JUDGMENT OF DISBARMENT AFFIRMED

Opinion and Judgment Signed and Delivered February 8, 2016.

BEFORE THE BOARD OF DISCIPLINARY APPEALS

APPOINTED BY
THE SUPREME COURT OF TEXAS

No. 56406

CHARLES J. SEBESTA, JR., 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 08-2

SBOT Case No. 201400539

Opinion and Judgment on Appeal

COUNSEL:

Jane Webre, Steve McConnico, Robyn B. Hargrove, Kim Gustafson Bueno, Scott Douglass & McConnico LLP, Austin, Texas, for Appellant Charles J. Sebesta, Jr.

Linda A. Acevedo, Chief Disciplinary Counsel, Laura Bayouth Popps, Deputy Counsel for Administration, Cynthia Canfield Hamilton, Senior Appellate Counsel, Office of the Chief Disciplinary Counsel of the State Bar of Texas, Austin, Texas, for Appellee Commission for Lawyer Discipline of the State Bar of Texas.

OPINION

In this attorney discipline case, we determine whether changes to the Texas Rules of Disciplinary Procedure in 2004 result in a *res judicata* effect when a Summary Disposition Panel dismisses a grievance upon a determination that Just Cause does not exist.[1] We hold that the legal principles established in cases pre-dating the 2004 rule changes remain unchanged: summary dismissals of grievances, prior to commencement of any evidentiary proceeding, have no *res judicata* effect. The judgment of disbarment is affirmed.

I. Background

A. Procedural status

On June 11, 2015, an Evidentiary Panel of the State Bar District 8-2 grievance committee entered judgment disbarring Charles J. Sebesta, Jr. The grievance was initiated by Anthony Graves on January 29, 2014. The Chief Disciplinary Counsel determined that Just Cause existed. An Evidentiary Panel was appointed and an evidentiary petition was served. Sebesta's answer included three affirmative defenses: *res judicata*, equitable estoppel, and quasi-estoppel.[2] Sebesta filed a pre-hearing Motion on Res Judicata and Estoppel. After briefing and argument, the Evidentiary Panel denied the motion. Following a four-day evidentiary hearing, the Evidentiary Panel found violations of Disciplinary Rules 3.03(a)(1), 3.03(a)(5), 3.09(d), 8.04(a)(1), and 8.04(a)(3) and entered a Judgment of Disbarment. Sebesta filed an appeal, which he limited "to

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[1] Summary Disposition Panels are governed by Tex. Rules Disciplinary P. R. 2.13. "Just Cause" means "such cause as is found to exist upon a reasonable inquiry that would induce a reasonably intelligent and prudent person to believe that an attorney … has committed an act or acts of Professional Misconduct requiring that a Sanction be imposed…." Tex. Rules Disciplinary P. R. 1.06.U. If "Just Cause" is determined to exist, then an evidentiary proceeding will be initiated – either in a district court or before an Evidentiary Panel, at the Respondent's election. Tex. Rules Disciplinary P. R. 2.14 & 2.15.

[2] Sebesta did not plead, and does not argue in this appeal, any theory that the grievance against him is barred by limitations.

only the Panel's rulings on the legal issues raised by Respondent in his Motion on Res Judicata and Estoppel."

B. Underlying facts

The Evidentiary Panel made the following findings of fact, which are not challenged in this appeal.

In 1994 Anthony Graves was convicted of the murder in 1992 of six persons. He was sentenced to death. As district attorney, Sebesta was the lead prosecutor of Graves.

Sebesta had earlier obtained the conviction of Robert Carter, who was sentenced to death for the six murders. Carter had admitted his presence at the murders and had implicated Graves. After Carter's conviction, Sebesta and Carter negotiated (through Carter's appellate counsel) for Carter's testimony in the upcoming trial against Graves. Because no physical evidence linked Graves to the murders, Carter's testimony would be critical to the prosecution of Graves.

