

1987

In Re: John S. Davis : Brief of Appellant

Utah Supreme Court

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Jo Carol Nessel-Sale; Bar Counsel; Attorney for Respondent.

John S. Davis; Appellant Pro Se.

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870051

IN THE SUPREME COURT OF THE STATE OF UTAH

IN RE:

:

JOHN S. DAVIS

:

Case No. 870051

:

Priority No. 4

BRIEF OF APPELLANT

APPEAL FROM FINDINGS OF FACT, CONCLUSIONS
OF LAW AND RECOMMENDATION OF THE BOARD OF
BAR COMMISSIONERS, BERT L. DART, PRESIDENT,
UTAH STATE BAR.

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

IN RE: :
JOHN S. DAVIS : Case No. 870051
: Priority No. 4

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Does the Utah State Bar have jurisdiction to hold disciplinary proceedings on Mr. Davis under Formal Complaint #F-198?

2. Is the Utah State Bar's Recommendation for disciplinary action excessive and inequitable?

STATEMENT OF THE CASE

John S. Davis, a member of the Utah State Bar, was charged by information with theft, a second degree felony (Ex. 4, Pg. 3). A jury found him guilty on October 20, 1982 (Ex. 4, Pg. 164). The trial court reduced defendant's conviction to one for a third degree felony and placed him on probation on November 26, 1982 (Ex. 4, Pg. 235 - 37). That probation was terminated by the trial court in October, 1985 (R. 244 in Brief of Appellant filed Feb. 5, 1987).

In early 1982 the Utah State Bar began disciplinary proceedings #F-137 against Mr. Davis based upon the actions which gave rise to the criminal action (R. 11 of #F-137). The Utah

State Bar made a motion to this Court to have Mr. Davis placed on Interim Suspension (R. 16 of #F-137) before the criminal trial, but that motion was denied (R. 19 of #F-137). Following the criminal trial, that motion was renewed and Mr. Davis was placed on Interim Suspension by order of this Court dated March 7, 1983 (R. 29 of #F-137).

On January 4, 1984 the Utah State Bar's Complaint #F-137 was amended to include a second count alleging the conviction by the trial court (R. 53 of #F-137). Mr. Davis challenged the procedural correctness in bringing about the second count, and the matter was referred back to the Ethics and Discipline Committee to correct the defective procedure. The Ethics Committee issued formal complaint #F-190 (R. 27 of #F-198, paragraphs #13 and #14. See also Appellant's motion to supplement the record for the full content of #F-190) which was essentially a duplicate of the second count of #F-137. Complaint #F-190 also contained procedural defects, so it was dismissed (R. 27 of #F-198, paragraphs #13 and #14) and Complaint #F-198 was issued in its stead (R. 25 of #F-198)

The second count of #F-137 was dismissed at that point because it was a duplication of Complaint #F-198 (R. 161 of #F-137). The two complaints, #F-137 and #F-198 were then consolidated (R.164-165 of #F-137). One month before the Panel Hearing, the first count of #F-137 was dismissed (R. 231 of #F-137) and the hearing was held on the allegations of Complaint #F-198, which resulted in the Findings, Conclusions and Recommendation now on appeal before this Court.

STATEMENT OF FACTS

The pertinent facts in this case are in the dates and the sequence of the documents that were filed in this case and the bearing that they have on the jurisdiction of the Board of Commissioners of the Utah State Bar and also the reasonableness of the discipline which is recommended.

The Order for Interim Suspension from the practice of law was issued March 7, 1983, but the amendment to add the allegation of the conviction was not initiated until Aug. 29, 1983 (R. 37 of #F-137) and accepted until Dec. 15, 1983 (R. 49 of #F-137). Complaint #F-190, replacing the allegations of count II were filed March 6, 1985 (Referred to in R. 27 of #F-198, para. #13 & #14), and Complaint #F-198 was filed April 30, 1985, replacing #F-190 (R. 25 of #F-198). On October 28, 1985 the Panel ordered consolidation of #F-137 and #F-198 and dismissal of count II of #F-137 at the request of Bar Counsel (R. 164 of #F-137). On April 10, 1986, count I of #F-137 was dismissed by stipulation (R. 231 of #F-137). The Panel Hearing was May 15, 1986.

