103.PCB

[13-Oct-1995]

STATE OF VERMONT

PROFESSIONAL CONDUCT BOARD

In re: Patricia Lancaster
PCB Docket No. 94.60

FINAL REPORT TO THE SUPREME COURT

Decision No. 103

This case presents an unfortunate incident where Respondent's zeal to prevail overcame sound judgment, resulting in a deliberate misrepresentation of facts to the trial court. We recommend that Respondent be publicly reprimanded for this significant lapse of duty.

There was no factual dispute in this disciplinary case. Bar Counsel, Respondent and her counsel appeared before us on September 1, 1995 and presented us with stipulated facts, incorporated by reference as Exhibit 1. Each presented oral argument on the issue of sanctions. Both sides urged a public admonition which we feel would be inappropriate.

Facts

Respondent, a public defender and a lawyer with 15 years of experience, was assigned in May of 1993 to represent a defendant charged with driving while intoxicated. It was his third offense and, therefore, a felony.

The defendant told Respondent that he had provided a breath sample as well as a blood sample before being lodged overnight at the correctional facility. Respondent contacted the hospital and made arrangements for the blood sample to be tested by an independent laboratory.

Vermont law provides that if an accused asks to give a blood sample, the arresting officer must make arrangements for administration of the blood test. 23 V.S.A. Section 1203a (b). If the officer does not do so, the State's breath test results might be suppressed as evidence against the accused.

Nearly six months after the defendant was arrested, Respondent deposed the arresting officer. The paperwork which the officer had prepared at the time of the arrest was not complete. It did not reveal that the officer had, in fact, made arrangements for the defendant to give a blood sample as required by law.

Relying upon this paperwork, the officer testified that the defendant did not give a blood sample for testing because he did not ask for one. Respondent knew that the officer's testimony was not accurate.

Within a week, Respondent filed two motions in which she asked the

Vermont District Court to suppress the Infra-red breath test. In support of this motion, Respondent falsely alleged that the arresting officer had failed to honor her client's request for a blood test.

At the time Respondent made these statements to the court, she knew they were false. However, she felt that her actions were justifiable because her intent was to put the State to its burden of proving compliance with statutory and constitutional requirements. Respondent even inquired of other counsel as to the propriety of the motion before filing it.

Meanwhile, the prosecutor had no knowledge that there was an independent blood test. He relied upon the processing paperwork and the officer's testimony that no blood test had been requested.

The court began hearing testimony on this motion on December 22. The officer testified that the defendant had not received or asked for a blood test. The matter was continued until January 6, 1994 when Respondent put her client on the stand. To her credit, Respondent told the defendant to respond truthfully to whatever question was posed. However, she limited her questioning so as not to elicit the fact that the police eventually took the defendant to the hospital for a blood test.

On cross examination, the prosecutor learned that defendant had, in fact, received a blood test. Respondent then withdrew her motion. The prosecutor brought this matter to our attention.

Conclusions of Law

Respondent admitted in her stipulation that she violated DR 7-102(A)(5)(knowingly making a false statement of fact). We also find that in filing pleadings with the court alleging that her client was denied his right to obtain an independent blood sample when she knew that allegation was not true, Respondent engaged in deceit and misrepresentation in violation of DR 1-102(A)(4). We further find that in wasting part of two different days of the court's time hearing a motion based upon false statements, Respondent engaged in conduct prejudicial to the administration of justice in violation of DR 1-102(A)(5).

Sanctions

We find that Standard 6.12 of the ABA Standards is applicable here because the admitted deception was done not by negligence but with knowledge. However, there are several factors present which this standard does not take into account.

When we examine the cases where lawyers have been suspended from the practice of law for presenting false information, they all involve cases where there was a clear plan to deceive the court. The lawyers not only submitted false documents, they counselled clients to support the deception in their testimony. See the cases collected at "Fabrication or Suppression of Evidence as Ground for Disciplinary Action Against Attorney," 40 ALR 3d 169.

Respondent here tried to avoid the presentation of perjured testimony by counselling her client to testify truthfully. At the same time, she continued to support the deception by bringing out only the testimony which supported her false statement. This clumsy attempt to walk a tightrope

between truthfulness and what she perceived to be vigorous advocacy shows that Respondent did not act with a bad heart. She acted with a bad head. She made a foolish decision to advocate a position that was based on a falsehood.

