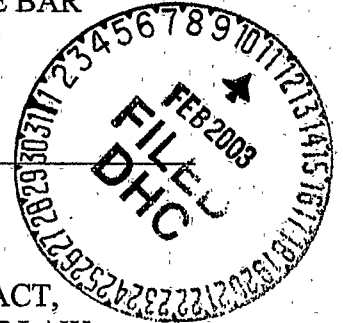


5837

WAKE COUNTY
NORTH CAROLINA

BEFORE THE DISCIPLINARY HEARING COMMISSION
OF THE NORTH CAROLINA STATE BAR
02 DHC 14



THE NORTH CAROLINA STATE BAR,)
Plaintiff)
v.)
DAVID B. SMITH,)
Defendant)

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER OF DISCIPLINE

This matter was heard on the 6th day of December, 2002, before a Hearing Committee of the Disciplinary Hearing Commission composed of Richard T. Gammon, Chair, F. Lane Williamson, and H. Dale Almond. Alan M. Schneider, David B. Freedman, and Dudley A. Witt appeared as counsel for defendant, David B. Smith. Douglas J. Brocker represented plaintiff, the North Carolina State Bar. Based upon the pleadings and the evidence introduced at the hearing, the Hearing Committee hereby enters the following:

FINDINGS OF FACT

1. The North Carolina State Bar (hereafter, "State Bar") is a body duly organized under the laws of North Carolina and is the proper party to bring this proceeding under the authority granted it in Chapter 84 of the General Statutes of North Carolina and the Rules & Regulations of the North Carolina State Bar promulgated thereunder.
2. Defendant, David B. Smith (hereafter "Smith"), was admitted to the North Carolina State Bar in 1973, and is, and was at all times referred to herein, an attorney at law licensed to practice in North Carolina, subject to the rules, regulations, and Rules of Professional Conduct of the North Carolina State Bar and the laws of the State of North Carolina.
3. During all of the periods referred to herein, Smith was actively engaged in the practice of law in the State of North Carolina and maintained a law office in the City of Greensboro, Guilford County, North Carolina.
4. Smith was properly served with process in this proceeding, and the hearing was held with due notice to all parties.

5. Smith and W. Steven Allen (hereafter, "Allen"), were appointed on February 18, 1998 to represent Russell William Tucker ("Tucker") on post-conviction proceedings arising from Tucker's first-degree murder conviction and death sentence entered by the Forsyth County Superior Court in February 1996.

6. Smith and Allen filed a motion for appropriate relief (MAR) on behalf of Tucker with the Forsyth County Superior Court on October 6, 1998. Smith and Allen subsequently amended the MAR on January 13, 2000.

7. Presiding Superior Court Judge Larry G. Ford summarily denied the MAR on May 11, 2000 without an evidentiary hearing.

8. After reviewing the North Carolina appellate rules, Smith concluded that, pursuant to N.C. App. Rule 21(f), a petition for writ of certiorari had to be filed with the North Carolina Supreme Court within 60 days of entry of the order denying the MAR.

9. Smith knew that Allen incorrectly believed that the 60-day deadline did not apply but did nothing to advise him of the correct interpretation of Rule 21(f).

10. Preparation of the writ of certiorari would not have required extensive research or other efforts because the legal and factual basis would have been similar to those set forth in the MAR.

11. During his representation of Tucker, Smith reviewed the trial evidence and traveled to North Carolina Central Prison to meet with Tucker on death row.

12. After reviewing the trial evidence and meeting with Tucker, Smith came to a personal belief that Tucker deserved to die and should be executed for his crimes.

13. Thereafter, Smith passively sabotaged Tucker's post-conviction relief and remedies.

14. Specifically, Smith intentionally and knowingly failed to file a writ of certiorari for Tucker with the North Carolina Supreme Court within the 60 days required by Rule 21(f).

15. Smith also did not withdraw from the representation or advise Allen of his personal beliefs about Tucker before the deadline expired for filing a writ of certiorari.