SUMMARY OF ARGUMENT

The authority and jurisdiction to discipline a member of the Utah State Bar is given to the Board of Bar Commissioners and their delegated committees by the Rules of Discipline of the Utah State Bar. They cannot exceed the jurisdiction that is specifically given to them.

The procedural rules in this case have been compounded in such a way as to cause an excessive and inequitable burden on the Defendant if the recommendation of the Bar is accepted.

ARGUMENT

POINT I

THE UTAH STATE BAR LACKED JURISDICTION IN FORMAL COMPLAINT #F-198 BECAUSE MR. DAVIS WAS NOT A MEMBER IN GOOD STANDING AT THE TIME IT WAS FILED.

The Rules of Discipline of the Utah State Bar, which were in effect in April of 1985, when Formal Complaint #F-198 was filed, say in Rule III, DEFINITIONS, that "A 'member of the Bar' refers to a lawyer in good standing on the official roster of attorneys of the Supreme Court of Utah and the Utah State Bar." Rule VII, DISCIPLINE AND SANCTIONS, says in sub-paragraph (b), "Suspension of a lawyer shall remove said individual as a member of the Bar of the Court in good standing" Sub-paragraph (b)(1) says ". . . the Court may issue an interim order suspending a lawyer . . .", which is what this Court did to Mr. Davis on March 7, 1983. That Order has remained in effect to this date. Rule VIII, COMPLAINT OF UNPROFESSIONAL CONDUCT, is the Rule that gives the Utah State Bar jurisdiction to impose disciplinary proceedings, but that jurisdiction has been limited to a "member of the Bar", which has been defined as a member in good standing.

POINT II

THE UTAH STATE BAR LACKED JURISDICTION IN FORMAL COMPLAINT #F-198 BECAUSE THE ALLEGATIONS CONTAINED IN THAT COMPLAINT BECAME MOOT AFTER THE SAME ALLEGATIONS HAD BEEN PREVIOUSLY VOLUNTARILY DISMISSED TWICE IN FORMAL COMPLAINTS #F-137 and #F-190.

Rule XII, DISCIPLINARY HEARING BEFORE COMMISSION, of The Rules of Discipline of the Utah State Bar, and also

the new Procedures of Discipline of the Utah State Bar, adopted in September of 1985, state in Rule XII(b) "The rules of evidence and procedure applicable to the conduct of non-jury civil trials in the District Courts of the State of Utah shall govern the hearing on a Formal Committee Complaint." Rule 41(a) of the Utah Rules of Civil Procedure says that ". . . a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action."

In this case, the allegations of the conviction were dismissed twice by the voluntary action of Bar Counsel in Complaint #F-137 and Complaint #F-190. Therefore, when Count I of Complaint #F-137 was voluntarily dismissed one month prior to the Panel Hearing, the Board of Commissioners lost jurisdiction to discipline Mr. Davis on these matters.

POINT III

IT IS EXCESSIVE AND INEQUITABLE DISCIPLINE TO DISBAR MR. DAVIS AFTER HAVING HIM ON INTERIM SUSPENSION FOR OVER FOUR YEARS DURING THE PENDENCY OF THE DISCIPLINARY PROCEEDINGS.

The maximum time period for suspension is two years, and an attorney, under the rules, may begin to apply for re-admission after five years from the date of disbarment. If this Court orders disbarment of Mr. Davis now, it will be a minimum of nine years that he will have been prevented from practicing law before he can begin to apply for readmission. That is excessive and inequitable by the normal standards, and in this particular case it is aggravated by the fact that

Bar Counsel had to issue three consecutive Formal Complaints and several amendments before this matter was finally brought to a hearing, and then one month before the hearing the allegations of the first count were voluntarily dismissed.

