JUDGMENT AFFIRMING IN PART, REVERSING IN PART, AND RENDERING SUSPENSION

Opinion and Judgment Signed November 7, 2011.

BEFORE THE BOARD OF DISCIPLINARY APPEALS

APPOINTED BY
THE SUPREME COURT OF TEXAS

No. 48512

MUSTAFA ENGIN DERKUNT, APPELLANT

V.

COMMISSION FOR LAWYER DISCIPLINE
OF THE STATE BAR OF TEXAS, APPELLEE

On Appeal from the Evidentiary Panel
for the State Bar of Texas
District 9-2 (Austin) Grievance Committee
No. A0050811711

Heard En Banc September 27, 2011

COUNSEL:

Appellant, Mustafa Engin Derkunt, Bar No. 00785818, Austin, Texas, *pro se*.

For Appellee, Commission for Lawyer Discipline of the State Bar of Texas, Linda A. Acevedo, Chief Disciplinary Counsel; Cynthia W. Hamilton, Senior Appellate Counsel, Office of the Chief Disciplinary Counsel, State Bar of Texas, Austin, Texas.

OPINION AND ORDER:

On September 27, 2011, the Board of Disciplinary Appeals ("Board" or "BODA") heard the above appeal by Respondent Mustafa Engin Derkunt ("Derkunt") from a judgment disbarring him signed by an Evidentiary Panel of the State Bar of Texas District 9 Grievance Committee. This is the second appeal by Derkunt in this matter. On August 5, 2010 this Board reversed one out of the six findings of misconduct and remanded the case for a new sanctions hearing. The issue in this second appeal is whether the record supports a harsher sanction following this Board's reversal of one of the findings of misconduct in Derkunt's first appeal. Derkunt argues that the harsher sanction is retaliatory. The Commission for Lawyer Discipline ("CLD" or "Commission") has conceded that the Evidentiary Panel's findings of fact and conclusions of law are insufficient to support the disbarment under *North Carolina v. Pearce*, 395 U.S. 711 (1969). The Commission further asks BODA to render rather than remand if it concludes that the sanctions were unsupported.

Because we find no reasons in the judgment for imposing a harsher sanction based on objective information and facts made a part of the record, no new evidence supporting a harsher sanction, and no exception in this case to the presumption that the "imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be . . . a violation of due process of law," *Id.* at 724, we reverse the judgment of disbarment and render sanction suspending Derkunt for the time he has been suspended or disbarred from practicing law through the date of this decision.

PROCEDURAL HISTORY

Derkunt's former client, Keith Collins, filed an original grievance against him arising from Derkunt's representation of Collins in the appeal before the United States Court of Appeals for the Seventh Circuit of his criminal conviction for conspiracy to possess with intent to distribute cocaine and possession with intent to distribute cocaine base.[1] The Office of the Chief Disciplinary Counsel of the State Bar of Texas determined that there was just cause to believe that Derkunt had committed professional misconduct and initiated formal proceedings against him. TEX. R. DISCIPLINARY P. 2.10, 2.14, 2.17; *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G, app. A-1 (Vernon 2005). A duly constituted Evidentiary Panel convened and heard evidence and arguments on November 12, 2009. The Office of the Chief Disciplinary Counsel represented the Commission at the hearing. Derkunt appeared *pro se*.

On conclusion of the evidentiary hearing, the Evidentiary Panel found that Respondent had violated the following Texas Disciplinary Rules of Professional Conduct: 1.01(b)(1) neglected a legal matter entrusted to the lawyer; 3.01 defended a proceeding or asserted an issue therein without reasonable belief that it was not frivolous; 5.04(a) shared fees with a non-lawyer; 7.03(d) entered into an agreement for an attorney's fee for a matter that was obtained in violation of 7.03(a), (b) or (c); 7.03(e) accepted a referral from an unauthorized lawyer referral service; and 8.04(a)(1) violated the Texas Disciplinary Rules of Professional Conduct. TEX. DISCIPLINARY R. OF PROF'L CONDUCT, *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G, app. A (Vernon 2005). Based on these findings, the CLD asked the panel to suspend Derkunt from practicing law for two years.

[1] *United States v. Collins*, 604 F.3d 481, 483 (7th Cir. 2010); *United States v. Collins*, 510 F.3d 697 (7th Cir. 2007). Collins had confessed when arrested to conspiring to distribute cocaine, possessing 673 grams of cocaine, and delivering cocaine.

Ignoring the CLD's recommendation, the Evidentiary Panel assessed a three-year active suspension.

