In the Supreme Court of Georgia

Decided: FEB 9 1998

S97Y0449. IN THE MATTER OF MARC EDWARD ACREE.

PER CURIAM.

Following a hearing before a special master under Bar Rule 4-106, the special master recommended that the respondent, Marc Edward Acree, be suspended from the practice of law for six months, based on his guilty plea in the United States District Court for the Northern District of Georgia to the misdemeanor of bank larceny, 18 USC § 2113 (b). Before this Court, Acree contends that a public reprimand is the appropriate level of discipline, and the State Bar contends that disbarment is appropriate.

It is clear that Acree has engaged in grave misconduct. By filing statements with lenders that were false by omission, Acree enabled a loan transaction to proceed that otherwise would not have proceeded if he had been truthful. Although Acree did not benefit from the loan transaction except for the attorney fees he received, the lenders lost their investment. Because the the severity of Acree's misconduct, a misdemeanor involving moral turpitude, we reject Acree's contention that a public reprimand is appropriate, as well as the special master's recommendation of only a six-month suspension. We also reject as too severe the State Bar's contention that disbarment is the appropriate level of discipline. Balancing the severity of Acree's conduct, with the mitigating factors that are present -- that Acree does not have a prior disciplinary infraction; that he has a solid record of supporting and serving his community; and that he has built an outstanding reputation for integrity both

in the legal community and the community at large[1] -- we conclude that a two-year suspension is the appropriate level of discipline. Further, in two recent similar cases, this Court has ordered suspensions of two years[2] and three years.[3] For these reasons, this Court suspends Acree from the practice of law for two years. Acree is reminded of his duties and responsibilities under Bar Rule 4-219 to notify any clients of his inability to represent them, to take all actions necessary to protect the interests of his clients, and to certify to this Court that he has satisfied the requirements of this Rule.

Two-year suspension. All the Justices concur, except Benham, C.J., Hunstein and Thompson, JJ., dissent.

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1 See ABA Standards for Imposing Lawyer Sanctions (1991), Standard 9.32 (a), (g).

2 In re Lenoir, 265 Ga. 403 (456 SE2d 584) (1995).

3 In re Washburn 266 Ga. 50 (464 SE2d 192) (1995).

S97Y0449. IN THE MATTER OF MARC EDWARD ACREE

HUNSTEIN, J., dissenting.

While I agree with the majority that Acree has engaged in grave misconduct, including a violation of Standard 66 which authorizes disbarment upon conviction of any felony or misdemeanor involving moral turpitude, I cannot agree with its conclusion that the penalty of disbarment is too severe in this disciplinary action. Because the record clearly establishes that Acree engaged in felonious conduct involving dishonesty, fraud, deceit and misrepresentation and that he engaged in deceptive practices during the disciplinary process, a factor not considered by the majority, I would disbar Acree from the practice of law in this State.

There are essentially two questions before the Court in this disciplinary matter, the appropriate level of discipline to be imposed and whether Acree's testimony at the show cause hearing contradicted his testimony at the plea hearing and trials in federal court. One look at the transcripts in this case reveals that Acree's position at the show cause hearing not only contradicts his testimony at the plea hearing, but is also, at best, disingenuous. At the plea hearing, the U. S. Attorney's summarization of the government's case reflects that Acree, in submitting misleading documents to lending institutions, was fully aware that those documents were misleading and that Acree intended to mislead those institutions as well as the Small Business Administration. Indeed, when directly asked by the trial court if he agreed that he had acted as outlined in the government's case, Acree responded affirmatively and only clarified that his

misconduct was that of omission.[1] At the show cause hearing, however, Acree attempted to minimize the gravity of his crime, thereby contradicting his previous testimony, by contending that he did not know his conduct was criminal at the time he submitted the misleading documents to the lending institutions. Such serious misconduct constitutes a deceptive practice within the disciplinary process as well as a refusal to acknowledge the wrongful nature of his conduct, see ABA Standard 9.22 (f) and (g), and is wholly ignored by the majority in determining the appropriate level of discipline,

Although I do not question Acree's previous reputation of good character in his community,

> [t]he relationship of courts and attorneys to the people is one of high responsibility, involving complete trust and confidence and absolute fidelity to integrity .... Members of the Bar must maintain a high standard of conduct. If the law is to be respected, the public must be able to respect the individuals who administer it.

In the Matter of Stoner, 246 Ga. 581, 582 (1) (272 SE2d 313) (1980). In a recent, and in some respects similar, disciplinary action, this Court held that

> [a]llowing an attorney who has been convicted of a crime to continue to practice law can undermine public confidence in the legal profession. In

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[1] Acree was represented by counsel at the plea hearing; the trial court found that Acree's plea was knowing and voluntary; and, in sentencing Acree to probation, a fine, and restitution, the court noted that the government afforded Acree a great consideration in allowing him to plea to a misdemeanor rather than a felony.

