundless; the Board considered the Motion to Set Aside sua sponte at its meeting of April 29, 1981. The Motion for Immediate Consideration, then, was moot upon filing. It contained nothing of substance which was not already set out in the previous motion, and would `not have changed our decision had it arrived before our meeting.

Finally, Respondent would have the Board set aside the suspension based upon the Grievance Administrator's purported "admissions" (in the Answer to Respondent's Motion for Immediate Consideration) that the grievances against Respondent are without merit. The Grievance Administrator has explained that this was `not an "admission", but an error in transcription. This is consistent with the totality of the pleadings and with the entire record, and the Board accepts the Administrator's explanation. Respondent has been afforded, and the Counsel for Respondent has further demanded, considerable procedural latitude, but would have Us set aside the stipulation on the basis of a technical error. Respondent's claim regarding said alleged "admission" is without merit.

The Motion for Reconsideration is granted, and the Motion to Set Aside is denied. "The [Respondent] freely, understandingly, voluntarily, and with counsel, made a deliberate choice. He should now abide by it." People v Gamble, 39 Mich App 227, 197 NW2d 500, 502 (1972), leave to appeal denied.

RECONSIDERATION GRANTED.

MOTION TO SET ASIDE DENIED.

ALL CONCUR.

FOOTNOTES:

1. Count I alleged neglect of a civil case which Respondent had been retained to handle; Counts II and III involved charges that Respondent failed to take action on behalf of criminal defendants who he had been appointed to represent on appeal.

2. The Stipulation itself does not mention the extra-Complaint grievances, but in the transcript of the official discussion between the Grievance Administrator and Respondent on November 25, 1980, the Grievance Administrator said, "In this stipulation you admit to Counts One, Two and Three of the Formal Complaint in return for which we have agreed that you should be suspended from the practice of law for a period of nine months effective from the date of the Attorney Discipline Board's order, and also that we are dismissing the following file numbers: File Number 36304, 36072, 389/80; 792;80, 852/80 and 1679/80." The Stipulation for Discipline and Waiver of Hearing of Edwin B. Ugorowski, November" 25,1980, at 3-4.

3. Respondent's Waiver included admissions that he had been advised and understood that he had a right to trial of the allegations; that they would have to be proven by the Administrator by a preponderance of the evidence; that he had a right to retain counsel to defend the merits of the allegations, and to offer evidence in mitigation, and was entitled to all other rights set out in Chapter 95 of the General Court Rules, and in the Michigan and United States Constitutions. He also acknowledged that the waiver was "knowingly, consciously and freely" made.

4. The Grievance Administrator questioned Respondent, who was under oath:

    Q. This is your wish?
    A. This is my wish.
    Q. Has anybody coerced you?
    A. Nobody has coerced me.
    Q. Are you doing this as a free and voluntary act?
    A. I'm doing this as a free and voluntary act.
    Q. Has [your attorney] advised you with respect to this stipulation?
    A. Yes.
    Q. Have you had sufficient time to talk to him about the consequence of this act?
    A. Yes.

    Respondent's Stipulation proceeding at 3.

5. The Motion contained nothing new of substance which the Board had not previously considered.

6. See note 2, supra.