The night before Carter was to testify against Graves, Carter told Sebesta that he had committed the murders alone. This statement necessarily excluded Graves as a participant in the murders. Sebesta never disclosed this information to the defense. This failure to disclose violated Disciplinary Rule 3.09(d).

Sebesta also presented false trial testimony both by Carter and by the lead investigator that (except for earlier grand jury testimony) all Carter's statements implicated Graves. That false trial testimony contradicted the undisclosed fact that Carter had told Sebesta the night before Graves' trial that Carter had committed the murders alone. Sebesta took no steps to correct the false testimony of Carter or of the lead investigator or to bring the perjured statement to the court's attention. Sebesta's use of testimony that he knew to be false violated Disciplinary Rule 3.03(a)(5).

Graves presented an alibi defense. Before the defense called Graves' critical alibi witness, Sebesta falsely stated in open court that the alibi witness was a suspect in the murders and would possibly be indicted. The witness then refused to testify and left the courthouse. Sebesta had no evidence or information tending to show any involvement by the alibi witness in the murders. Sebesta's false statement to the court violated Disciplinary Rule 3.03(a)(1).

Additionally, Sebesta told defense counsel that Carter had implicated a person named "Red" in the murders. Sebesta knew, but did not disclose to defense counsel, (i) that law enforcement had identified "Red" as Kevin Dwayne Vincent and had ruled him out as a suspect and (ii) that Carter himself had confirmed that Vincent was not involved. Sebesta's failure to disclose this information to the defense violated Disciplinary Rule 3.09(d).

Sebesta also failed to disclose to defense counsel that an important prosecution witness was currently under indictment on other charges. Sebesta's failure to disclose this information to the defense violated Disciplinary Rule 3.09(d).

The Evidentiary Panel also found that Sebesta violated Disciplinary Rules 8.04(a)(1) and 8.04(a)(3).

From 1994 to 2006, Graves was in prison on death row. In 2006, his conviction was reversed and remanded for new trial based on Sebesta's misconduct. In 2010, a special prosecutor determined that there was no credible evidence that Graves had any involvement in the murders. Graves was released following 16 years in prison.

C. Dismissal of prior grievance

On January 31, 2007, Houston attorney Robert S. Bennett filed a grievance against Sebesta. The grievance was initially classified as an Inquiry and dismissed. On Bennett's appeal, the grievance was determined to be a Complaint, and the Office of Chief Disciplinary Counsel was

directed to investigate further. Sebesta filed a written response to Bennett's grievance.[3] After an investigation, the Chief Disciplinary Counsel determined that no Just Cause existed. On August 16, 2007, the Office of Chief Disciplinary Counsel wrote Sebesta (i) that the Summary Disposition Panel had determined that the grievance should be dismissed and (ii) that "our file on this matter has been closed and this office will take no further action." Sebesta's affidavit in 2014 says that J. M. Richards, Senior Investigator of the Office of Chief Disciplinary Counsel, discussed with Sebesta (i) that Sebesta had passed a lie detector test, and (ii) that Anthony Graves had failed a lie detector test. Sebesta's affidavit says that Richards told him, "That's all we needed."

The 2007 grievance was based on substantially the same allegations of misconduct as the 2014 grievance. Sebesta asserts that the 2014 prosecution should have been barred either by *res judicata* or by quasi-estoppel.

II. Standard of Review

To the extent that Sebesta has limited his appeal to legal issues, the Evidentiary Panel's legal determinations are reviewed under a *de novo* standard.[4] Any factual determinations are reviewed under the substantial evidence standard.[5]

[3] The written response in 2007 stated facts substantially contradictory to the facts later found by the Evidentiary Panel in 2015, which are unchallenged in this appeal.

[4] *Comm'n for Lawyer Discipline v. Schaefer*, 364 S.W.3d 831, 835 (Tex. 2012).