In many ways, this case is similar to People v. Bertagnoli, 861 P.2d 717 (Col.1993) where the lawyer relied upon his expert witness' testimony during closing argument. So great was the lawyer's interest in prevailing that he failed to disclose that the expert witness wished to appear before the tribunal and correct the testimony he had given. Like Respondent here, Mr. Bertagnoli was troubled by the ethical dilemma he faced in not wanting to damage his client's position but in wanting to be truthful to the tribunal. Like Respondent here, Mr. Bertagnoli sought guidance from a colleague who advised silence about the change of testimony. In a decision which carefully analyzes the duties violated, the Colorado supreme Court chose to impose a public reprimand.

We believe that a public reprimand is the appropriate choice here, too. Respondent, although she has substantial experience at the bar, has no prior disciplinary history and has been co-operative during the pendency of these proceedings. Her misconduct was not the result of selfishness, but of a misguided desire to advocate strongly for her client. She is extremely remorseful and has obviously learned the hard way that every lawyer must be scrupulous in presenting the truth to the court.

There was clearly a potential for injury to the State here and to the legal proceeding. That potential was substantially diminished by Respondent calling her client to testify, thereby subjecting him to cross-examination, and her preparatory admonition to him to testify truthfully. It is fortunate for Respondent and all concerned that the truth came out when it did, thereby avoiding the court's suppression of evidence based on her false allegations.

Respondent's demeanor before us and her expressions of remorse at the hearing of September 1 convince us that the impact of the disciplinary process upon her has been strong and positive. We believe that she poses no danger to the public and that her license to practice should not be interrupted.

Dated at Montpelier, Vermont this 13th day of October, 1995.

PROFESSIONAL CONDUCT BOARD

/s/
_____
Deborah S. Banse, Chair

_____
Joseph F. Cahill, Jr., Esq.

_____
Nancy Corsones, Esq.

_____
George M. Crosby

_____
Charles Cummings, Esq.

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Paul S. Ferber, Esq.

/s/
Nancy Foster

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Rosalyn L. Hunneman

/s/
Robert P. Keiner, Esq.

/s/
Donald Marsh

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Karen Miller, Esq.

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Robert F. O'Neill, Esq.

/s/
Mark L. Sperry, Esq.

/s/
Ruth Stokes

/s/
Jane Woodruff, Esq.

/usr3/wsc/9460.opinion

STATE OF VERMONT
PROFESSIONAL CONDUCT BOARD

In re: PCB File No. 94.60
Patricia Lancaster, Esq.--Respondent

STIPULATION OF FACTS

NOW COME Shelley A. Hill, Bar Counsel, and Patricia Lancaster, Respondent, and hereby stipulate to the following facts:

1. Patricia Lancaster was admitted to practice law in the State of Vermont on September 1, 1987 and is currently on active status.

2. Ms. Lancaster is a public defender in Rutland County and has served in that capacity since 1987.

3. On May 20, 1993 Ms. Lancaster was appointed to represent John Gillam on a charge of driving while intoxicated, third offense, a felony. Ms. Lancaster met with Mr. Gillam on that date and briefly interviewed him. He told her that he had provided a breath sample and had been lodged overnight. He also told her that the police had, before transporting him to the correctional facility, taken him to the hospital at his request so that he could obtain an independent blood test.

4. Vermont statutes require that if an accused is being lodged the officer must "make arrangements for administration of the blood test upon demand." 23 V.S.A. Section 1203a (b). If such requirement is not met, the State's breath test results are susceptible to being suppressed.

5. Upon return to her office that day, Ms. Lancaster directed her staff to send the designated form to the hospital where the blood sample was being held for forwarding to an independent chemist for analysis. The sample was analyzed, and the results received by Ms. Lancaster on June 7, 1993.

6. Ms. Lancaster took the deposition of the processing officer, Officer Fuller, on November 5, 1993. In response to Ms. Lancaster's question, Officer Fuller testified that Mr. Gillam had not requested an independent blood test so that he was not taken to the hospital before being lodged.

