SCAD-11-0000162

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

OFFICE OF DISCIPLINARY COUNSEL, Petitioner,

vs.

EARLE A. PARTINGTON, Respondent.

ORIGINAL PROCEEDING
(ODC 10-079-8913)

DISSENTING OPINION BY NAKAYAMA, J.,
IN WHICH McKENNA, J., JOINS

I respectfully dissent.

Pursuant to RSCH Rule 2.15(c), Respondent Partington, to avoid the same or substantially similar discipline of indefinite suspension in this jurisdiction, must demonstrate that one of four conditions pertain to his disciplinary matter:

> (1) the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
> (2) there was such an infirmity of proof establishing the factual basis for the discipline . . . as to give rise to the clear conviction that the court could not, consistent with its duty, accept as final the other jurisdiction's conclusion on that subject; or
> (3) the reason for the other jurisdiction's discipline, or restrictions or conditions no longer exist; or
> (4) the conduct established warrants substantially different discipline . . . in this state.

Respondent Partington has failed to demonstrate that any of the four conditions, *supra*, exist in the present matter and, therefore, RSCH Rule 2.15(c) clearly states that the supreme court "*shall* enter an order imposing *the same or substantially equivalent discipline* . . . upon the attorney's license to practice law in this jurisdiction . . . ." (Emphasis added.) In light of Respondent Partington's knowing and willful misrepresentations to the military appellate court in Washington, D.C. and his persistent lack of cooperation resulting from those misrepresentations -- going so far as to deny the court before which he argued had jurisdiction over him to impose discipline -- I cannot agree that a one-month suspension from the practice of law in this jurisdiction is "the same or substantially similar" to the Judge Advocate General's sanction of indefinite suspension or even to the military appellate court's sanction, not technically related to this reciprocal discipline action from the JAG, of a one-year suspension.

First and foremost, it is important to be clear that Partington was not making a legal argument when he informed the military appellate court in Washington, D.C. that the military judge at the plea-hearing had acquitted his client of the video voyeurism charges: he was intentionally misrepresenting facts to the appellate court in the hope that, by misleading it, he could gain an advantage for his client. There are two alternate

characterizations of Partington's behavior: (1) Partington truly did believe the military judge had, indeed, dismissed the video voyeurism specifications against his client as jurisdictionally flawed -- despite the evidence in the transcript wherein the military judge says clearly and repeatedly that he refuses to make a ruling on that issue at the plea hearing -- in which case Partington at the plea hearing aided and advised his client to plead guilty to charges that Partington believed at the time had been dismissed, or (2) Partington was aware, through the repeated admonitions of the military judge, that the judge was not making a ruling on the adequacy of the charge that day, Partington accepted the fact that the charges, pending a later ruling on their sufficiency, remained against his client, and that Partington made a decision at that time to not challenge the charges further and instead advised his client to plead guilty to a lesser included offense, a strategic decision that ultimately reduced his client's possible sentence from in excess of 60 years to 5 years.

Partington cannot argue that on the day of the plea hearing he believed that the charges remained valid, justifying his advice to plead guilty to the lesser included offense, and then argue later, on appeal, that on the day of the plea hearing he believed the charges were, in fact, declared null and void by the military judge and, therefore, that his client pled guilty to

invalid charges. The two states of mind are mutually exclusive.

It is also important to be clear that, on appeal, Partington did not make the *legal* argument that the indictments of video voyeurism were insufficient as to the element of jurisdiction and therefore invalid, and that his client's pleas of guilty to the lesser included offenses were therefore invalid.[1] As the majority states, there was, indeed, "some basis on which to argue that his client could not plead guilty to a lesser included offense under the circumstances as they existed." If Partington had used the evidence in the record to make the *legal* argument that the appellate court should rule that the charges were insufficient, the appellate court would have analyzed that legal argument under the *Watkins* test, *supra* note 1. In light of the reasoning in *Watkins*, I suspect that the appellate court would have found the missing jurisdictional information was not fatal to the validity of the charges, insofar as Partington's client stated in several instances that he was

[1] Partington timed his motion to dismiss based on insufficient specificity of the charges so as to make it *after* the military judge had accepted his client's pleas of guilty to the video voyeurism charges, following a very long and very thorough colloquy with Partington's client concerning every charge, but *before* the filing of the appeal, in order to avoid, on the one hand, the prosecutor withdrawing the charges and moving to amend them, and on the other hand, facing a more stringent test on appeal analyzing the sufficiency of the charges (*see United States v. Watkins*, 21 M.J. 208, 209-10 (C.M.A. 1986) (cited by Partington at the plea hearing, and stating that, "[a]lthough failure of a specification to state an offense is a fundamental defect which can be raised at any time, we choose to follow the rule of most federal courts of liberally construing specifications *in favor of validity* when they are challenged for the first time on appeal.") (Emphasis added, footnote omitted.)

aware of the nature of the charges and the location in which his activities occurred and was fully informed as to the charges before him.

In order to avoid the *Watkins* test for validity, which would likely not have succeeded, Partington eschewed the strategy of making the legal argument that the specifications were insufficient and seeking to convince the appellate court to so rule. Instead, rather than convince the appellate court to make the ruling, Partington chose to attempt to deceive the appellate court by informing it that the military judge at the plea hearing *had already made the insufficiency ruling*: that the hearing judge had, in fact, declared the charges invalid, had acquitted Partington's client of the charges and, therefore, that his client had had no charges against him to which he could plead guilty to a lesser offense. The transcript of the hearing makes it abundantly clear that no such ruling was made. He was not making the legal argument that the appellate court *should* rule the specifications insufficient, he was making the false declaration that the trial court *had* ruled the specifications insufficient. It is on that distinction that his discipline is justified.

