

Smith
399 S.E. 2d 36

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 28th day of November, 1990, the following order was made and entered:

The Committee on Legal Ethics of The West Virginia State Bar, Complainant


vs.) No. 19683

W. Bernard Smith, Respondent

The Court, having maturely considered the petition for rehearing and reargument filed in the above-captioned case, is of opinion to, and doth hereby deny the prayer of the petitioner and doth order that the final order entered herein be made absolute and certified as heretofore directed. Chief Justice Neely would grant.

A True Copy

Attest:


Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 14th day of November, 1990, the following order was made and entered:

The Committee on Legal Ethics of The West
Virginia State Bar, Complainant

vs.) No. 19683

W. Bernard Smith, a member of The West
Virginia State Bar, Respondent

On a former day, to-wit, November 9, 1990, came the respondent, W. Bernard Smith, pro se, and presented to the Court his motion in writing praying for a ninety-day stay of execution of the order of suspension entered on the 18th day of October, 1990, in this Court in the above-styled proceeding, for reasons stated therein.

Upon consideration whereof, the Court is of opinion to and doth hereby sustain said motion for a stay of execution of the order of suspension in the above-styled proceeding for a period of sixty days. It is therefore considered and ordered by the Court that the execution of the aforesaid order should be, and it hereby is, stayed for a period of sixty days from the date of this order to permit a decision by the United States Supreme Court upon a petition for an appeal or writ of certiorari; all of which is ordered to be certified to the West Virginia State Bar. Chief Justice Neely absent.

A True Copy

Attest:


Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 8th day of November, 1990, the following order was made and entered:

The Committee on Legal Ethics of The
West Virginia State Bar, Complainant

vs.) No. 19683

W. Bernard Smith, a member of The West
Virginia State Bar, Respondent

On a former day, to-wit, October 24, 1990, came the petitioner, the Committee on Legal Ethics of The West Virginia State Bar, by Cynthia Santoro Gustke and Sherri D. Goodman, its attorneys, and presented to the Court its motion for an award of costs incurred in the above-captioned proceeding and filed therewith a written statement of said costs. Upon consideration whereof, the Court is of opinion to and doth hereby grant said motion. It is therefore ordered that the respondent, W. Bernard Smith, reimburse costs in the amount of Two Thousand Six Hundred Thirty-Two Dollars and Forty-Four Cents (\$2,632.44) to the Committee on Legal Ethics of The West Virginia State Bar. Chief Justice Neely would refuse.

A True Copy

Attest:


Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 18th day of October, 1990, the following order was made and entered:

The Committee on Legal Ethics of The West
Virginia State Bar, Complainant

vs.) No. 19683

W. Bernard Smith, a member of The West
Virginia State Bar, Respondent

The Court, having maturely considered the verified complaint praying for the suspension of the respondent's license to practice law in the State of West Virginia for one year, together with the Original Report of the Committee on Legal Ethics, as provided by Sections 18 and 19, Article VI of the Bylaws of The West Virginia State Bar, the Findings and Recommendations of said Committee and the various pleadings and exhibits filed with the Committee, the rule awarded thereon, and the oral argument and briefs of counsel, is of opinion for reasons stated in writing and filed with the record that the respondent, W. Bernard Smith, has been guilty of violating Disciplinary Rule 6-101(A)(3) of the Code of Professional Responsibility, and his license to practice law in the State of West Virginia should be suspended.

Accordingly, it is therefore adjudged and ordered that the license and authority of the respondent, W. Bernard Smith, to practice law in the State of West Virginia, be, and the same is hereby suspended for one year.

The syllabus of points adjudicated, prefixed to the written opinion prepared Per Curiam, was concurred in by Justices Miller, McHugh, Workman and Brotherton. Chief Justice Neely dissents.

Service of a copy of this order upon the respondent, W. Bernard Smith, by certified mail, return receipt requested, shall constitute sufficient notice of the contents hereof.

A True Copy

Attest: 
Clerk, Supreme Court of Appeals

In summary, we hold that the circuit court erred in concluding that the State Board has no authority to review or reject the County Board's closure plan. We further conclude that in view of the lack of an appropriate evidentiary record, the circuit court erred in holding that the State Board acted arbitrarily and capriciously in failing to approve the County Board's decision.⁹ The case is remanded to the State Board with instructions to give an appropriate statement of its reasons for not approving the County Board's plan. Afterwards, if the County Board believes that the State Board has acted arbitrarily and capriciously, it may pursue this issue before the circuit court in an evidentiary hearing.

