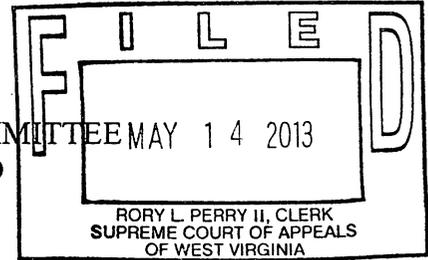


BEFORE THE HEARING PANEL SUBCOMMITTEE
LAWYER DISCIPLINARY BOARD
STATE OF WEST VIRGINIA



RE: H. JOHN ROGERS, a member
Of the West Virginia State Bar

Bar No.: 3151
Supreme Court No.: 12-0195
I.D. No.: 12-01-093

BRIEF OF THE RESPONDENT, H. JOHN ROGERS

H. John Rogers, Pro Se
317 Foundry Street
New Martinsville, WV 26155
Telephone: (304) 455-3200
WVSB No. 3151
(No email address)

TABLE OF CONTENTS

<u>Item</u>	p. no.
Assignment of Error.....	1
Statement of the Case.....	1
a) Procedural History	
b) Statement of the Facts	
Summary of Argument	
Argument	
I. Lack of factual predicate.....	1
II. Effect of nolo plea.....	4
III. Failure to consider mitigating evidence.....	6
Conclusion.....	10

ASSIGNMENT OF ERROR

- I. THE HEARING PANEL ERRED IN ITS TOTAL ADOPTION OF THE OFFICE OF DISCIPLINARY (HEREINAFTER “ODC”) VERSION OF THE FACTS.
- II. A DISCUSSION OF THE NOLO CONTENDRE PLEA ENTERED BY THE RESPONDENT IN MAGISTRATE COURT AND ITS EFFECTS ON THE INSTANT PROCEEDING.
- III. THE HEARING PANEL ERRED IN ITS FAILURE TO CONSIDER THE MITIGATING TESTIMONY SET FORTH IN ODC EXHIBIT NO. 11, THE TESTIMONY ADDUCED AT THE RESPONDENT’S SENTENCING HEARING IN MAGISTRATE COURT.

STATEMENT OF THE CASE

This case arises out of two incidents which occurred on 27 July 2009. The central factual dispute centers around a statement made by the Respondent, alleging inter alia “[Mr. Shade] physically assaulted me twice, at 9:30 a.m. and 5:00 p.m....” Hearing Panel Subcommittee Findings of Fact, etc., at p. 3 (hereinafter HP @ p.3) The ODC presented three witnesses in support of its position. The Respondent testified and produced a witness who indicated that one of the ODC’s witnesses had changed his story.

By agreement of the parties, subsequently ratified by the Hearing Panel, the Respondent had admitted in its entirety the transcript of his sentencing hearing in Magistrate Court on the ancillary criminal charges.

ARGUMENT I (Lack of Factual Predicate)

With regard to the morning incident, the Complainant, his former wife (also business partner and co-parent), and one Jim Long all testified that the Complainant did not “manhandle” the Respondent. The Hearing Panel refused to permit the Respondent to cross-examine Jim Long about his use of drugs. (He was then under felony

indictment, later reduced to a misdemeanor on 21 December 2012. State v. James Ronald Long, No. 12-F-12.

The complainant and his former wife both testified to the 5:00 p.m. incident. A third person – also a business partner – was present at that incident, but was not interviewed by the State Police or subpoenaed by the ODC.

Thus, in the first instance the ODC case is premised on the theory that the Respondent is so obtuse that he would tell a bare faced, bold lie in the presence of three witnesses and expect to get by with it!

Further, the ODC case is further premised on the theory that the Respondent sought his revenge by initiating this complaint rather than by, say, a civil suit or even knocking out a couple windows at 3:00 a.m. (Neither of which would probably have brought the wrath of the ODC down upon Respondent's head.)

Actually, the Complainant had a greater motive to dissemble: he testified at the hearing that he was concerned that the allegations of drug usage could impair his ability to earn a living as a masseuse (his primary occupation, another being hypnotist). Jill Shade, his former wife, current business partner, and co-parenter certainly could not be classified as a disinterested witness.