7. On November 17, 1993, Ms. Lancaster filed two motions to suppress. One of them was based partially on the officer's allegation that Mr. Gillam had been denied his request and right to an independent blood test. (Attachment A). The other was based exclusively on that same allegation. (Attachment B). The filing of the second motion was an oversight.

8. Ms. Lancaster admits that the statement she set forth in her motions, i.e., the officer's testimony that Mr. Gillam had not been given a blood test, was not true and that she knew it was not true at the time. Her belief was that a motion in a criminal case raises issues for hearing and places the burden on the state to establish compliance with statutory and constitutional requirements. However, because of the unusual nature of the motions, Ms. Lancaster gave substantial consideration to the filing and discussed the issue with another attorney before filing them with the court.

9. The prosecutor did not know that Mr. Gillam had requested an independent blood sample and had been accommodated in his request because the processing paperwork did not reflect it and the officer denied it under oath in his deposition.

10. Hearing on the motions to suppress was held on December 22 1993. There was time only for Officer Fuller's testimony. He testified again under oath that Mr. Gillam was not taken to the hospital for an independent blood test because he did not ask for one.

11. At the continuation of the hearing on January 6, 1994 Ms. Lancaster put Mr. Gillam on the stand. She had previously advised him to respond truthfully to whatever question was posed to him, either on direct or cross examination. She elicited from him that he requested of the officer the opportunity to obtain a blood sample. She also elicited from him that, up to a certain point in time, they did not take him to get a blood test. She limited her direct examination of her client to not include the conclusion of the processing, or that he had eventually been taken to the hospital.

12. In cross examination the prosecutor elicited from Mr. Gillam the fact that he was taken to the hospital for a blood drawing. (Attachment C).

13. Ms. Lancaster withdrew that portion of the motion to suppress related to the blood test issue at the conclusion of the hearing, and that issue was not continued before the court for its determination.

14. Ms. Lancaster admits that her inclusion of this language in the motion constituted a violation of DR 7-102(A)(S).

15. Ms. Lancaster has no previous disciplinary sanctions, nor have any actions previously been brought against her.

16. Ms. Lancaster has cooperated fully with the disciplinary proceedings.

17. Ms. Lancaster has substantial experience in the practice of law.

Dated at Montpelier, Vermont this 28th day of August, 1995.

/s/
_____
Shelley A. Hill
Bar Counsel

Dated at Rutland, Vermont this 24th day of August, 1995.

/s/

_____
Patricia Lancaster
Respondent

Approved as to form:

/s/
_____
Martha M. Smyrski
Attorney for Respondent

23-137/48731

Attachment A

STATE OF VERMONT
RUTLAND COUNTY, SS.

STATE OF VERMONT	*	VERMONT DISTRICT COURT
V.	*	Unit #1, RUTLAND CIRCUIT
JOHN GILLAM	*	Docket No. 616-5-93Rdcr

MOTION TO SUPPRESS/MOTION TO DISMISS

Defendant, through counsel, moves to suppress evidence seized in the above matter on the ground that his rights were violated, as set forth

below.

1. No probable cause existed for the stop of Defendant's vehicle. Defendant was stopped as an alleged participant in a misdemeanor not observed by the officer. V.R.Cr.P. 3(a) does not permit a warrantless arrest under these circumstances. U.S. Constitution Amend. IV, XIV, Vermont Constitution, Chapter 1, Article 11.

2. Defendant's breath test must be suppressed because of Defendant's stated inability to comprehend the implied consent advice. A defendant cannot be held to waive rights he does not understand. State v. Normandy, 143 Vt. 383, 387 (1983). In addition, Defendant was advised that he would be incarcerated if he did not take the test, the voluntariness of any consent given.

3. Defendant requested counsel and did not waive his Constitutional rights prior to the officer's request to him to provide a breath sample for testing. Defendant was not permitted to consult with counsel before deciding whether to take the test, despite his request. 23 V.S.A. §1202(c); State v. Garvey, 157 Vt. 105 (1991); 13 V.S.A. §5234(a), U.S. Constitution, Amend. V, VI, XIV; Vermont Constitution, Chapter 1, Article 10. Because Defendant did not waive his rights, the police were required to cease all further interrogation. Edwards v. Arizona, 451 U.S. 477 (1981); State v. Kilborn, 143 Vt. 360, 363 (1983); reversed on other grounds, State v. Davis, 157 Vt. 506 (1991). Failure to cease questioning requires suppression of the evidentiary fruits of the further interrogation. State v. Badger, 141 Vt. 43, 451 (1982).