16. Even after the 60 day deadline expired, Smith failed to take effective steps to file the writ of certiorari, to alert Allen to the problem, or to withdraw from his representation of Tucker, prior to at least October 16, 2000.

17. Smith's failure to file Tucker's petition or take other appropriate action was

due at least in part to his desire to passively sabotage his client's post conviction proceeding, based upon Smith's dislike of Tucker and his belief that Tucker deserved the death penalty.

18. On October 19, 2000, more than 90 days after the deadline expired for filing the writ of certiorari, the Secretary of the North Carolina Department of Corrections issued an order setting an execution date for Tucker for December 7, 2000, upon notification from the Attorney General that Tucker had not filed a Petition for Writ of Certiorari.

19. The execution date was set because Smith and Allen failed to file a writ of certiorari or otherwise pursue Tucker's post-conviction remedies.

20. After receiving the October 19, 2000 Order setting Tucker's execution date, Smith and Allen prepared a Motion for Reconsideration and Vacation of Order Summarily Denying Motion for Appropriate Relief and First Amendment to Motion for Appropriate Relief in State v. Tucker and filed it on October 24, 2000.

21. After filing the above Motion, Smith met with attorneys at the Death Penalty Resource Center (hereafter, "DPRC"). While at the DPRC on October 24, 2000, Smith executed an affidavit concerning his actions in representing Russell Tucker ("Tucker affidavit").

22. Smith read the Tucker affidavit and had an opportunity to correct any errors or make any revisions before executing it.

23. Smith was legally competent at the time he executed the Tucker affidavit.

24. At the time Smith executed the Tucker affidavit, he knew it would be submitted to the Forsyth County Superior Court in connection with Tucker's underlying criminal case.

25. All of the statements contained in the sworn Tucker affidavit that Smith executed were true.

26. On October 25, 2000, Smith and Allen filed additional motions in State v. Tucker, including a: (a) Supplemental Motion for Reconsideration and Vacation of Order Summarily Denying Motion for Appropriate Relief and First Amendment to Motion for Appropriate Relief, (b) Motion to Stay Execution of Death Sentence, and (3) Motion for Substitution of New Counsel in Motion for Appropriate Relief.

27. The Tucker Affidavit that Smith executed was attached to the Supplemental Motion for Reconsideration and Vacation of Order Summarily Denying Motion for Appropriate Relief and First Amendment to Motion for Appropriate Relief, which was filed in State v. Tucker on October 25, 2000.

28. After a hearing on November 1, 2000, the Honorable Larry G. Ford denied the above-mentioned motions.

29. On November 2, Smith sent a letter to the State Bar enclosing the affidavit he had executed in State v. Tucker and self-reporting his conduct in that matter.

30. After Judge Ford's rulings, Smith and Allen filed additional documents with the North Carolina Supreme Court in State v. Tucker.

31. The North Carolina Supreme Court entered an Order on November 8, 2000 in State v. Tucker allowing a Motion to Have Petition for Writ of Certiorari Deemed Timely Filed.

32. The North Carolina Supreme Court subsequently entered an Order on November 28, 2000 in State v. Tucker which allowed the Motion to Stay Execution, the Motion to Withdraw and the Motion to Substitute Counsel, vacated the November 1, 2000 Orders of Judge Ford, and remanded the case to him for appointment of new counsel and further proceedings on the Motion for Appropriate Relief.

Based upon the foregoing Findings of Fact, the Hearing Committee enters the following:

CONCLUSIONS OF LAW

1. All parties are properly before the Hearing Committee, and the Committee has jurisdiction over defendant, David B. Smith, and the subject matter of this proceeding.

2. Smith's conduct, as set out in the Findings of Fact above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) in that by intentionally failing to file a timely petition for writ of certiorari with the North Carolina Supreme Court or otherwise perfect an appeal of the denial of Tucker's motion for appropriate relief, Smith:

- a. failed to abide by his client's objectives of representation in violation of Revised Rule 1.2(a),
- b. failed to act with reasonable diligence and promptness in representing Tucker in violation of Revised Rule 1.3,
- c. engaged in conduct prejudicial to the administration of justice in violation of Revised Rule 8.4(d), and
- d. intentionally prejudiced or damaged his client during the course of the professional relationship in violation of Revised Rule 8.4(g).