Based upon the Respondent's recollection (he could not afford a copy of the transcript and the ODC did not provide a copy with its filings), Jim Long's testimony was markedly different from that of Mr. and Ms. Shade: Long said that the Respondent chased the Complainant up the stairs and slapped him on his back.

Sgt. Scott Adams of the WVSP did not contact Long during his investigation. The witness Jessie King testified that he and the Respondent easily located Long at some

junction before the instant hearing and that Long at that time stated that Shade had initiated a physical confrontation. They met later that evening at a local restaurant and further discussed the matter. However, Long refused to sign a written statement. The Respondent objected to Long's testimony on the ground that it was hopelessly compromised because of the intervening felony indictment. Supra.

The actual mental hygiene complaint contains allegations going considerably beyond the physical assaults, including, but not limited to, the Complainant's narration of a recent "bad LSD trip". The Respondent who has long term experience (which will be discussed infra) with drug and alcohol abuse was shocked and stunned by a "bear hug" followed by the proverbial "bum's rush" from a person whom he had a long relationship, going back a decade or so. See, Respondent's testimony.

Thus, the Respondent was joyfully reporting a moral victory to a friend.

The record here should reflect that the Respondent and the "Barista's crowd" share basically the same liberal, left, humanistic (the Respondent is a theist) outlook, supporting the same state and local political candidates and causes. (The relationship with two of the Complainant's business partners – the pizza chef and the bartender – has continued. Thus, the Respondent assumed on that fateful morning that the Complainant would equally rejoice in the debating points that the Respondent had scored against the "gun nuts" at the Court Restaurant (not courthouse).

The Hearing Panel's conclusion was to the effect that the Respondent's motivation herein was a merely low level "spite" reaction, as noted supra.

Like the State Police, the Hearing Panel did not even consider placing the events of 27 July in context, considering them against a backdrop of some 30 years work with addicts and alcoholics.

With regard to Assignment of Error I, the Respondent would ask that the materials contained in ODC Exhibit No. 11 be considered here as well as the argument pertaining to the Argument in III Assignment, *infra*.

ARGUMENT II
(Effect of Nolo Plea)

The Respondent would certainly acknowledge that the weak spot in his position is the entry of the nolo pleas to both charges in the indictment. HP @ p. 2 and 3.

However, the Respondent has certainly made it clear throughout both the civil and criminal proceedings that he did not enter these pleas because he was guilty in fact, but rather because he desired to bring this whole matter to a conclusion. Further, he also clearly indicated that he sought whatever earthly merit there was in sparing the local authorities a 2 or 3 day trial.

The ODC had earlier advised the Respondent that it made no difference to it what the outcome of the criminal proceedings was: They would proceed with the ethical complaints. HP @ p. 14, 15. This case had been languishing almost four years – Respondent had not asked for any delays – and the Respondent wanted to end the whole matter.

The chair of the panel seems to mock the Respondent's assertion that he thought he could win acquittal. HP @ p. 15. Respondent would offer the following in this regard:

- a) As set in Argument I, this case is basically a “he said/she said” case.

- b) The Special Prosecutor was a neophyte trial lawyer from an adjoining county. The Respondent had picked or assisted in picking many petit juries, including the one that returned the largest civil verdict in state history.
- c) The Respondent had run for office several times in the county, most recently carrying the county in the Democratic election for nomination to the Supreme Court. Even the instant complainant had supported him in that race. See Exhibit no. I to this brief, which was admitted without objection at the sentencing hearing.
- d) Several years earlier the Respondent had led the ticket for Delegate to the national Democratic convention as a supporter of the Rev. Al Sharpton. President Obama lost every time he was on the local ballot.

Finally, with regard to the Hearing Panel's conclusion that the alleged "misconduct was egregious and impacts his trustworthiness as a lawyer", HP @ p. 15, and worked for an unjustified "surprise" is negated by the fact that the sentence imposed far exceeded the sentence that was the recommendation of the Special Prosecutor.

Finally in this regard, the Hearing Panel found that the Respondent's argument that he should be afforded relief in this Court because of an "uncounseled plea" in Magistrate Court was "disingenuous". HP @ p. 14.

