

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

APR 19 1990

ROBERT L. HOECKER
Clerk

In the Matter of:)
ANTHONY R. RUSSO,) No. 89-3308
) (No. 81-1127AD)
Plaintiff-Appellant.) (D. Kansas)

ORDER AND JUDGMENT*

Before MOORE, BRORBY, and EBEL, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(1); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

This is a disciplinary proceeding in which Mr. Russo appeals the order of the United States District Court denying Mr. Russo's petition for reinstatement to the Bar of the United States District Court for the District of Kansas.

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Mr. Russo's problems began in 1974, when he was convicted in federal court of conspiracy to use interstate facilities in violation of state laws concerning prostitution and bribery of law enforcement officials. Mr. Russo, following his conviction, surrendered his license to practice law both in the state of Kansas and in the United States District Court and served his sentence. Mr. Russo subsequently filed a petition for reinstatement with the Supreme Court of Kansas which denied this petition in 1980. See State v. Russo, 230 Kan. 5, 630 P.2d 711 (1981) (Russo I).

Mr. Russo then filed his first petition for reinstatement in the federal court for the district of Kansas in 1981. This petition was heard before a two-judge panel, which heard and received evidence and denied Mr. Russo's petition. This panel specifically held: (1) no constitutional questions had been raised; and (2) there are no exceptional circumstances which would warrant the United States District Court taking action different from the state. The two-judge panel also specifically stated:

We agree with our state brethren that the serious nature of petitioner's original misconduct and its consequent adverse effect upon the legal profession and the administration of justice outweighs the favorable recommendations of friends and members of the bar, their sympathy for him, and their beliefs that he has been sufficiently punished. Perhaps petitioner has paid the price for his criminal activity, but the court cannot overlook the fact that his criminal transgression was of such nature that it undermines the very foundation of our justice system.

(Citation omitted). Mr. Russo did not appeal this decision.

In 1987 Mr. Russo again applied for reinstatement to the Kansas Supreme Court which, after considering the record, denied his petition holding that "the seriousness of the original misconduct of Mr. Russo is such that his disbarment should be permanent." In re Russo, 244 Kan. 3, 765 P.2d 166, 167 (1988) (Russo II).

Mr. Russo then filed another petition with the United States District Court pursuant to D. Kan. Rule 409, praying for an order reinstating him to practice before the federal court. By its order of July 1, 1989, the district court denied the petition for reinstatement and, pursuant to D. Kan. Rule 410, issued an order to show cause why the imposition of discipline identical to that imposed by the Kansas Supreme Court would be unwarranted. Mr. Russo filed a response to this order stating his desire to present "live evidence and additional documentation." In order to determine whether an evidentiary hearing was necessary, the district court directed Mr. Russo to file a statement listing proposed witnesses and their proposed testimony, together with any additional documentation he wished to offer. Mr. Russo thereupon specified: (1) the names of witnesses who would testify that, in their opinions, his reinstatement would not adversely affect the public confidence and respect for the Bar or the administration of justice; (2) the petition of approximately 125 lawyers opposing Mr. Russo's suspension to show the support of the Bar for Mr. Russo; (3) "[c]opies of polygraph tests admitted before Kansas Supreme Court in 1974 going to the question of the seriousness of

the offense"; (4) a newspaper clipping reporting the reinstatement of a federal judge to the Utah Bar after his conviction of a felony; and (5) his own testimony.

The district court thereafter ruled that it could "conceive of no circumstances making any of the above relevant to the issues" before the court (those issues set forth in the district of Kansas Rule 410(d))¹ and declined to conduct an evidentiary hearing. The district court then found and determined

upon the face of the record that the proceedings in none of the disciplinary matters which resulted in the

¹ D. Kan. Rule 410(d) reads:

Identical Discipline Imposed; Exceptions. Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of (b) above, the Disciplinary Panel shall impose the identical discipline unless the respondent-attorney demonstrates, or the Disciplinary Panel finds, that upon the face of the record upon which the discipline in another jurisdiction is predicated it clearly appears:

(1) That the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Disciplinary Panel could not, consistent with its duty, accept as final the conclusion on that subject; or

(3) that the imposition of the same discipline by the Disciplinary Panel would result in grave injustice; or

(4) that the misconduct established is deemed by the Disciplinary Panel to warrant substantially different discipline.

Where the Disciplinary Panel determines that any of said elements exist, it shall enter such other order as it deems appropriate.

respondent's disbarment or in denial of his readmission to the Bar were in any way so lacking in notice or opportunity to be heard as to deprive him of due process; that there was no infirmity of proof establishing the respondent's misconduct; that the imposition of the same discipline would not result in grave injustice; and that the misconduct established is deemed by this court to warrant identical disbarment but that the disbarment need not be permanent.

The court also stated that it could not overlook the fact, as decided by the earlier two-judge panel, that Mr. Russo's criminal transgressions were of such a nature that they "'undermine the very foundation of our justice system.'"

Mr. Russo, while articulating his arguments in a different fashion, is asserting on appeal:

(1) Mr. Russo was denied his right, under the Due Process Clause, to an evidentiary hearing before the district court concerning his petition for reinstatement;

(2) the district court failed to consider any of Mr. Russo's arguments concerning his constitutional assertions; and

(3) The district court erred in determining that the action of the Kansas Supreme Court in disbaring Mr. Russo was constitutionally valid as the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process, and the district court erred in finding that the

imposition of temporary disbarment was warranted based on the state court proceedings.