4. Defendant's request for a blood test rather than an infra-red test was a refusal to take the test, which should have been honored. 23 V.S.A. §1205(a). Instead, he was advised that he would go to jail if he did not take the test and would not be entitled to have a blood test, at his own expense, unless he took the infra-red test.

5. Subsequently, and after Defendant gave the infra-red sample, Defendant's request for an independent blood test was denied, in violation of 23 V.S.A. §1202(d)(4)(5), requiring suppression of the infra-red test results. See, State v. Karmen, 150 Vt. 547 (1988). Vermont Constitution, Chapter I, Article 10, United States Constitution, Amendments VI and XIV.

DATED at Rutland, Vermont this 17th day of November, 1993.

JOHN GILLAM

By: /s/
Patricia M. Lancaster
Attorney for Defendant

cc: Marc D. Brierre, Deputy State's Attorney

Attachment B

STATE OF VERMONT
RUTLAND COUNTY, SS.

STATE OF VERMONT * VERMONT DISTRICT COURT
V. * UNIT #1, RUTLAND CIRCUIT
JOHN GILLAM * DOCKET No. 616-5-93Rdcr

MOTION TO SUPPRESS BREATH
TEST RESULTS/MOTION TO DISMISS

John Gillam, through his attorney Patricia M. Lancaster, respectfully moves for suppression of the Infra-red test results in the above matter on the ground that Defendant was denied the procedural protections guaranteed by the Implied Consent Law. Specifically, he was refused his request, as a Defendant being lodged, to have the officer make arrangements for the administration of a blood test. 23 V.S.A. §1202(d)(4)(5).

Since Mr. Gillam was denied this right, he was unable to obtain the independent test results which the statue mandates, denying him the right to a fair trail and to "call for evidence in his favor." Vermont Constitution, Chapter I, Article 10, United States Constitution, Amendments VI and XIV. Therefore, suppression of the State's breath test results

and dismissal of the charges is required due to the statutory violation which resulted in Defendant's inability to obtain an independent test.

DATED at Rutland, Vermont this 17th day of November, 1993.

JOHN GILLAM

By /s/
Patricia M. Lancaster
Attorney for Defendant

cc: Marc D. Brierre, Deputy State's Attorney

Attachment C

Exhibit C-2

MR. BRIERRE RESUMES

Q. The officer testified, but you were offered, were you not?
A. Yes. I told him I wanted to go.
Q. And you're saying that he just refused?
A. No. I'm not saying he refused anything.
Q. He just didn't take you?
A. Yes. They brought me up to the hospital.
Q. You were brought to the hospital?
A. Yes. I did get a blood test.
Q. You got a blood test?
A. Yes.
Q. Are you sure?
A. Positive.
Q. And we're talking about the night, May 20, 1993, when Officer

Fuller stopped you outside the Midway Diner?
A. Right. Same night.
Q. He brought you to the hospital, or some officer brought you to the hospital?
A. Yes. He brought me to the hospital.
Q. And blood was taken?
A. That's right.
Q. So you had an independent sample taken from you; a blood test?
A. Right.

ENTRY ORDER

SUPREME COURT DOCKET NO. 95-547

SEPTEMBER TERM, 1996

In re Patricia Lancaster, Esq.	}	Original Jurisdiction
	}	
	}	FROM:
	}	Professional Conduct Board
	}	
	}	DOCKET NO. 94-60

In the above-entitled cause, the Clerk will enter:

The Professional Conduct Board recommends that respondent, who knowingly made false statements to a court in a pretrial motion, receive a public reprimand for her conduct. Respondent argues that, based on the circumstances of this case, a private admonition would adequately serve the goals of the disciplinary process. We adopt the Board's recommendation that respondent receive a public reprimand.