CONCLUSION

Because the Board of Commissioners of the Utah State Bar lacked jurisdiction to discipline Mr. Davis on the matters before it, the Findings of Fact, Conclusions of Law, and the Recommendations should be reversed. This Court should decide that if disciplinary action is necessary, that the four years that Mr. Davis has spent on interim suspension is sufficient and should order termination of that suspension.

RESPECTFULLY submitted this ¹⁵~~20~~th day of ^{Sept.}~~May~~, 1987.

JOHN S. DAVIS
Appellant Pro Se

CERTIFICATE OF MAILING

I hereby certify that four true and exact copies of the foregoing Brief were mailed, postage prepaid, to Jo Carol Nasset-Sale, Bar Counsel, 425 East First South, Salt Lake City, Utah 84111, this ¹⁵~~20~~th day of ^{Sept.}~~May~~, 1987.

ADDENDUM

BEFORE THE SUPREME COURT
OF THE STATE OF UTAH

IN RE:

JOHN S. DAVIS

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND RECOMMENDATION OF
THE BOARD OF BAR COMMISSIONERS
F-137 & F-198

The Board of Bar Commissioners having reviewed and considered the Findings, Conclusions and Recommendation of the Hearing Committee in the above-entitled case, hereby affirm the attached Hearing Committee determinations.

Dated this _____ day of _____,
198__.



Bert L. Dart
President, Utah State Bar
425 East 100 South
Salt Lake City, Utah 84111

Findings - F-137 & F-198

John S. Davis

Page 2

I hereby certify that a true and correct copy of the foregoing Findings of Fact, Conclusions of Law and Recommendation was mailed certified mail, return receipt requested to John S. Davis, 1068 N. Grand Circle, Provo, Utah 84604 and hand-delivered to Jo Carol Nesset-Sale, Bar Counsel, Utah State Bar, this 5th day of January, 1987.

John S. Davis

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

IN RE:

JOHN S. DAVIS

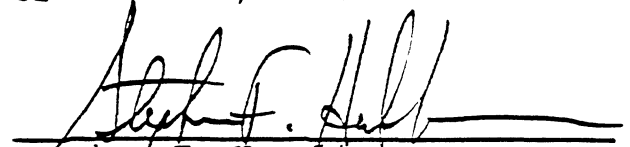
NOTICE OF FINDINGS OF CONCLU-
SIONS AND RECOMMENDATION
No. F-198 and F-137
Consolidated

Notice is hereby given that the Hearing Committee Panel of the Utah State Bar has submitted Findings of Fact, Conclusions and Recommendation in the above-entitled case.

Pursuant to Rule XII (d) of the Procedures of Discipline of the Utah State Bar, a copy of these Findings, Conclusions and Recommendation shall be served up on Bar Counsel and the attorney in question or his counsel. Bar Counsel or the attorney in question shall have 10 days from the date of receipt of the Findings, Conclusions and Recommendation to petition the Board for amendment or modification thereof, in substance or in form. Said petition shall be filed with the Executive Director of the Bar, and shall succinctly specify any proposed amendments, additions, or deletions setting forth the basis therefor including any citation of authorities.

The Board of Bar Commissioners will consider the above-entitled matter at its regularly scheduled meeting on December 19, 1986.

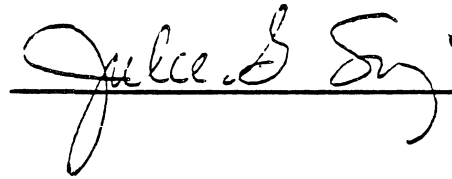
Dated this 21st day of November, 1986.



Stephen F. Hutchinson
Executive Director

Certificate of Mailing

I hereby certify that the foregoing Notice of Findings of Fact, Conclusions and Recommendation in No. F-198 and F-137 consolidated have been mailed certified return receipt requested to John S. Davis, 1068 N. Grand Circle, Provo, Utah 84604 and hand-delivered to Karin S. Hobbs, Associate Bar Counsel, this 21st day of November, 1986.



BEFORE OF THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In Re:)	
)	
)	FINDINGS OF FACT,
)	CONCLUSIONS AND
JOHN S. DAVIS)	RECOMMENDATION
)	
)	No. F-198
)	and F-137 Consolidated
)	

The Hearing Committee Panel appointed by the Board of Bar Commissioners comprised of Gerald H. Kinghorn, Randon W. Wilson and E. Allan Hunter convened on Thursday, May 15, 1986 at 9:30 a.m. for hearing pursuant to notice and stipulation of the parties at the conference room at the law office of Jones, Waldo, Holbrook and McDonough, 170 South Main Street, Suite 1500, Salt Lake City, Utah 84101.

The hearing was convened at 9:30 a.m. and recessed until the appearance of Mr. Davis or until 10:00 a.m. Mr. Davis appeared at 9:59 a.m. Present were Mr. John S. Davis, (herein referred to as the Respondent) appearing pro se, Karin Hobbs, counsel for the Utah State Bar, Joseph E. Tesch counsel for Charlie Joseph who was present pursuant to a subpoena for the Respondent.

Counsel for the Bar requested a ruling as to whether the hearing would proceed pursuant to the Procedures of Discipline of the Utah State Bar adopted September 25, 1985 or the provisions of Rule 12 of the Rules of Discipline of the Utah State Bar which were in effect prior to the adoption of the Procedures of Discipline of the Utah State Bar of September 25, 1985.

The Respondent insisted that the prior rules of discipline be used for the hearing and all subsequent proceedings. After hearing the arguments of counsel and reviewing the material documents, the Panel finds that no difference exists between the Rules and the Procedures adverse to the Respondent; if the Respondent calls the attention of the Panel to a matter where an adverse conflict may exist, the Panel will rule on the matter and the appropriate rules during the hearing.

The Panel will apply the Procedures of Discipline of the Utah State Bar adopted September 25, 1985 to the hearing except as provided more specifically above.

The Respondent moved for the exclusion of witnesses to be heard by the Panel from the hearing room. The exclusionary rule was invoked and each party was asked to state the name of all witnesses to be called. The Panel instructed the witnesses to stand and be sworn. The following persons were named by the parties as witnesses: Mr. Randall Hall, Mr. Jeff Paoletti and Mr. Charlie Joseph were sworn by the reporter and admonished not to discuss their testimony with each other or discuss the subject matter of the hearing.

The Respondent objected to counsel for Mr. Joseph remaining during the hearing. Under the public hearing provisions under which the Hearing is conducted, Mr. Tesch was allowed to remain in the room but was admonished while the witnesses were leaving

the room not to discuss the opening statements, arguments or testimony of witnesses with his client or other witnesses.

Counsel for the Bar proceeded to make an opening statement. At the close of the opening statement by counsel for the Bar, the Panel confirmed that the hearing was going forward only under Count II of the amended complaint in the consolidated matters F-137 and F-198 which alleges that the Respondent was convicted of the crime of theft in the second degree, that the trial judge reduced the offense to a felony in the third degree; Paragraph 5 of Count II alleges that the conduct of the Respondent is in violation of Rule II, Section 4 (1) and Cannon 1, Dr 1-102 (A) (4), of the Revised Rules of Professional Conduct of the Utah State Bar, Rule II (a), Rules of Discipline of the Utah State Bar; and Paragraph 23, of the Rules for Integration and Management of the Utah State Bar.

The Respondent reserved the right to make an opening statement.

Counsel for the Bar reviewed the record and specifically the answer of the Respondent to the amended complaint. The Respondent objected to the characterization of his answer in paragraph 2 of the second defense as an admission that he was sentenced on November 26, 1982.

Counsel for the Bar offered proposed Exhibits 1, 2 and 3 as evidence. The Respondent examined the proposed exhibits and the Respondent having no objection, Exhibit Nos. 1, 2 and 3 were admitted and received in evidence.

Exhibit No. 4 was then marked and offered as an exhibit which is the transcript and record on appeal to the Supreme Court of the State of Utah in the case of State v. Davis 689 P.2d 5 (Utah 1984). The Respondent requested time to examine the exhibit and the Panel proposed that counsel for the parties disclose all their proposed exhibits to each other, have them numbered, organized and examined by counsel during a recess.

Upon resuming the hearing, counsel for the Bar offered proposed Exhibit No. 4 consisting of subparts 4a, 4b, 4c and 4d. Mr. Davis objected on the grounds that the exhibit is irrelevant. The panel ruled that the exhibit would be received into evidence, reserving to the panel the discretion to determine the relevancy and weight of the evidence; Exhibit No. 4 was admitted.

Proposed Exhibit No. 5 was marked and offered; the Respondent offered the same objection as to relevancy to proposed Exhibit No. 5 and the Panel ruled that the exhibit would be received subject to the same reservation of discretion as to relevancy and weight.

Counsel for the Bar then called Mr. Randall Hall as a witness. Prior to the examination of Mr. Hall, Bar Counsel requested that the panel rule that based on the exhibits the Respondent has been convicted of a crime as charged in Count II of the Amended Complaint.

After hearing the arguments of counsel and examining the exhibits, the panel ruled that the Bar had sustained its burden

of proof by clear and convincing evidence that the Respondent was convicted of a crime and a judgment of conviction was entered. The finding of the Panel expressly is without prejudice to Mr. Davis opportunity to argue the issues presently before the Supreme Court or other technical issues relevant to the conviction, mitigation or cause for disbarment. The finding of the Panel includes the reservation by the Respondent and renewal of the Respondents pre-trial motions.

Mr. Hall was then sworn and examined by Counsel for the Bar. Proposed Exhibit No. 6 was marked for identification, offered and admitted into evidence with no objection from the Respondent.

Mr. Hall was cross-examined by Mr. Davis. Mr. Davis offered proposed Exhibit K which was received in evidence without objection. Proposed Exhibit J was offered by Mr. Davis after identification by the witness and received in evidence without objection.

Examination of the witness was concluded by the parties. Members of the panel asked the witness certain questions the witness was excused.

Counsel for the Bar then informed the Court that the Bar did not intend to call any further witnesses, however specific notice should be taken of the case of State vs. Davis.

Counsel for the Bar having rested, the Respondent was invited to proceed.

The Respondent moved for dismissal of the complaint on the basis of the provisions of 76-3-402(2)(b). After hearing the

arguments of counsel, examining the statute, the exhibits and after considering additional grounds for the Motion to Dismiss as stated by the Petitioner that the Bar had failed to sustain its burden of proof on the remainder of the charges in Count II, the Respondent's motions to dismiss were denied.

The Respondent made an opening statement in which he renewed the pre-trial motions heard by the Panel on prior occasions.

The Respondent called Jeff Paoletti as a witness. Mr. Paoletti was seated and examined by the Respondent. After the examination of the Respondent, Counsel for the Bar declined to cross-examine Mr. Paoletti.

The Respondent called Mr. Charlie Joseph as a witness. Counsel for Mr. Joseph requested an opportunity to consult with Bar counsel with respect to protective matters regarding Mr. Joseph. The Panel briefly recessed and reconvened the hearing for further proceedings.

Counsel for the Bar stated a continuing objection to the testimony of Mr. Joseph as being irrelevant to the issues defined by the Respondent during his opening statement and on the basis that the Respondent was attempting to relitigate the issue of guilt or innocence in the criminal matter. After hearing the arguments of counsel, the objection of Bar Counsel was overruled and the Respondent was permitted to proceed to examine Mr. Charlie Joseph based on Rule 23 of the Rules of Integration and Management of the Utah State Bar and the case of In Re: Kline D. Strong 616 P.2d, 583 (Utah 1980).