Reversed and remanded with directions.

NEELY, C.J., did not participate in the consideration or decision of this matter.



The COMMITTEE ON LEGAL ETHICS
OF the WEST VIRGINIA STATE BAR

v.

W. Bernard SMITH, a Member of the
West Virginia State Bar.

No. 19683.

Supreme Court of Appeals of
West Virginia.

Oct. 18, 1990.

Rehearing Denied Nov. 28, 1990.

In an attorney disciplinary proceeding, the Supreme Court of Appeals held that: (1) attorney/executor's dilatoriness in pursuing claim for estate is not neglect of entrusted legal matter, and (2) attorney/executor's threats to deny benefits to legatees who filed legal ethics complaint

9. We decline to discuss Appellee Cooper's cross-assignment of error because it was not considered below. See Syllabus Point 2, *Duquesne*

adversely reflects on fitness to practice law and warrants one-year suspension.

License suspended.

Neely, C.J., dissented and filed opinion.

1. Attorney and Client ⇐53(2)

In court proceeding prosecuted by Committee on Legal Ethics for purpose of having suspended license of attorney to practice law for designated period of time, burden is on Committee to prove by full, preponderating and clear evidence charges contained in complaint filed on behalf of Committee.

2. Attorney and Client ⇐44(1), 46

Attorney/executor's dilatoriness in pursuing claim for estate is not neglect of entrusted legal matter, where informal attempt to collect assets fails, where litigation to collect assets may result in counterclaim against estate, and where executor is seriously ill and informally approaches at least two lawyers concerning possible litigation. Code of Prof.Resp., DR 6-101(A)(3).

3. Attorney and Client ⇐38, 58

Attorney/executor's threats to deny benefits to legatees who filed legal ethics complaint adversely reflects on fitness to practice law and warrants one-year suspension, where executor is previously disciplined. Code of Prof.Resp., DR 1-102(A).

4. Constitutional Law ⇐287.2(5)

Statement of charges in attorney disciplinary proceeding reflecting legatees' concerns about administration of estate and attorney/executor's threats to dissuade filing of legal ethics complaint gave attorney notice and opportunity to defend required by due process clause. U.S.C.A. Const. Amends. 5, 14.

5. Attorney and Client ⇐48

Investigation of legal ethics complaint is not under direction and control of original complainant; rather, Investigative Pan-

Light Co. v. State Tax Dep't., — W.Va. —, 327 S.E.2d 683 (1984), cert. denied, 471 U.S. 1029, 105 S.Ct. 2040, 85 L.Ed.2d 322 (1985).

probable cause existed to hold a hearing. Charges against Mr. Smith were that he violated the *Code of Professional Responsibility* Disciplinary Rule 6-101(A)(3) by his failure to complete the administration of the estate and Disciplinary Rule 1-102(A) by his threats to deny estate funds to heirs who filed ethics complaints.² DR 6-101(A) states: "A lawyer shall not: . . . 3) Neglect a legal matter entrusted to him." DR 1-102(A) states: "A lawyer shall not: . . . (6) Engage in any other conduct that adversely reflects on his fitness to practice law."

Hearings upon the charges were conducted by the Committee on Legal Ethics.³ Thereafter, the Committee recommended that this Court suspend Mr. Smith's license to practice law for one year because of his attempts to interfere with the process of the filing of the ethics complaints by threatening the heirs who filed ethics complaints with the loss of benefits under the will of Reece S. Browning. On the charge of neglect in the estate administration, the Committee found that although Mr. Smith's "administration of the estate is not a paragon of competence, it does not rise to the level of a violation. . . ."

I

On November 17, 1982, Mr. Browning executed a will prepared by Mr. Smith. The will named Mr. Smith as executor and provided that the estate be converted into cash at the sole discretion of the executor and divided among five heirs. The heirs included: Aldine Carlisle (sister of the decedent), Jeanne Johnston (niece of the decedent), Becky Browning Keyes (niece of the decedent), James White, Jr. (friend of the

decedent), and Judy Barker (friend and employee of the decedent). The will also contained the following provision:

That should any beneficiary hereunder entertain such litigation against the Administrator (Mr. Smith), which should not prevail, the said beneficiary or persons claiming under such beneficiary shall be excluded from any of the benefits passing under this Last Will and Testament.