Derkunt appealed the decision of the Evidentiary Panel to this Board, which heard argument July 23, 2010. On August 10, 2010, the Board issued its judgment reversing the decision of the Evidentiary Panel as to its finding of misconduct under Disciplinary Rule of Professional Conduct 7.03(d)[2] and, accordingly, the sanction. The Board remanded the matter to the Evidentiary Panel for a reassessment of punishment at a new sanctions hearing in light of the reversal.

On March 17, 2011, the Evidentiary Panel convened and heard evidence and arguments relating to this matter. The Commission offered testimony from new counsel who had represented Collins after Derkunt. He explained that, with the agreement of the prosecutor, he had successfully obtained a remand of Collins' case[3] for resentencing due to a change in the law concerning sentencing for possession of crack cocaine.[4] Thereafter, the United States District Court reduced Collins' sentence from 144 months imprisonment to 78 months.[5] The Commission asked the evidentiary panel to reinstate the three-year active suspension originally imposed against Derkunt. At the conclusion of the proceedings, the Evidentiary Panel assessed a punishment of disbarment. Respondent then timely appealed the decision to the Board.

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[2] We reversed the finding that Derkunt violated Disciplinary Rule of Professional Conduct 7.03(d) because the judgment contained no finding that Derkunt had violated Rule 7.03(a), (b), or (c), a necessary element of the Rule 7.03(d) violation.

[3] *United States v. Collins*, 604 F.3d 481 (7th Cir. 2010).

[4] In *Kimbrough v. United States*, 552 U.S. 85 (2007), decided four days before the first Collins appeal was decided, the United States Supreme Court held that the relevant guideline which yielded sentences for selling crack cocaine three to six times longer than those for dealing powder cocaine was advisory only. Previously, including the trial under which Collins had been sentenced to 144 months, the courts had treated the disparately harsher sentencing as mandatory. *United States v. Collins*, 604 F.3d at 483.

[5] *United States v. Collins*, Case No. 03 CR 80, United States District Court for the Northern District of Illinois, Eastern Division, Judgment signed August 10, 2010.

PRESUMPTION OF RETALIATION

Although no case law provides guidance specifically with respect to the assessment of a greater punishment to a respondent upon remand in the disciplinary context, the Board is guided by Texas criminal cases controlling this issue.[6] In that regard, Texas law, based on *North Carolina v. Pearce*, 395 U.S. 711 (1969), provides that, where a criminal matter has been reversed and remanded for assessment of punishment and the defendant is assessed a greater punishment than previously given, a presumption of retaliation arises. *Ex parte Miller*, 330 S.W.3d 610, 631 (Tex. Crim. App. 2010); *Miller v. State of Texas*, 472 S.W.2d 269, 271 (Tex. Crim. App. 1971). Although a tribunal in a disciplinary proceeding has broad discretion to assess sanction, *State Bar of Texas v. Kirkpatrick*, 874 S.W.2d 656, 659 (Tex. 1994), and the sentencing court must be permitted to consider all relevant information that might reasonably bear on determination of the proper sentence, *Moore v. State of Texas*, 109 S.W.3d 537, 541 (Tex. App. – Tyler 2001, no pet.) (citing *Wasman v. United States*, 468 U.S. 559, 563-564 (1984)), penalizing a defendant for having successfully pursued a statutory right of appeal by imposing a harsher sanction "would be a flagrant violation of the rights of the defendant." *North Carolina v. Pearce*, 395 U.S. at 724. To assure the absence of a retaliatory motive, the reasons for imposing a more severe sentence must affirmatively appear and be based on objective information and facts made a part of the record. *Alabama v. Smith*, 490 U.S. 794, 798 (1989); *Hood v. State of Texas*, 185 S.W.3d 445, 449-450 (Tex. Crim. App. 2006) (citing *North Carolina v. Pearce*, 395 U.S. at 726). Notably, the Commission does not dispute and specifically recognizes this principle. The Board now adopts the principle set forth in *Pearce* for use in the context of a disciplinary proceeding.

[6] BODA has decided this issue previously without opinion. *Leas v. Comm'n for Lawyer Discipline*, BODA Case 31501 (October 27, 2004). After a partially successful appeal, Mr. Leas was sanctioned for a longer period of active suspension than in the first evidentiary judgment. BODA applied the *Pearce* presumption and modified the judgment to conform to the original sanction. The Supreme Court of Texas affirmed the BODA decision without opinion. *Leas v. Comm'n for Lawyer Discipline*, Cause 04-1038 (April 8, 2005).

The *Pearce* presumption does not apply where the circumstances and record do not support the inference of an improper motive. Consequently, *Pearce* has been held not to apply in several circumstances, such as: where the second court in a two-tier system imposed the harsher sentence, *Colten v. Kentucky*, 407 U.S. 104, 112-113 (1972); a jury without knowledge of the prior result imposed the harsher sentence and the judge imposed the original sentence, *Chaffin v. Stynchcombe*, 412 U.S. 17, 35 (1973); the defendant originally pled guilty but went to full trial after remand, *Wiltz v. State of Texas*, 863 S.W.2d 463, 464 (Tex. Crim. App. 1993); or a jury on retrial was not aware of the lesser sentence imposed by the first jury, *Shiflett v. State of Texas*, 530 S.W.2d 548, 550 (Tex. Crim. App. 1965).[7]

The presumption does apply where a different judge imposes the second sentence if the judge was aware of the prior proceeding. *Bingham v. State of Texas*, 523 S.W.2d 948, 949 (Tex. Crim. App. 1975).[8] In this case the record discloses that the chair of the panel for the new sanctions hearing after remand was present at Derkunt's first hearing and that the other members of the second panel had reviewed the testimony from the first hearing and were aware of the result.

To assure the absence of a retaliatory motive, the reasons for imposing a more severe sentence must affirmatively appear and be based on objective information and facts made a part of the record. *North Carolina v. Pearce*, 395 U.S. at 726; *Alabama v. Smith*, 490 U.S. at 798; *Hood v. State of Texas*, 185 S.W.3d at 450. Accordingly, the burden falls upon the Evidentiary Panel and CLD to justify the increased punishment assessed to Derkunt by pointing to new evidence adduced at the second hearing that would justify the increased punishment. CLD failed

[7] These examples are not exhaustive; additional exceptions exist that are not instructive in this case.

[8] The court in *Bingham* addressed harsher punishment after remand on its own although the appellant had not raised the point due to the seriousness of the constitutional due process issue.

to carry this burden. We need not, however, divine whether actual retaliation was the motivating force behind the more severe punishment assessed after the second hearing; CLD concedes in its brief that the panel failed to articulate reasons for the disbarment in the judgment in violation of *Pearce.*

CLD seemed less willing to concede the retaliation point at the argument before this Board. Instead, CLD argued that there was new evidence in the transcript of the second hearing that would justify a greater punishment. Specifically, CLD pointed to the circumstance that Derkunt's client in the underlying matter hired different counsel following his first appeal to the United States Court of Appeals for the Seventh Circuit. New counsel filed a 28 U.S.C. § 2255 petition for habeas corpus which was partly granted by the trial court allowing Collins a new appeal. On the second appeal, the Seventh Circuit remanded the case for resentencing in light of the *Kimbrough* decision,[9] and new counsel subsequently obtained a reduction of Collins' sentence.[10]

This argument is unpersuasive. The record reflects that Collins' second counsel obtained a reduction in Collins' sentence because of a change in the law governing sentencing guidelines. The change in law was such, in fact, that the prosecutor agreed Collins was entitled to appeal based on the change. All of Collins' other appellate points, such as those relied upon to justify the claim that Derkunt had performed poorly, were rejected by the trial court and the appellate court. Thus, the "new evidence" relied upon by CLD to justify a greater punishment in the second proceeding, although possibly actionable under other circumstances, did not rise to the level of professional misconduct.

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[9] *United States v. Collins,* 604 F.3d 481 (7th Cir. 2010).

[10] *United States v. Collins,* Case No. 03 CR 80, United States District Court for the Northern District of Illinois, Eastern Division (August 10, 2010).

RENDERING SANCTION

BODA has authority to render the appropriate sanction in this appeal. TEX. GOV'T CODE § 81.0751(b)(3); BODA INTERNAL P. R. 4.10(a); *In re State Bar of Texas*, 113 S.W.3d 730, 734 (Tex. 2003) (orig. proceeding). Appellate courts must render judgment unless remand is necessary. TEX. R. APP. P. 43.3; *Lone Star Gas Co. v. R.R. Comm'n of Texas*, 767 S.W.2d 709, 710 (Tex. 1989) (where no purpose for remand appeared and neither party had requested remand or suggested that the evidence was not fully developed below, the court of appeals erred in remanding an issue to the trial court). We agree with the CLD that the evidence here was fully developed at the second hearing making remand unnecessary. *See, Kittyhawk Landing Apts. III v. Anglin Constr. Co.*, 737 S.W.2d 90, 94 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd, n.r.e.). It is also notable, of course, that CLD requests that the Board, should it reverse the determination of the Evidentiary Panel and assess punishment, render the same sanction that CLD urged should have been assessed at the second Evidentiary Panel hearing: a three-year suspension.