We disagree with Mr. Russo's contentions and affirm the decision of the district court.

Where a disbarred attorney challenges a district court's disciplinary procedures, the only question before the court is whether the district court followed its rules and whether those rules meet constitutional standards. Mattox v. Disciplinary Panel of U.S. Dist. Court, 758 F.2d 1362, 1364 (10th Cir. 1985). Whether those rules provide adequate constitutional protection is a matter for de novo review at the appellate level. In addition, the appellate court must review de novo the district court's application of constitutional due process standards to the state court proceedings.

Mr. Russo first argues that he has been denied his right, under principles of due process, to a full evidentiary hearing before the federal district court concerning his petition for reinstatement. However, we begin our analysis by noting that the due process requirements in a disciplinary proceeding are less exacting than for, by example, a criminal proceeding. Razatos v. Colorado Supreme Court, 746 F.2d 1429, 1435 (10th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); In re Phelps, 637 F.2d 171, 176 (10th Cir. 1981). The standard is one of permitting the

attorney a fair opportunity to present his case. In re Phelps, 637 F.2d at 176.

Here, the federal district court afforded Mr. Russo a fair opportunity to present his case. The court allowed Mr. Russo to identify the new or additional evidence that he wished to present. Upon review of Mr. Russo's response, the court concluded that none of the evidence proffered would be relevant to any of the issues to be determined under D. Kan. Rule 410(d), and therefore closed the record. The court then went on to review the existing record, including Mr. Russo's petition, summary of facts, and points and authorities in making its decision. We conclude that Mr. Russo was afforded sufficient opportunity to submit relevant information to the court in support of his position. Thus, we find no constitutional infirmity with the federal district court proceedings. We also find no evidence that the district court abused its discretion therein. We note that the federal courts have now considered Mr. Russo's reinstatement twice. The first panel considered evidence and testimony for Mr. Russo and concluded that disbarment was appropriate pursuant to Rule 410. With the instant proceedings, appellant has now had a second opportunity to present these same issues.

Mr. Russo's next contention that the federal district court failed to consider any of his arguments is simply without foundation or merit. While the court may not have articulated a specific response to each of Mr. Russo's assertions, the

Memorandum Opinion is clear and it is beyond doubt that the court considered and ruled against Mr. Russo on all relevant matters.

As to the adequacy of the state proceedings, Mr. Russo argues that the district court erred in relying upon the state court proceedings to impose its own discipline. He also alleges that the discipline was improperly imposed upon him without due process or equal protection of law, and that the state court proceedings suffered such infirmity of proof as to render it defective under Rule 410(d).

Here, the district court specifically found and determined as required by Rule 410, upon the face of the record, that the discipline imposed by the Kansas Supreme Court was not flawed by any deprivation of notice or opportunity to be heard as to deprive Mr. Russo of due process, and that there was no infirmity of proof establishing his misconduct. Also as required by Rule 410, the court concluded that the imposition of the same discipline would not result in grave injustice, and that the misconduct warranted identical disbarment, but that the disbarment need not be permanent. Accordingly, the district court's findings are consistent with the guidelines established in Rule 410(d). The provisions of D. Kan. Rule 410(d) are based upon Selling v. Radford, 243 U.S. 46, 51 (1917), wherein the Supreme Court established the principles and conditions under which all federal courts give effect to state court disciplinary proceedings.

We have reviewed the record and conclude that Mr. Russo was given a full and fair opportunity to present his case before the Kansas Supreme Court. The disciplinary panel appointed by the Kansas Supreme Court heard numerous witnesses and recommended to the Kansas Supreme Court that Mr. Russo be reinstated. All of this evidence was on record for the Kansas Supreme Court's review. However, that court, not once but twice, determined that the seriousness of Mr. Russo's conduct was such that he should be permanently disbarred. See, Russo I, and Russo II. In so doing, the court in Russo II adopted and reaffirmed its statement in Russo I:

"While the evidence before the panel indicates that many respected members of petitioner's community sincerely believe that he has been totally rehabilitated and should be again admitted to the practice of law, it is this court's duty to determine whether the readmission of Mr. Russo to the practice of law would be in the best interests of justice and the people of the State of Kansas." 230 Kan. at 8, 630 P.2d 711.

That statement is equally applicable to the proceeding now before the court.

It is the opinion of a majority of the members of the court that the seriousness of the original misconduct of Mr. Russo is such that his disbarment should be permanent.

765 P.2d at 167. The fact that the Kansas Supreme Court did not consider appellant's evidence as sufficient to overcome the seriousness of appellant's original misconduct does not constitute a lack of due process. Accordingly, we affirm the federal district court's findings as to the constitutional adequacy of the state court proceedings.

Finally, Mr. Russo argues that his right to practice law had merely been suspended temporarily, and that during the petition for reinstatement the Kansas Supreme Court, without notice to him or opportunity to be heard, changed the proceeding into one of permanent disbarment. The record simply does not support such an argument. Mr. Russo further asserts that disbarment by the Kansas Supreme Court is not a sanction available to that court; that permanent disbarment has never been imposed on any other Kansas lawyer; and he cites an Oklahoma case which illustrates that Oklahoma holds that time and experience may overcome a character flaw. These arguments do not rise to a constitutional dimension.

The decision of the United States District Court for the District of Kansas is **AFFIRMED**.

The mandate shall issue forthwith.

Entered for the Court:

WADE BRORBY
Circuit Judge