The Respondent then examined Mr. Joseph. After examination by the Respondent, the witness was cross-examined by counsel for the Bar and after cross-examination by Counsel for the Bar, the Respondent examined Mr. Joseph based on issues raised during the cross-examination by Bar counsel. The Panel directed certain questions to the witness and the Respondent moved that the testimony elicited by the Panel be stricken or in the alternative, that he be given an opportunity to further examine the witness. The Respondent received assurance from the Panel that the entire transcript would be read and reviewed before a decision is rendered. The Panel allowed the Respondent to re-examine Mr. Joseph. Thereafter Mr. Joseph was excused from the proceedings.

The Respondent indicated that he intended to introduce one more document which counsel for the Bar stipulated could be admitted. The document is a pre-sentence report prepared for the Fourth District Court by the Division of Adult Probation and Parole.

The Respondent indicated that his version of the incident was adequately explained in the report of the Division of Adult Probation and Parole and therefore he would not testify. After admission of the stipulated exhibit, the Respondent rested.

Counsel for the Bar made a closing statement, citing certain cases and providing copies of the cases to members of the Panel. Upon the conclusion of the closing statement of Counsel for the

Bar, Mr. Davis was invited to make a closing statement. During the closing statement by Mr. Davis, certain questions were asked by the Panel to clarify the issues Mr. Davis felt were relevant for the Panel's consideration.

The Respondent was permitted to introduce certain additional illustrative exhibits which were prepared by him, subject to the objection of Bar Counsel as to the foundation for the exhibits.

After the closing statements of the parties, a spontaneous statement was made on the record by Carol B. Davis, the wife of the Respondent over the objection of Bar Counsel. Mrs. Davis was not sworn, however, the Panel permitted the statement by Mrs. Davis.

At 6:56 p.m. the record was closed after having received all exhibits, evidence and statements of counsel.

Based upon the exhibits, testimony and all of the evidence, the Panel makes the following:

FINDINGS OF FACT

1. The Respondent is a member of the Utah State Bar and is the same person as the Defendant in the case of The State of Utah vs. John Shepard Davis, 689 P.2d 5 (Utah 1984).

2. The Respondent was convicted of the crime of theft, a felony in the second degree and sentenced by the Court pursuant to the discretion of the District Court, to a sentence for theft, a felony in the third degree.

3. The sentence and conviction of the Respondent were appealed to the Supreme Court of Utah and the decision of the jury and trial court were affirmed.

4. The Respondent engaged in conduct which was dishonest and deceitful by appropriating funds to his own use, which were the property of clients without their consent, by failing to disclose to the client the disbursement of the client's funds and attempting to prevent the client from the discovery of the disbursement of funds and by the use of such funds for personal expenditures.

5. The Respondent introduced no evidence in mitigation of the conviction of theft or to be considered for the purpose of these proceedings and the claims in the complaints herein.

Based on the foregoing Findings of Fact, the Panel makes the following Conclusions and Recommendation:

1. The crime of theft and the circumstances of the conviction of the Respondent constitute conduct involving moral turpitude and therefore the Respondent violated Rule 2, Section 4 (1) of the Revised Rules of Professional Conduct of the Utah State Bar.

2. The conviction of the Defendant of the crime of theft constitutes a violation of Rule 2(a) of the Rules of Discipline of the Utah State Bar in that the crime was a crime involving moral turpitude.

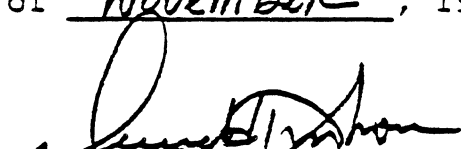
3. The Respondent is subject to a judgment of disbarment pursuant to Paragraph 23 of the Rules for Integration and Manage-

ment of the Utah State Bar having been convicted of a crime involving moral turpitude.

4. The Respondent should be disbarred and his name stricken from the register of attorneys in the State of Utah.

5. No mitigating circumstances exist to provide a basis for any sanction other than disbarment.

DATED this 18 day of November, 1986.


GERALD H. KINGHORN


RANDON W. WILSON


E. ALLAN HUNTER