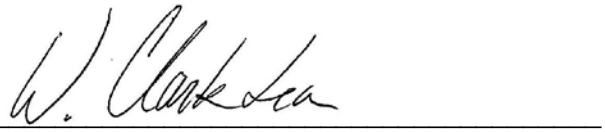
DISPOSITION

Because the presumption of retaliation stands unrebutted, the Board reverses the determination of the Evidentiary Panel as to sanction. Rather than remand this matter to that Panel again, the Board exercises its discretion to assess the punishment the Panel should, in its opinion, have assessed. We note that the Panel originally ignored the Commission's initial recommendation of a two-year suspension and assessed a three-year suspension instead. We note also that Derkunt cooperated during the disciplinary proceeding and has no prior disciplinary record. Given the facts revealed in the record, the Board is of the opinion and finds that Derkunt's punishment should be assessed at time already served in suspension and during the

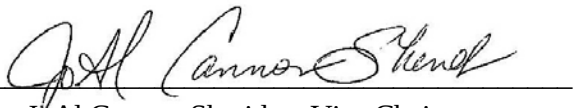
evidentiary panel's judgment of disbarment.[11] In assessing this sanction, the Board notes that evidence was introduced in the second hearing before the Panel to show that the action the Panel found Derkunt should have taken would have been unsuccessful and that Derkunt had since discontinued his professional dealings with the individual who had referred these cases to him. This evidence, as well as other evidence introduced at that second hearing, support the sanctions herein handed down. The Evidentiary Panel originally assessed attorney's fees in the amount of $10,500.00 as an ancillary sanction against Derkunt pursuant to Texas Rule of Disciplinary Procedure 1.06Y(b) and assessed direct expenses in the amount of $1,292.00, for a total assessment of $11,792.00. Under the facts of the case, the Board finds this award as additional sanction to be unmerited and awards no attorney's fees or expenses.

IT IS ACCORDINGLY ORDERED that the judgment of the Evidentiary Panel be affirmed as to the findings of misconduct and reversed as to sanction, and that Derkunt's sanction for the disciplinary violations found by the Panel be assessed at a suspension from the practice of law equal to the amount of time served on suspension and disbarment to this date.

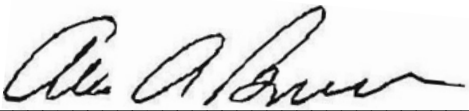
IT IS SO ORDERED.



W. Clark Lea, Chair

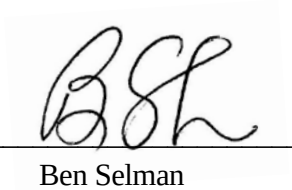


JoAl Cannon Sheridan, Vice Chair



Alice A. Brown

[11] Derkunt was suspended from November 16, 2009 until August 5, 2010 and disbarred from March 22, 2011 until the date of this decision. Although the disbarment was in effect while Derkunt appealed that judgment to BODA, it never became final and is therefore terminated by this decision.



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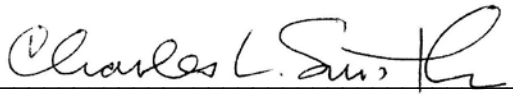

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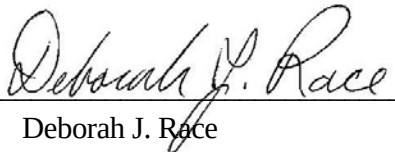

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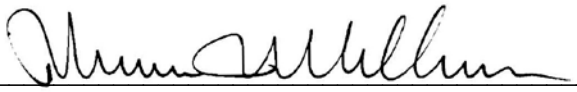

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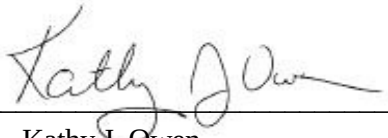

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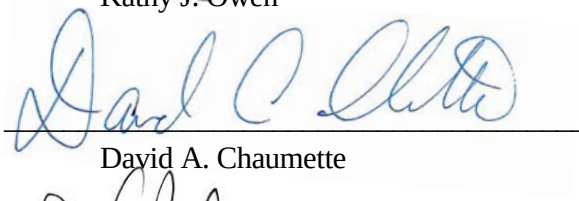

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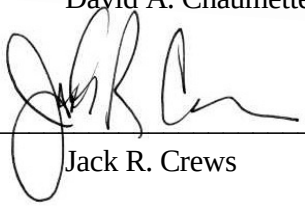

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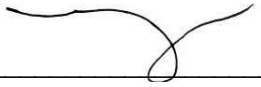

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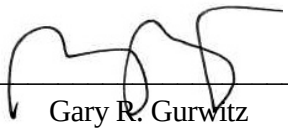

Gary R. Gurwitz