Respondent has stipulated to the underlying facts. At the time this incident occurred, respondent had practiced law for fifteen years. She was admitted to the Vermont bar in 1987, and since that year has served as a public defender. On May 20, 1993 she was appointed to represent John Gillam on a charge of driving under the influence, third offense. When she first interviewed the defendant on that date, he stated that he had provided a breath sample to the police and that at his request he had been taken to a hospital to obtain an independent blood test. Respondent received the results of that test several weeks later. In November 1993 respondent deposed the processing officer. The officer testified that the defendant had not requested a blood test and therefore had not been taken to the hospital. The processing paperwork did not mention the trip to the hospital and the prosecutor was unaware that defendant had received the blood test.

Based on the officer's testimony, respondent moved to suppress the results of the defendant's breath test, alleging that the defendant's request for an independent blood test was denied. See 23 V.S.A. § 1202(d)(4); State v. Karmen, 150 Vt. 547, 548-49, 554 A.2d 670, 671 (1988). She admits that she knew at the time she filed the motion that the

defendant had in fact been given a blood test. Respondent gave substantial consideration to the motion and discussed the issue with another attorney. Her decision to file the motion was based on her belief that a motion in a criminal case raises issues for hearing and places the burden on the state to establish compliance with statutory and constitutional requirements.

At the hearing, the officer again testified that the defendant had not been taken to the hospital for an independent blood test because he did not ask for one. Respondent put the defendant on the stand. She had previously advised him to answer all questions truthfully, whether on direct or cross-examination. In response to her questions, the defendant testified that he had requested a blood test, and that up to a certain time, the police did not take him to get a test. Respondent limited her direct examination to avoid the conclusion of the processing, and the defendant's eventual trip to the hospital for the blood test. This information was, however, elicited during cross-examination, and respondent withdrew the motion to suppress at the conclusion of the hearing.

Respondent stipulated that her conduct violated DR 7-102(A)(5) (knowingly making a false statement of law or fact). The Board also found that respondent engaged in deceit and misrepresentation in violation of DR 1-102(A)(4) and in conduct prejudicial to the administration of justice in violation of DR 1-102(A)(5). Based on these violations, the Board looked to Standard 6.12 of the American Bar Association Standards for Imposing Lawyer Sanctions. See In re Berk, 157 Vt. 524, 532, 602 A.2d 946, 950 (1991) (ABA standards helpful in determining attorney sanctions). That provision states:

> Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

The Board recognized, however, that the circumstances of this case supported a less severe form of discipline. Specifically, the Board noted that respondent was motivated by a desire to advocate strongly for her client, not by selfishness; that she was troubled by the ethical dilemma and sought guidance from a colleague; that she tried to avoid the presentation of perjured testimony by counselling her client to testify truthfully; that she had no prior disciplinary history; that she cooperated with the disciplinary proceedings; and that she was extremely remorseful. In light of the strong and positive impact the disciplinary process had on respondent, the Board concluded that a public reprimand would be a sufficient sanction.

We agree with the Board that this instance of misconduct does not warrant the sanction suggested by Standard 6.12. This case, although involving a serious violation of the disciplinary rules, is distinguished by the many mitigating factors listed above. See ABA Standard 3.0 (in imposing sanction, court should consider existence of aggravating and mitigating factors). Respondent did act wrongly, but both the Board and bar counsel agree that she was motivated by a sincere desire to advocate strongly for her client and by a good-faith misunderstanding of the law. In the words of the Board, respondent acted with a "bad head," not with a

"bad heart."

Nonetheless, we cannot accept respondent's argument that a private admonition is the appropriate sanction. According to the Permanent Rules Governing Establishment of the Professional Conduct Board and Its Operation, an admonition should be imposed "[o]nly in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession." A.O. 9, Rule 7(A)(5)(b). However well-intentioned, respondent's conduct was a serious violation of the Code of Professional Responsibility. The profession, the public, and most of all the judicial system, rely on attorneys to be honest and straightforward in their representations to courts.

Respondent is publicly reprimanded for the violations found in this opinion.

BY THE COURT:

/s/
_____
Frederic W. Allen, Chief Justice

/s/
_____
Ernest W. Gibson III, Associate Justice

/s/
_____
John A. Dooley, Associate Justice

/s/
_____
James L. Morse, Associate Justice

/s/
_____
Denise R. Johnson, Associate Justice