[5] *Comm'n for Lawyer Discipline v. A Texas Attorney*, No. 55619, 2015 WL 5130876, at *2 (Tex. Bd. Disc. App., July 24, 2015).

III. *Res Judicata*

A. Law prior to the 2004 rule changes

Sebesta acknowledges that, prior to the 2004 rule changes, determinations by a grievance committee whether or not to take disciplinary action did not have any *res judicata* effect.[6] This is because such preliminary screenings, prior to any evidentiary proceeding,

> have been inquisitorial in nature, but they have not been decisions upon the merits of the complaints. The preliminary investigation of an attorney for alleged misconduct has been compared to an inquisition by a grand jury. ... The Committee's prior decisions did not ever rise to the level of a final determination of the merits of the complaints before them, and they are not res judicata.[7]

B. 2004 rule changes

Sebesta asserts that the foregoing principle is no longer applicable, due to changes to the disciplinary process in 2004. Sebesta says that after January 1, 2004, (i) there was no longer a local investigatory hearing for attorney discipline actions, (ii) investigations are instead conducted

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[6] *State v. Sewell*, 487 S.W.2d 716, 718 (Tex. 1972); *Rodgers v. Comm'n for Lawyer Discipline*, 151 S.W.3d 602, 618 (Tex. App.—Fort Worth 2004, pet. denied) ("Although a prior State Bar grievance committee determined that Rodgers did not violate the version of the trade name rule in effect in 1994…, a grievance committee decision not to prosecute has no res judicata or collateral estoppel effect."); *Gonzalez v. State Bar of Texas*, 904 S.W.2d 823, 829 (Tex. App.—San Antonio 1995, writ denied) ("even if the matter had gone before a tribunal, a voluntary dismissal not touching upon a ground going to the merits of the case would not give rise to res judicata or to collateral estoppel"). *See also Smith v. Grievance Committee, State Bar of Texas for District 14–A*, 475 S.W.2d 396, 399 (Tex. Civ. App.—Corpus Christi 1972, no writ); ("... the proceeding before the Grievance Committee is not an adversary process. The committee is an investigating body. The aim of its inquiry is to collect and assemble facts and information that will enable the committee to take such future action as it may deem expedient for the public welfare. The Grievance Committee is not designed or equipped by the rules and regulations of the State Bar Act to conduct a trial. The adversary process and petitioner's day in court is commenced by the filing of the formal complaint as provided by the Texas Bar Act."); *Green v. State*, 589 S.W.2d 160, 164 (Tex. Civ. App.—Tyler 1979, no writ) (a grievance committee does not have statewide jurisdiction, promulgates no rules and does not decide 'contested cases'); *Galindo v. State,* 535 S.W.2d 923, 927 (Tex. Civ. App.—Corpus Christi 1976, no writ) ("the Grievance Committee's proceedings do not accord finality"); *Minnick v. State Bar of Texas*, 790 S.W.2d 87, 90 (Tex. App.—Austin 1990, writ denied) ("A grievance committee's investigations have been compared to an inquisition by a grand jury.").

[7] *State v. Sewell, supra,* 487 S.W.2d at 718.

by a team of professional investigators employed by the Office of Chief Disciplinary Counsel, (iii) even upon a determination by the Office of Chief Disciplinary Counsel that no Just Cause exists, the determination must be reviewed before any dismissal can occur, (iv) a Summary Disposition Panel makes an independent determination whether Just Cause exists, and (v) no appeal is available from a dismissal by the Summary Disposition Panel if it determines that no Just Cause exists. Sebesta emphasizes that under pre-2004 procedures, a dismissal was without prejudice to the Complainant's ability to re-file a complaint within 30 days with additional evidence; after 2004, the words "without prejudice" were stricken and the appeal right was removed.