Partington did not "omit[] material facts necessary to accurately portray the court martial proceedings that were the subject of the appeal" as the majority states -- he deliberately

filed a falsehood with an appellate court that goes beyond "factual omissions" (majority at 2) in an attempt to deceive the appellate justices. Respondent Partington cannot boldly misstate the record and, when confronted with his deceit, hide behind the use of quotation marks. Candor to a tribunal is a clear duty of all attorneys, required by all applicants to the Hawai‘i Bar, *see* RSCH Rule 1.3(c)(1) ("A lawyer should be one whose record of conduct justifies the trust of . . . courts . . . . A record manifesting a deficiency in[] honesty, []trustworthiness, . . . or respect for the law shall be grounds for denying an application") and all practitioners before the Bar, *see* HRPC Rule 3.3 ("A lawyer shall not knowingly[] make a false statement of material fact or law to a tribunal") and HRPC Rule 8.4 ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation . . . ."). The duty of candor, though, rises above rules of court. A court's trust in the reliability and honesty of the attorneys that practice before it is essential to the very machinery of the court system. Any violations of that duty must be addressed resolutely to make clear to both the attorney in question but also to other attorneys and to the public the severity of the offense and the threat it poses to the trust upon which the judicial system relies. Had Partington's tactics in the present matter succeeded, they would have had a significant

adverse effect on the integrity of the legal proceedings and would have caused serious injury to the legal system.[2]

As to RSCH 2.15(c)(4), through his actions in the military courts, Partington violated the duty of candor and refused to cooperate with the investigation, going so far as to deny the military court's jurisdiction over him for disciplinary purposes. Such behavior in this jurisdiction, which would violate HRPC Rules 3.3(a)(1) and 8.4(c) at a minimum, would not "warrant[] substantially different discipline" from that imposed by JAG. *See ODC v. Hacker*, SCAD-11-0000473, August 16, 2011 (imposing a five-year suspension from the practice of law upon Respondent Hacker for a lack of competence and diligence in an underlying divorce matter, falsifying a document subsequently offered to opposing counsel as authentic, and filing false information in a federal bankruptcy court); *ODC v. Lau*, No. 18459, June 4, 1997 (disbarring Lau for neglecting clients and their matters, failing to obey obligations under rules of a tribunal, misusing client funds which he later refunded, and for failing to cooperate with the investigation into his actions); *ODC v. Regent*, No. 18952, May 23, 1995 (disbarring Regent for making false statements on her Arizona and Nevada Bar

[2] I do not believe my colleagues in the majority dispute the fact that Partington's Due Process Rights were fully observed in the disciplinary investigation and subsequent hearing (*see* RSCH Rule 2.15(c)(1)), or that violating the duty of candor to a tribunal remains grounds for discipline in the JAG's jurisdiction (*see* RSCH Rule 2.15(c)(3)), so I do not address those issues further.

applications, evading ODC subpoenas, and refusing to answer ODC inquiries into the matter); *ODC v. Martin*, No. 19378, November 29, 1995 (suspending Martin for one year and a day for failing to complete a probate over 15 years, failure to communicate, and for failure to respond to ODC inquiries or to participate in subsequent disciplinary hearings); *ODC v. Miyasaki*, No. 15816, February 18, 1992 (suspending Miyasaki for three years for failure to perform agreements, failure to communicate, charging an excessive fee, failure to refund the fee, and for failure to cooperate in subsequent investigation); *ODC v. Kunimura*, No. 14173, January 3, 1990 (suspending Kunimura for two years for neglecting four cases and failing to cooperate with the disciplinary proceedings, including declining to provide evidence in explanation or mitigation of her conduct); *see also In re Cardwell*, 50 P.3d 897, 900-02 (Colo. 2002) (although Cardwell contended that his false statement to the tribunal that his client had no previous drunk-driving offenses was "made in the heat of the moment and were influenced by his zeal to help his client to avoid jail," the court concluded he had violated, *inter alia*, Colorado Rules of Professional Conduct Rules 3.3(a)(1) and 8.4(c) and imposed a three-year suspension with 18 months stayed); *Att'y Grievance Comm'n v. Maignan*, 935 A.2d 409, 418-20 (Md. 2007) (Attorney's failure to inform court of his suspension from the practice of law and his subsequent appearance before

that court, where he asserted he could represent his client for 15 more days when, in fact, he could not, violated Maryland Rules of Professional Conduct Rule 3.3(a)(1) and Rule 8.4(c) and justified his continued indefinite suspension from the practice of law); *In re Disciplinary Proceeding Against Whitney*, 120 P.3d 550, 552, 557-58 (Wash. 2005) (wherein Whitney was disbarred for violating the duty of candor to a tribunal and engaging in dishonesty and misrepresentation, including, unlike the present matter, a dishonest or selfish motive but also, as here, bad faith obstruction of the disciplinary proceedings and a refusal to acknowledge the wrongful nature of his conduct).

I would impose upon Respondent Partington a suspension from the practice of law of, at a minimum, one year, as well as fees and costs connected with the disciplinary matter and other such conditions as required by the Rules of the Supreme Court.

DATED: Honolulu, Hawai‘i, November 9, 2011.

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna