No. 24009: Lawyer Disciplinary Board v. Cecelia G. Jarrell, a Member of the West Virginia State Bar

Davis, Justice, dissenting,

FILED
Nov. 10, 1999
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
Nov. 10, 1999
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

I respectfully dissent to the majority opinion in this case because of the uncertainty this opinion creates in the legal community regarding this Court's willingness (or, in this case, unwillingness) to accept recommended dispositions which are consented to by the parties. Rule 3.12 of the Rules of Lawyer Disciplinary Procedure should be used sparingly to set aside a recommended disposition consented to by the respective parties.

Rule 3.12 of the Rules of Lawyer Disciplinary Procedure provides that "[i]f the parties consent to the recommended disposition, the matter shall be filed with the Supreme Court of Appeals for entry of an order consistent with the recommended disposition." Id. The rule further sets forth the procedure to be utilized when the Court does not concur with the recommended disposition. See id. Thus, it is clear that even "where the parties consent to a recommended disposition of a charge, this 'Court does not [have to] concur with the recommended disposition.'" Lawyer Disciplinary Bd. v. Kupec, 202 W. Va. 556, 568, 505 S.E.2d 619, 631 (1998) (quoting Rule 3.12 of the Rules of Lawyer Disciplinary Procedure).

This Court, nonetheless, should only refuse to concur with a recommended disposition, consented to between the parties, in those few cases where correct procedures were not followed or where a grave injustice will occur if the recommended disposition is accepted. For instance, in Kupec, we did not concur with the recommended disposition that charges against a lawyer be dismissed, because the HPS failed to comply with the procedures outlined in the Lawyer Disciplinary Rules by failing to hold an evidentiary hearing. 202 W. Va. at 573, 505 S.E.2d at 636. We indicated in that case, however, that after the necessary record was developed on remand, the HPS could once again recommend that the charges be dismissed. Id. n.30.

In the instant case, the Hearing Panel Subcommittee ("HPS") found that Ms. Jarrell violated Rule 4.2 of the Rules of Professional Conduct by conferring with a defendant without his counsel present. The HPS further found that Ms. Jarrell violated Rules 3.4(c) and 3.8(b) of the Rules of Professional Conduct by stating falsely that there had been no verbal plea offers, by arranging for the execution of a plea agreement at a date after the hearing when the plea information was sought, and by failing to disclose an executed plea agreement to a co-defendant in a murder trial for more than three months. Ms. Jarrell **never** objected to any of these factual findings. Further, when recommending its disposition for Ms. Jarrell's violations, the HPS acknowledged and relied upon all of the mitigating factors outlined by this Court in its majority opinion. Yet, the Court now finds those same factors "extraordinary," in order to justify its decision to dismiss the charges and refuse to follow

the recommendation of the HPS which was to sanction Ms. Jarrell with the most minimal punishment possible -- an admonishment.

Quite simply stated, there is no justifiable reason for this Court to have refused to adopt the recommended decision of the HPS, which was consented to by Ms. Jarrell. By failing to adopt the original recommended disposition of admonishment all the majority has really accomplished is to delay Ms. Jarrell's ability to put this bad experience behind her. Further, the majority has created more embarrassment and humiliation for Ms. Jarrell by etching the details of her ethical violations forever in the law reporters of this State. This undoubtedly was something she was hoping to avoid by voluntarily consenting to the most minimal recommended disposition of an admonishment.

For the foregoing reasons, I respectfully dissent.