First, that argument was made in the criminal case, State v. Rogers, No. 12-1184, in this Court. Secondly, the argument was premised on Mr. Justice McHugh's opinion in State, ex rel. O'Reilly v. Gay, 285 S.E. 2d 636 (W. Va. 1981) and Rule 20.1(a) of the Rules for Criminal Procedure for Magistrate Courts, not out of some whole cloth spun by

the Respondent. Finally, it was only advanced in the context of the magistrate's sentence.

The holding in Gay was that a pro se defendant who pled guilty in Magistrate Court was entitled to an automatic trial de novo in Circuit Court. The question presented by the appeal in State v. Rogers was whether a lawyer – who may or may not be versed in the law of misdemeanors – was precluded from asserting a similar claim.

Similarly, a similar question is presented by the peculiar facts and circumstances of the instant matter is whether consonant with Miller v. Wood, 729 S.E. 2d 867 (W.Va. 2012), a nolo plea below precludes a de novo review here. That case entails a statute, the instant matter a court rule.

Or, to put it differently, does a person accused of drunken driving have more procedural rights than a lawyer? The Respondent would suggest that the concepts of procedural equal protection of the law extends to a nolo plea in the present matter. After, all, both the Magistrate and the Special Prosecutor accepted the nolo plea here with the oral qualification enumerated by the Respondent, i.e. of his factual innocence. The magistrate in sentencing made this explicit.

ARGUMENT III (Failure to Consider Mitigating Evidence)

At the pre-hearing conference, the Respondent submitted 75 names of witnesses who in essence would testify as to the bona fides of his conduct. A number of these witnesses were members of various 12 step programs (basically AA, NA, Nar-Fam, and Cocaine Anonymous), all of whom were well aware of the Respondent's work with members of one or more of the above programs.

The chair of the Hearing Panel expressed some umbrage of the number of Respondent's prospective witnesses (which included three prosecuting attorneys with whom the Respondent had extensive contact over the decades) and the ODC objected to member of the above programs retaining their anonymity. Also, the chair strongly counseled the Respondent to winnow his list and that any failure to do so would be "considered" in the Panel's decision.

In accordance with the chair's desires, the Respondent submitted a highly truncated list of witnesses (whose testimony will be discussed infra) with the stipulation that the testimony adduced at the Respondent's sentencing hearing in Magistrate Court on 23 January 2012 (ODC Exhibit No. 11) be admitted and considered in the instant proceeding. The Hearing Panel does not even list these people as witnesses and there is no – absolutely no – indication that the Hearing Panel took any note of this crucial testimony.

This alone, Respondent would suggest, is grounds for reversal if not outright dismissal of these charges.

Some points made at this hearing include:

1) Sgt. Adams testified that the Respondent volunteered to take a polygraph. (There were no preconditions.) The Respondent also volunteered in a letter to the Special Prosecutor to testify before the grand jury. Neither of these offers was accepted. Bates 01127. Although not admissible, these offers certainly have some investigative value. The complainant sneered at these offers.

2) Tim Haught, the Wetzel County Prosecutor, (who had original jurisdiction) testified voluntarily for the Respondent, both in this proceeding and at the

sentencing in Magistrate Court. He testified that he had “privileged” relationship with James Long, an ODC witness, concerning a right of way dispute with the Respondent. The point of the colloquy in Magistrate Court is that neither the WVSP nor the ODC had ever contacted the one neutral witness until both civil and criminal charges had been preferred. Bates 01131-00135. Long also failed to honor a subpoena to appear in Magistrate Court.

Mr. Haught also testified that he was well acquainted with the Respondent’s works with addicts and alcoholics and went on to testify that he had no knowledge of the Respondent “overreaching” in this area. Bates 01137. His only criticism of the Respondent was that he occasionally pushed “the envelope”.

3) Jesse Dale King testified about the Respondent’s work with him and his three sons (one now deceased from a drug overdose). Bates 01137. Civil Commitment procedures were utilized.

4) Donna Cox (Bates 01146) testified with regard to the Respondent’s work in NAR-FAM, a group for the families of addicts. She stated “you certainly have helped quite a few people to my knowledge”. Id.

5) George Daugherty, a member of the bar from Charleston who has had extensive contact with the Respondent in the 12-step programs since 1982. “George D” also knows the principals in this dispute, having visited Barista’s several times with the Respondent during Mr. Daugherty’s campaign for Secretary of State. Also, he has worked with literally hundreds of addicts and alcoholics. I would rest my claim for a “pure heart”. [HP @ p. 13], cited by the author thereof, perhaps facetiously, as one of Respondent’s claims for a mitigating factor” on the testimony of Mr. Daugherty. Bates

0112. He knows the Respondent, he knows the complainant, and - most importantly – he understands the dynamics of drug addiction and alcoholism.

6) John Stirewalt is the Respondent’s 12 steps sponsor, succeeding the late Arch Riley of Wheeling, long time chair of the Bar’s Committee on the addictions. Bates 01167. He is a retired VP of both Consol and Arch Coal Companies and a member of a 12 step program for some 40 years. His testimony alone would give a disinterested observer a view of the Respondent’s inner workings within the program and also offer some insight as to the Respondent’s good faith in the instant matter.

7) William Gramlich. His testimony was accepted and admitted as a proffer with the agreement of the Special Prosecutor. Bates 01179. The great relevance of this case is that he was the recipient of an involuntary commitment which worked well and led to his recovery. Bates 01179 to 01185. The Respondent continues as his “sponsor” some 3 or 4 years later.

As was suggested above, the Hearing Panel simply ignored this testimony – as well as the testimony of the Respondent – with regard to the Respondent’s decades long history of working with addicts, alcoholics, and their families, engaging in numerous “interventions” over the years. Some have been successful (e.g. King and Gramlich, supra) and some have not.

Finally in this regard, the Respondent has published several articles on addiction, one of which is an exhibit in this case, a publication in the West Virginia Central, and two of which appeared in the Charleston Gazette in the past two or three years. Respondent would ask this Court to take judicial notice of these publications (one of which prompted a note of appreciation from a member of this Court.)

As part of his own recovery from drug and alcoholic addiction, the Respondent obtained two graduate degrees in theology (a M. Div. from the Pittsburgh Theological Seminary, a Presbyterian school; and a M.A. in Sacred Theology from the Seminary of the Immaculate Conception in New York) with courses at both schools in addiction studies. The best thinking in the addiction field is to the effect that the only cure for alcoholism and drug addiction is a spiritual cure. As one of the program clichés puts it “I came to AA to save my butt but found out that I really had to save my soul.”

CONCLUSION

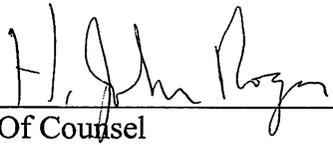
The Respondent would suggest that the Hearing Panel did not view the Respondent’s conduct in context, either for purposes of determining what happened on the day in question or in determining the sanction. The Panel simply ascribes the basest of motives to the Respondent, concluding that after the incident he adopted a stupid and easily disprovable tact. The Panel simply did not view the Respondent’s testimony on an equal footing with that of the complainant and his former wife, etc.

The ODC introduced no evidence as to the type of drug test Mr. Shade received. The Respondent attempted to obtain this information in the companion criminal case, but was refused. Hallucinogens either do not show up in these tests or those drugs quickly wash out of one’s system. At any rate, the ODC did not meet its burden in this regard.

The Respondent would ask that the charges be dismissed. In the alternative, he would ask that the virtual “death sentence” be severely mitigated.

Respectfully submitted,

H. JOHN ROGERS,
Petitioner, Pro Se

By: 
Of Counsel

317 Foundry Street
New Martinsville, WV 26155
Telephone: (304) 455-3200
WVSB No. 3151
(No email address)

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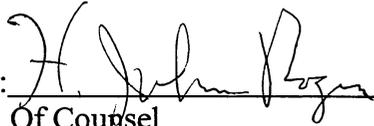
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CERTIFICATE OF SERVICE

Service of the foregoing **Brief of Respondent** was had by delivering true and correct copies thereof to the following persons via First Class U.S. Mail, postage prepaid, to their last known address this 13th day of MAY, 2013.

Andrea J. Hinerman
Senior Lawyer Disciplinary Counsel
City Center East
Suite 1200C
4700 MacCorkle Ave., SE
Charleston, WV 25304

By: 
Of Counsel

H. John Rogers
317 Foundry Street
New Martinsville, WV 26155
Telephone: (304) 455-3200
WVSB No. 3151
(No email address)