C. Analysis

The 2004 changes to the rules diminished, rather than increased, the investigatory tools available to the screening entity. The dismissal in 2007, which Sebesta says should be given *res judicata* effect, was by a Summary Disposition Panel. We compare its tools and powers with those available to a grievance committee prior to 2004, whose dismissals did not have *res judicata* effect. The Summary Disposition Panel has no subpoena power to compel production of documents or to compel testimony; and it hears no witnesses.[8] The pre-2004 grievance committees had subpoena power to gather documents and to require testimony; and they had the opportunity to hear and cross-examine witnesses under oath.[9] The Summary Disposition Panel has fewer tools than the pre-2004 grievance committees to attempt any adjudication of merits, and the Summary Disposition Panel is not charged with any adjudicatory function.

[8] Tex. Rules Disciplinary P. R. 2.13.

[9] *See McGregor v. State*, 483 S.W.2d 559, 561 (Tex. Civ. App.—Waco 1972), writ granted and order set aside without reference to the merits due to petitioner's motion for nonsuit below, 487 S.W.2d 693 (Tex. 1972).

The changes in 2004 do not transform the role of the screening entity into an adjudicatory body, whose decisions might have *res judicata* effect. Just as the pre-2004 screening role of grievance committees has frequently been compared to the inquisitorial and non-adjudicatory role of grand juries,[10] the Summary Disposition Panels continue to perform that function but with fewer investigatory tools.

Sebesta's further argument – that pre-2004 dismissals were expressly "without prejudice" to a complainant's right to re-file the same complaint with additional evidence within 30 days – does not persuade a different conclusion. The pre-2004 cases found no *res judicata* following a screening dismissal – without regard to whether a complainant had, or had not, chosen to re-file within 30 days from the dismissal. The limited procedural opportunity before 2004 for a complainant to re-file the same complaint within 30 days was irrelevant to the question whether the Commission on Lawyer Conduct is barred by *res judicata* from initiating a disciplinary proceeding in the future.

It should be no surprise that a dismissal prior to commencement of an evidentiary proceeding can have no *res judicata* effect. Even after commencement of an evidentiary proceeding, and during an evidentiary hearing up until the close of the Commission's case in chief, allegations of an attorney's professional misconduct can be voluntarily non-suited by the Chief Disciplinary Counsel. Such a non-suit is without prejudice and without any subsequent *res judicata* effect.[11] There is no jurisprudential or public policy reason why a dismissal at a much

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[10] *State v. Sewell*, *supra*, 487 S.W.2d at 718; *Commission for Lawyer Discipline v. Stern*, 355 S.W.3d 129, 137 (Tex. App.—Houston [1st Dist.] 2011, pet. denied); *Minnick v. State Bar of Texas*, *supra*, 790 S.W.2d at 90; *Greenspan v. State*, 618 S.W.2d 939, 941 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.); *Wilson v. State*, 582 S.W.2d 484, 487 (Tex. Civ. App.—Beaumont 1979, no writ); *Smith v. Grievance Committee, State Bar of Texas for District 14–A*, *supra*, 475 S.W.2d at 399.

[11] Disciplinary evidentiary proceedings are governed by the Texas Rules of Civil Procedure except as expressly modified by the Rules of Disciplinary Procedure. Tex. Rules Disciplinary P. R. 3.08.B. Thus,

earlier date should be given *res judicata* effect – at a time when a screening entity does not have the benefit of the investigatory tools available later in an evidentiary proceeding, such as the capacity to subpoena production of documents and to subpoena testimony, the capacity to receive any sworn testimony in any depositions or evidentiary hearing, and the opportunity for cross-examination.

"*Res judicata*" means "the matter has been adjudicated." There is no adjudication by a Summary Disposition Panel, but only a screening based upon the investigation by the Office of the Chief Disciplinary Counsel without the formal tools later available in an evidentiary proceeding. The Summary Disposition Panel makes a determination of which matters warrant the commencement of evidentiary proceedings. It does not adjudicate the merits, nor does it yet have the tools to make any evidentiary findings by a preponderance of the evidence. Those findings are made at the conclusion of an evidentiary proceeding – either by an Evidentiary Panel or by a district court. Only then – after an adjudication – should principles of *res judicata* become applicable.