> the Matter of Stoner, 246 Ga. 581, 582 (1) (272 SE2d 313) (1980). This is particularly true where, as here, the conviction is for a crime involving the fraudulent mishandling of funds. See generally In the Matter of Meier, 256 Ga. 72, 75 (344 SE2d 212) (1986) (reviewing cases involving the mishandling of clients' funds). Compare In the Matter of Douglas J. Flanagan, 258 Ga. 491 (371 SE2d 404) (1988) (thirty-day suspension where respondent pled guilty to failure to file tax returns, but had paid the taxes). In determining the appropriate sanction, the American Bar Association's standards provide guidance. In the Matter of Jack O. Morse, 265 Ga. 353, 354 (2) (456 SE2d 52) (1995). Under those standards, disbarment is generally appropriate when a lawyer engages in serious criminal misconduct, a necessary element of which includes fraud, or engages in any other intentional conduct involving dishonesty, fraud, or deceit. Standard 5.11, ABA Standards for Imposing Lawyer Sanctions (1991).

In the Matter of Thomas L. Washburn, 266 Ga. 50 (464 SE2d 192) (1995). The facts clearly establish that Acree intentionally engaged in felonious conduct involving dishonesty, fraud, deceit and misrepresentation that seriously and adversely reflects on both his fitness to practice law and the integrity of the legal profession. Considering the gravity of Acree's crime and the aggravating factors in this case, including Acree's substantial experience in the practice of law, ABA Standard 9.22 (j), I would conclude that disbarment is the only appropriate level of punishment. See Washburn, supra; In the Matter of Robert W. Harrison, Jr., 260 Ga. 455 (396 SE2d 901) (1990) (attorney disbarred for violation of Standard 66 - income tax evasion).

Acree's disciplinary problems arose after his involvement in a fraudulent loan transaction which resulted in his pleading guilty to a misdemeanor charge of bank larceny, § 18 U.S.C. 2113 (b). Acree initially represented the seller and prepared certain documents on behalf of the buyer and the seller. The buyer and seller were acting together to obtain a loan for the buyer guaranteed by the United States Small Business Administration (S.B.A.), although the buyer was not qualified for such a loan. In order to guarantee the loan, the S.B.A. required that the buyer have $50,000, unencumbered and available with which to operate. The $50,000 had to be unencumbered to ensure the buyer had operating capital to run the business and in order to close the loan, Acree had to certify that he held $50,000 on the buyer's behalf. Accordingly, the seller arranged a loan from another party to provide Acree $50,000 so that Acree could provide the appropriate certification to the lenders. At the seller's direction, Acree certified to the lenders that he held the $50,000 in his trust account for the buyer and specifically omitted any reference in the certification to the origin of such funds. As the loan closing proceeded, the lenders disbursed the loan funds and Acree retained a portion of those funds for his fee.

The government's position was that Acree understood that the $50,000 was to be used to deceive the S.B.A., it would not, in fact, be unencumbered, and that the money would be returned to the party who loaned it to the seller immediately after the closing. Thus, by intentionally failing to inform the lenders that the $50,000 was encumbered, Acree assisted the buyer in obtaining money under false pretenses. Both lenders lost their

investments, the property involved was burned, and the government brought various charges against Acree, the buyer and the seller. As part of plea negotiations, the government agreed to indict Acree for a misdemeanor, rather than a felony, and to recommend probation. Acree, in turn, agreed to testify in the government's case against the buyer and seller, and to return the amounts he received as attorney fees to the lenders.

During the plea hearing, at which Acree was represented by counsel, Acree agreed to the facts as set forth by the Assistant U. S. Attorney; i.e., that he knew the $50,000 was to be used to deceive the S.B.A., and it would be returned immediately after the loan closing, and that it was Acree's intent, in certifying to the lenders that he held the funds in his trust account, without telling the lenders those funds were encumbered, to deceive the S.B.A. The federal trial court sentenced Acree to three years probation, fined him $2,000, and ordered that Acree pay restitution in the amount of the fee he received to the S.B.A. and one of the lenders. Several months later Acree testified for the government and against the buyer and seller, and those defendants were convicted.

Pursuant to the State Bar's petition, the Court appointed a special master to hold a "show cause" hearing under Bar Rule 4-106. Acree testified at the show cause hearing that although he realized his certifications to the lenders about the $50,000 he held in trust for the buyer were misleading in that he did not indicate those funds were encumbered, at the time he made those certifications he did not realize it was necessary that the funds be unencumbered.

Following the hearing before the special master, the State Bar filed a "Prayer for Enhanced Discipline Based on Respondent's Misrepresentation of His Intent," in which the Bar argued that Acree's testimony at the show cause hearing before the special master regarding his lack of scienter and his reasons for entering into the plea directly contradicted Acree's testimony both at the plea hearing and at the trial against the buyer and seller.

I am authorized to state that Chief Justice Benham and Justice Thompson join in this dissent.