

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2002 Term

FILED

November 4, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 28473

RELEASED

November 4, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

LAWYER DISCIPLINARY BOARD,
Complainant

v.

JOHN G. SIMS,
AN ACTIVE MEMBER OF THE WEST VIRGINIA STATE BAR,
Respondent

DISCIPLINARY PROCEEDING

PUBLIC REPRIMAND AND COSTS

Submitted: October 8, 2002

Filed: November 4, 2002

Charles M. Love, III, Esq.
Michael J. Halaiko, Esq.
Special Disciplinary Counsel
Bowles Rice McDavid Graff & Love
Charleston, West Virginia
Attorney for Complainant

H. John Rogers, Esq.
New Martinsville, West Virginia
Attorney for Respondent

The Opinion of the Court was delivered PER CURIAM.

CHIEF JUSTICE DAVIS concurs, in part, and dissents, in part, and reserves the right to file a separate opinion.

JUSTICE McGRAW, deeming himself disqualified, did not participate in the decision of this case.

JUDGE O'HANLON sitting by special assignment.

SYLLABUS BY THE COURT

1. ““A *de novo* standard applies to a review of the adjudicatory record made before the [Lawyer Disciplinary Board] as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the [Board’s] recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the [Board’s] findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record.” Syl. pt. 3, *Committee on Legal Ethics v. McCorkle*, 192 W.Va. 286, 452 S.E.2d 377 (1994).’ Syllabus Point 2, *Lawyer Disciplinary Bd. v. McGraw*, 194 W.Va. 788, 461 S.E.2d 850 (1995).” Syllabus Point 3, *Lawyer Disciplinary Bd. v. Cunningham*, 195 W.Va. 27, 464 S.E.2d 181 (1995).

2. “This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys’ licenses to practice law.” Syllabus Point 3, *Committee on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984).

3. “Ethical violations by a lawyer holding a public office are viewed as more egregious because of the betrayal of the public trust attached to the office.” Syllabus Point 3, *Committee on Legal Ethics v. Roark*, 181 W.Va. 260, 382 S.E.2d 313 (1989).

4. “Rule 3.16 of the West Virginia Rules of Lawyer Disciplinary Procedure enumerates factors to be considered in imposing sanctions and provides as follows: ‘In

imposing a sanction after a finding of lawyer misconduct, unless otherwise provided in these rules, the Court [West Virginia Supreme Court of Appeals] or Board [Lawyer Disciplinary Board] shall consider the following factors: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors.” Syllabus Point 4, *Office of Lawyer Disc. Counsel v. Jordan*, 204 W.Va. 495, 513 S.E.2d 722 (1998).

5. “In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession.” Syllabus Point 3, *Committee on Legal Ethics v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987).

Per Curiam:

In this disciplinary proceeding, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board (Hearing Panel) recommends that this Court suspend the law license of the respondent, John G. Sims, and assess the costs of the proceeding against him. The recommendation follows Sims' removal from the office of prosecuting attorney for Logan County by this Court in *In re Sims*, 206 W.Va. 213, 523 S.E.2d 273 (1999) (*Sims I*), and is based on the Hearing Panel's conclusion that Sims violated West Virginia Rules of Professional Conduct 3.6,¹ 3.8,² and 8.4³ prior to and following the circuit court's caution to refrain from improper behavior. We believe Sims should be reprimanded and pay the costs of the disciplinary proceeding.

¹West Virginia Rule of Professional Conduct 3.6(a) states, "A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding."

²West Virginia Rule of Professional Conduct 3.8 states in pertinent part, "The prosecutor in a criminal case shall: (e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6."

³West Virginia Rule of Professional Conduct 8.4 states in pertinent part, "It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (d) engage in conduct that is prejudicial to the administration of justice[.]"

I.
FACTS

The Hearing Panel bases its recommendation upon many of the same facts which provided the foundation for the removal proceeding in which Sims was removed by this Court from the elected office of prosecuting attorney for Logan County. Those facts were discussed in detail in *Sims I, supra*. The only facts that we need to enumerate in this opinion are those which we did not previously consider. After the three-judge panel entered its order but before this Court filed its opinion, Russell Rick Grimmatt, assessor of Logan County, filed a petition for a writ of prohibition in the Circuit Court of Logan County against Sims seeking to prevent Sims from investigating the practices of the assessor's office regarding property tax exonerations or presenting evidence to the grand jury. The circuit court found that a conflict of interest existed between the two offices and awarded the writ.

In its order, the trial court noted that it was concerned "regarding the release of new[s] stories about the grand jury proceedings[.]" The court thereupon strongly cautioned Sims that he should refrain from making extrajudicial statements to the press regarding grand jury matters. Nonetheless, articles were subsequently printed in The Williamson Daily News and in The Logan Banner wherein Sims was directly quoted as accusing the assessor of forgery, illegal reduction of property taxes, and fraud. Based upon Sims' apparent flagrant disregard for the court's admonishment against making extrajudicial statements, Grimmatt filed a motion for contempt against Sims. Following a hearing on the matter, the circuit court found that

Sims' behavior violated West Virginia Rules of Professional Conduct 3.6 and 3.8. However, the court dismissed the motion because civil contempt was not alleged; the special prosecutor was ordered to "expand her investigation to determine whether charges of criminal contempt are warranted against the Respondent for actions including allegations of disclosure of Grand Jury information in violation of Rule 6 of the Rules of Criminal Procedure."

Even though the three-judge panel failed to remove Sims from office, the panel concluded that Sims' behavior was "so flagrant" that it "warrant[ed] some suspension from the practice of law." Consequently, the panel referred the case to the Lawyer Disciplinary Board for resolution. The entirety of Sims' behavior was submitted to special counsel for the Office of Disciplinary Counsel. Following an investigation, the Investigative Panel issued a statement of charges against Sims alleging he violated Rules 3.6, 3.8, and 8.4. The matter was then brought before the Hearing Panel upon stipulations. The Office of Disciplinary Counsel and Sims stipulated and submitted for consideration the transcript and testimony adduced during the removal proceeding; the order of the three-judge panel; the opinion of this Court, *Sims I*; the transcript and testimony adduced along with the court's order in the prohibition proceeding; and the transcript and testimony adduced along with the court's order in the contempt proceeding.

The Hearing Panel found that while Sims served as prosecuting attorney, he "repeatedly made extrajudicial statements that he knew or should have known would have a

substantial likelihood of materially prejudicing an adjudicative proceeding.” The Hearing Panel also found that following his removal from the investigation involving the assessor’s office, Sims continued on at least two occasions to give interviews to the press. In both newspaper articles, Sims is quoted as publicly accusing the assessor of forgery, illegal reduction of property taxes, and fraud.⁴

After making these findings of fact, the Hearing Panel concluded that both aggravating and mitigating factors existed in this case. The Hearing Panel believed it was

⁴The June 10, 1999 article which was printed in The Williamson Daily News, *Prosecutor accuses assessor of fraud*, states in part:

Logan County’s chief law enforcement officer claims he has point-blank proof that Logan Assessor Rick Grimmatt is signing off on bogus taxpayer documents and costing the county hundreds of thousands of dollars in tax revenues each year.

Logan Prosecutor John Sims revealed hundreds of documents Tuesday obtained from Grimmatt’s office which, he claims, clearly shows definitive proof that the assessor is illegally decreasing property taxes on political allies throughout Logan County.

In some cases, added Sims, taxpayer signatures have been forged without their knowledge.

“We’ve had several people who have testified they’ve never signed a document, or have signed a blank document,” he said. “Furthermore there are scads of people out there living in homes worth hundreds of thousands of dollars only paying taxes on property tax assessments of \$20,000 or \$30,000.

Sims said his office has found fraud in “every avenue” of its investigation into the assessor’s requests for exoneration of erroneous assessments.

These same quotations appeared in the June 11, 1999 article which was printed in The Logan Banner.

significant that Sims “held a position of public trust--that of Prosecuting Attorney--at the time of the misconduct and that his misconduct involved a pattern of repeated offenses.” Along this same vein, the Hearing Panel believed it was significant that notwithstanding the fact that the three-judge panel held his behavior had violated the rules, and after he had been cautioned by the supervising circuit judge, Sims flagrantly repeated the improper behavior. The Hearing Panel also concluded that Sims’ removal from office as prosecuting attorney was “a substantial sanction” which was a mitigating factor. The Hearing Panel was not persuaded that removal from office alone was a sufficient sanction under the circumstances. Therefore, the Hearing Panel recommends to this Court that Sims’ license be suspended for ninety days and that he be required to pay the costs of the proceedings.

II.

STANDARD OF REVIEW

“A *de novo* standard applies to a review of the adjudicatory record made before the [Lawyer Disciplinary Board] as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the [Board’s] recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the [Board’s] findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record.’ Syl. pt. 3,

Committee on Legal Ethics v. McCorkle, 192 W.Va. 286, 452 S.E.2d 377 (1994).” Syllabus Point 2, *Lawyer Disciplinary Bd. v. McGraw*, 194 W.Va. 788, 461 S.E.2d 850 (1995).

Syllabus Point 3, *Lawyer Disciplinary Bd. v. Cunningham*, 195 W.Va. 27, 464 S.E.2d 181 (1995).

III.

DISCUSSION

Rule 3.7 of the West Virginia Rules of Lawyer Disciplinary Procedure states that “[i]n order to recommend the imposition of discipline of any lawyer, the allegations of the formal charge must be proved by clear and convincing evidence.” There is no question or dispute that the allegations in this case were proved by clear and convincing evidence. The parties stipulated the facts and the Board submitted to this Court copies of the latest newspaper articles which quote statements made by Sims. Sims does not argue that he did not make the public statements or commit the acts complained of; rather, he argues that his case should be referred back to the three-judge panel for a decision regarding whether sanctions beyond removal from office are warranted. In our review of the West Virginia Code and the Rules, we find that neither provides for such a procedure. We reiterate that “[t]his Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys’ licenses to practice law.” Syllabus Point 3, *Committee on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984). Trial courts and

three-judge panels simply lack the power or jurisdiction to reprimand a lawyer or to suspend or annul a lawyer's license to practice law.⁵

In his brief submitted to this Court, counsel for Sims concedes that Sims should have been removed from office, but he argues that no further sanctions should be imposed because Sims' actions were protected by free speech and prosecutorial immunity. Counsel stresses that "although he may not have comported himself as one might expect prosecutors to do, still his heart was pure. In his eyes, he was fighting entrenched political corruption. As has been noted at several places above, there is nothing in the record to indicate that Mr. Sims was anything other than a young, inexperienced, and crusading prosecuting attorney."

The Board argues that Sims' license should be suspended, in part, because "lawyers holding public office [are held] to a higher standard of conduct." Syllabus Point 3 of *Committee on Legal Ethics v. Roark*, 181 W.Va. 260, 382 S.E.2d 313 (1989), states, "Ethical violations by a lawyer holding a public office are viewed as more egregious because of the betrayal of the public trust attached to the office." The Board believes that Sims' conduct

⁵W.Va. Code § 51-1-4a (1945), the Bylaws of the West Virginia State Bar, and the Judicial Reorganization Amendment to the West Virginia Constitution, Article VIII, clearly contemplate that legal ethics concerns must be resolved by this Court rather than circuit courts. *See Carey v. Dostert*, 170 W.Va. 334, 337, 294 S.E.2d 137, 139-40 (1982) ("[A] license to practice [law] may only be granted by this Court and may be annulled only by us. . . . A trial court that discovers attorney misconduct must complain to the Legal Ethics Committee, By-Laws , Article VI, § 1, § 4 (paragraph 2).") (Citations omitted).

demonstrated a pattern of blatant disregard for Rules 3.6 and 3.8 both before and after judicial officers instructed him that his behavior was prejudicial and unethical. The Board argues that knowingly and repeatedly violating Rules 3.6 and 3.8 falls squarely within the conduct Rule 8.4 aims to prohibit.

In *Sims I*, this Court found that the conduct complained of here constitutes malfeasance and official misconduct; in other words, Sims persistently and deliberately used pre-hearing publicity to prejudice adjudicative proceedings. This violates Rules 3.6(a) and 3.8(e). Sims' knowing and repeated violation of these rules falls within the ambit of Rule 8.4. We further note that we have not previously considered the statements given by Sims to two local newspapers wherein he accused the assessor of forgery, illegal reduction of property taxes, and fraud.

After Sims was cautioned to stop making extrajudicial statements, he nevertheless deliberately proceeded to do exactly what he had been cautioned by the trial court to stop doing. The statements he gave to the press approximately a month after he was ordered to appoint a special prosecutor to investigate the assessor's office had a substantial likelihood of materially prejudicing the special prosecutor's ability to investigate and prosecute any wrongdoing. The statements also had a substantial likelihood of materially prejudicing the assessor's ability to defend any forthcoming charges and receive a fair adjudication of the same. We simply cannot condone this conduct. The statements made by Sims during the

investigation are unfair to the assessor not only because the statements could prevent a subsequent fair jury trial, but also because they publicly malign the assessor and at the same time deny him any forum in which to respond to defend himself.

This Court has said,

Rule 3.16 of the West Virginia Rules of Lawyer Disciplinary Procedure enumerates factors to be considered in imposing sanctions and provides as follows: “In imposing a sanction after a finding of lawyer misconduct, unless otherwise provided in these rules, the Court [West Virginia Supreme Court of Appeals] or Board [Lawyer Disciplinary Board] shall consider the following factors: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer’s misconduct; and (4) the existence of any aggravating or mitigating factors.

Syllabus Point 4, *Office of Lawyer Disc. Counsel v. Jordan*, 204 W.Va. 495, 513 S.E.2d 722 (1998). Except for the last two instances, Sims’ conduct was sanctioned by removal from office. We believe that removal of a lawyer from an elected office is an effective, dramatic, and powerful punishment which serves as a “deterrent to other members of the Bar.” This Court has made it very clear that:

In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession.

Syllabus Point 3, *Committee on Legal Ethics v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987).

In the final analysis, Sims' deliberate practice and pattern of repeatedly making extrajudicial statements which had a substantial likelihood of materially prejudicing adjudicative proceedings is clearly an aggravating factor to be considered by this Court in imposing a sanction. On the other hand, his removal from the office of prosecuting attorney for this misconduct must in fairness be considered a mitigating factor. Forfeiture of a public office and removal therefrom is a harsh and drastic sanction indeed.

We, therefore, conclude that under all the circumstances of this case, including the fact that Mr. Sims was removed from office, a public reprimand and payment of the costs incurred in this proceeding⁶ are appropriate and adequate sanctions.

Public Reprimand and Costs.

⁶West Virginia Rule of Lawyer Disciplinary Procedure 3.15 states in pertinent part, "When a sanction is imposed, the Hearing Panel Subcommittee or the Court shall order the lawyer to reimburse the Lawyer Disciplinary Board for the costs of the disciplinary proceeding unless the Panel or the Court finds the reimbursement will pose an undue hardship on the lawyer."