After Mr. Browning's death on February 28, 1983, Mr. Smith probated the will on March 8, 1983 and since then, has been attempting to complete the administration of the estate.⁴ In October 1983, Mr. Smith made a \$5,000 advance to each of the heirs and Ms. Barker received an additional advance of \$2,000 in 1983 or 1984 because she was "in a bind." In 1984-5, several complaints were filed with the Ethics Committee alleging that Mr. Smith was dilatory in administering the estate and failed to communicate with certain heirs. In addition to the uneven distribution of assets, the other major complaint was Mr. Smith's administration of the estate concerned his failure to collect the value of two Associated Grocers' membership certificates.⁵

The appraisal of the estate, filed in December 1984, listed as potential assets two Associated Grocers' membership certificates with face amounts of \$37,000 and \$3,000. Associated Grocers did not file a claim against the estate. In the Summer of 1984, Mr. Smith had an informal meeting with a representative of Associated Grocers, which disclosed a possible claim against the estate and failed to determine the value of the memberships. After that meeting, Mr. Smith did not take any formal action to determine the value of the mem-

2. The *Code of Professional Responsibility*, which was in effect when this action arose, was superseded and replaced by the *Rules of Professional Conduct* on January 1, 1989.

3. Although the original complaints were filed in November and December 1984 and February 1985, the matter was not submitted for a decision until November 1989. Unfortunately during this disciplinary process, Mr. Smith developed a serious medical problem that caused some of the delay. Because of the inordinate delay in this case, the Committee On Legal Ethics of the West Virginia State Bar is preparing to

recommend protocols to facilitate and expedite the resolution of complaints.

4. According to the record and representations made during oral argument on September 11, 1990, there has been no final distribution of the estate.

5. Ethics complaints were filed by the following heirs who were all relatives of the decedent: Ms. Carlisle, Ms. Johnston and Ms. Browning Keyes. Another ethics complaint was filed by Donald Rex Browning, the brother of the decedent, who was not an heir.

In a court proceeding prosecuted by the Committee on Legal Ethics of the West Virginia State Bar for the purpose of having suspended the license of an attorney to practice law for a designated period of time, the burden is on the Committee to prove by full, preponderating and clear evidence the charges contained in the complaint filed on behalf of the Committee.

See Committee on Legal Ethics v. Thompson, — W.Va. —, 356 S.E.2d 623 (1987); *Committee on Legal Ethics v. Daniel*, 160 W.Va. 388, 235 S.E.2d 369 (1977); *Committee on Legal Ethics v. Pence*, — W.Va. —, 216 S.E.2d 236 (1975); *Committee on Legal Ethics v. Pietranton*, 143 W.Va. 11, 99 S.E.2d 15 (1957).

[2] We agree with the Committee that Mr. Smith's failure to pursue the claim against Associated Grocers is not a violation of DR 6-101(A). Although Mr. Smith has been dilatory in pursuing the claim for the estate, given the complications, he has not fallen below the minimum level of conduct proscribed by the *Code of Professional Responsibility*. The record indicates that Mr. Smith's informal attempt to collect the assets failed and that litigation to collect the assets might result in a counterclaim against the estate. In addition Mr. Smith, who has been seriously ill, has informally approached at least two lawyers concerning possible litigation. Although the delay in settling the estate does not constitute neglect at this time, we urge that the estate be settled without delay.⁷

[3] From our review of the record and the numerous exhibits, we find that the Committee met its burden with regard to the charge that Mr. Smith threatened to deny benefits under the will because of the filing of legal ethics complaints.⁸ The

7. We note with concern that there has been an uneven distribution of estate assets. Assuming that the \$1,000 expense reimbursements and the additional money to Ms. Carlisle and Ms. Johnson came from Mr. Smith's personal funds, the record indicates that Ms. Barker received an advancement from the estate of \$2,000 in 1983-84 over the advancements received by the other heirs.

Committee found that Mr. Smith's attempt to frustrate the "disciplinary process is considered to be aggravating enough to warrant the recommended discipline." The evidence that Mr. Smith threatened to deny benefits to heirs who pursued ethics complaints against him is clear and conclusive.