IV. Appellant's estoppel defense

Alternatively, Sebesta asserts that the 2014 disciplinary proceeding should be barred due to principles of quasi-estoppel. Among non-governmental actors, quasi-estoppel "precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken. The doctrine applies when it would be unconscionable to allow a person to maintain a

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the Commission for Lawyer Discipline may file a voluntary notice of non-suit at any time before it has completed its case-in-chief. Tex. R. Civ. P. 162. A voluntary non-suit has no *res judicata* effect. *Epps v. Fowler*, 351 S.W.3d 862, 868 (Tex. 2011). Indeed, in *State v. Sewell*, *supra*, the grievance committee had filed a formal disbarment suit in district court and had subsequently chosen to take a non-suit. The Supreme Court held: "The order dismissing the formal complaint to disbar McGregor was without prejudice to the Committee's right to refile the suit. Such an order is not a bar to the institution of the same suit." 487 S.W.2d at 718.

position inconsistent with one to which he acquiesced, or from which he accepted a benefit."[12] Quasi-estoppel is not applicable against a party who did not have knowledge of all material facts.[13]

For four reasons we overrule Sebesta's argument.

First, Sebesta cites no instance when quasi-estoppel is available against a governmental entity or based upon actions of an agent of a governmental entity. Estoppel is ordinarily not available in such circumstances.[14]

Second, even when quasi-estoppel may be available, it is a factually intensive determination.[15] The substantial evidence review applicable to fact issues does not support any conclusion that the Evidentiary Panel acted without a reasonable basis.[16]

Third, as an equitable defense, quasi-estoppel is not available to parties with unclean hands.[17] The unchallenged findings of fact show (i) Sebesta's conduct in the underlying prosecution was egregious and (ii) the March 29, 2007 response Sebesta submitted in connection with the 2007 grievance failed to admit, and substantially contradicted, the facts found concerning his conduct in the underlying prosecution.

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[12] *Lopez v. Muñoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000).

[13] *Clark v. Cotton Schmidt, L.L.P.*, 327 S.W.3d 765, 770 (Tex. App.—Fort Worth 2010, no pet.).

[14] *City of Hutchins v. Prasifka*, 450 S.W.2d 829, 835 (Tex. 1970).

[15] *See, e.g., Lopez v. Muñoz, Hockema & Reed, L.L.P., supra* (reversing summary judgment); *Clark v. Cotton Schmidt, L.L.P., supra* (reversing summary judgment; "resolving all doubts in Clark's favor on the quasi-estoppel issue, we hold that Cotten Schmidt did not conclusively establish that it is unconscionable to allow him to maintain a position inconsistent with one to which he previously acquiesced").

[16] *See Comm'n for Lawyer Discipline v. A Texas Attorney*, *supra*, at 2.

[17] *Texas Enterprises, Inc. v. Arnold Oil Co.*, 59 S.W.3d 244, 249 (Tex. App.—San Antonio 2001, no pet.); *Truly v. Austin*, 744 S.W.2d 934, 938 (Tex. 1988).

Fourth, it is not unconscionable for a screening entity of a disciplinary authority to reach one conclusion as to Just Cause when presented with information in 2007 (including Sebesta's materially inaccurate March 29, 2007 response) and to reach another conclusion when presented with information in 2014 (including a 2010 affidavit from the special prosecutor stating his determination that there was no credible evidence that Graves had any involvement in the murders).

V. Conclusion

The judgment of disbarment is affirmed.

IT IS SO ORDERED.

David N. Kitner, Chair

Ramon Luis Echevarria II, Vice Chair

George A. Taylor

Robert A. Black

Jeanne C. "Cezy" Collins

Roland K. Johnson

Deborah Pullum

John J. McKetta III

Katherine A. Kinser

David M. González

Wendy Adele Humphrey

Mike Mills