[4] Mr. Smith raises several procedural arguments in his defense, the most important of which is that the Committee's consideration of the alleged retaliatory threats made by Mr. Smith to the heir/complainants violated a due process requirement of notice and an opportunity to defend.

[5-7] In this case the Statement of Charges reflects not only the complainants' concerns about the administration of the estate but also the threats Mr. Smith used to dissuade the heir/complainants. Mr. Smith had notice of the charge of neglect that was before the Investigative Panel and by his actions sought to frustrate the legal ethics complaint process. The investigation of a legal ethics complaint is not under the direction and control of the original complainant. Rather the Investigative Panel, with its goal of protecting the public, must consider the issues raised by the complainant and any attendant issues. *See In re Daniel*, 153 W.Va. 839, 173 S.E.2d 153 (1970); Syllabus Point 3, *Daily Gazette Co., Inc. v. Committee on Legal Ethics*, — W.Va. —, 326 S.E.2d 705 (1984). The decision by the Investigative Panel to issue formal charges, after the requests to withdraw the complaint, on the neglect issue and the disruption of the investigatory process is not an abuse of discretion and does not show disparate treatment of Mr.

8. Mr. Smith also contends that the delay prior to the presentation to the Investigative Panel constitutes laches. After the complaints were filed, Mr. Smith was given an opportunity to settle the estate. However, the estate was not settled and Mr. Smith used the delay to attempt to have the complainant/heirs dismiss their complaints. Mr. Smith fails to show that the delay was prejudicial or placed him at a disadvantage. *See Syllabus Point 2, Committee on Legal Ethics v. Pence, supra.*

especially his brother, expressed their dissatisfaction. In the full expectation of a similar gnashing of teeth and tearing of hair during the administration of his estate, especially because the decedent's brother was not an heir, the decedent drafted a will with the "in terrorem" provision and appointed his lawyer, Mr. Smith, to serve as administrator.

Although I agree with the majority that what Mr. Smith did was wrong, I believe that the penalty is too high in light of Mr. Smith's extraordinarily bad health in the last four years (one of his legs was amputated) and the difficulties of eliciting cooperation from these particularly quarrelsome complainants.

Accordingly, I believe the penalty too harsh.



STATE of West Virginia

v.

Brigitte WICKLINE.

No. 19494.

Supreme Court of Appeals of
West Virginia.

Oct. 24, 1990.

Defendant was convicted, in the Wayne County Court, Robert G. Chafin, J., of first-degree murder without recommendation of mercy and she appealed. The Supreme Court of Appeals, Miller, J., held that: (1) court properly admitted defendant's second statement, and (2) record was insufficient for court to reach determination as matter of law on merits of defendant's claim of ineffective assistance of counsel.

Affirmed.

1. Criminal Law \S 412.1(1), 414

Spontaneous statement by defendant made prior to any action by police officer and before accusation, arrest or custodial interrogation was undertaken by police was admissible without voluntariness thereof first having been determined in in camera hearing.

2. Criminal Law \S 412.1(3)

Defendant's second written statement was properly admitted, despite her contention that she was not promptly presented before magistrate after her arrest; although defendant was arrested at point, after her confession, when she was told to wait in police car, three and one-half hour delay from time defendant confessed to when she was transported from crime scene was attributable to police investigation of crime scene and other delay involved drive from crime scene to police barracks, where she was processed, fingerprinted, and given her *Miranda* warnings again and where oral confession was reduced to writing. Code, 62-1-5; Rules Crim.Proc., Rule 5(a); U.S.C.A. Const. Amend. 5.

3. Criminal Law \S 519(8)

Delay in taking defendant to magistrate may be critical factor in totality of circumstances making confession involuntary and thus inadmissible, where it appears that primary purpose of delay was to obtain confession from defendant. Code, 62-1-5; Rules Crim.Proc., Rule 5(a).

4. Arrest \S 70(2)

Prompt presentment rule is triggered when accused is placed under arrest or when defendant is in police custody with sufficient probable cause to warrant arrest. Code, 62-1-5; Rules Crim.Proc., Rule 5(a).

5. Criminal Law \S 519(8)

Delay between time of arrest or custodial interrogation and giving of confession is most critical for prompt presentment purposes because during this time period custodial confinement and interrogation can be used to attempt to produce confession. Code, 62-1-5; Rules Crim.Proc., Rule 5(a).