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the evidence and arguments of the parties concerning the appropriate discipline, the Hearing Committee hereby makes additional:

FINDINGS OF FACT REGARDING DISCIPLINE

1. Smith's misconduct is aggravated by the following factors:
 - a. prior disciplinary offense resulting in an admonition,
 - b. substantial experience in the practice of law,
 - c. significant negative impact of Smith's conduct on the legal community and on the criminal justice system.

2. Smith's misconduct is mitigated by the following factors:
 - a. absence of selfish or dishonest motive,
 - b. personal or emotional problems during the time period in which the violations occurred,
 - c. efforts to rectify the consequences of his misconduct,
 - d. full and free disclosure to the Hearing Committee and cooperative attitude toward the proceedings,
 - e. good character and reputation, as demonstrated by substantial testimony and other evidence
 - f. remorse,
 - g. interim rehabilitation, and
 - h. mental disability or impairment. Smith suffered from severe clinical depression during the time period in which the violations occurred and was diagnosed with and sought treatment for this condition at that time and prior to the initiation of the State Bar's investigation of this matter.

3. The mitigating factors significantly outweigh the aggravating factors.

Based upon the foregoing Findings of Fact, Conclusions of Law, Aggravating and Mitigating Factors, and the evidence and arguments of the parties, the Hearing Committee hereby enters the following:

ORDER OF DISCIPLINE

1. The license of the defendant, David B. Smith, is hereby suspended for three years from the date this Order of Discipline is served upon him. The period of suspension is stayed for three years upon the following conditions:

a. Smith shall execute a recovery contract with the LAP Program and satisfactorily participate in the Lawyer's Assistance Program ("LAP") throughout the period of his stayed suspension, including but not limited to, the following conditions:

(i) within thirty days of entry of this Order, obtain an independent, comprehensive evaluation by a doctor and other medical personnel as recommended by the LAP Program and sign waivers for all his present physicians, psychologist, and other treating professionals to release information to LAP and the evaluating physician;

(ii) enter into a LAP recovery contract based upon the recommendations of the evaluating physician and the LAP;

(iii) satisfactorily perform all the conditions of his LAP recovery contract which may include, by way of illustration and not limitation, remaining abstinent from alcohol or other mind altering drugs, alcohol or drug screening, psychotherapeutic counseling, inpatient or outpatient treatment, attendant at 12-step support group meetings, attendance at LAP support group meetings, taking appropriate medication, and communicating regularly with his designated monitor or mentor;

(iv) participate in all recommended treatment and remain in treatment throughout the period of his stayed suspension unless both LAP and his treating professionals agree to terminate such treatment. Smith shall obtain the approval of LAP before changing or modifying the frequency or necessity of psychological treatment, such as counseling or medication, even if recommended by his treating professionals;

(v) be responsible for all costs associated with obtaining an evaluation, treatment, and otherwise complying with his LAP recovery contract;

(vi) agree to any changes in his LAP recovery contract to address any significant changes in his medical condition during the period of his stayed suspension;

(vii) sign appropriate waivers for all his treating professionals to release information concerning his treatment and condition to LAP, and for LAP to release information to such treating professionals; and

(viii) sign appropriate waivers to permit LAP to make quarterly reports to the State Bar's Office of Counsel and to report any failure of Smith to comply with this Order and his LAP recovery contract. Smith is responsible to ensure that quarterly reports are sent to the State Bar Office of Counsel on January 1, April 1, July 1, and October 1 during each year of the stay;

b. Smith shall not violate any state or federal laws during the period of his stayed suspension;

c. Smith shall not violate any provisions of the Rules of Professional Conduct during the period of his stayed suspension;

d. Smith shall pay all costs incurred in this proceeding, as assessed by the Secretary, within 30 days of service of the notice of costs upon him; and

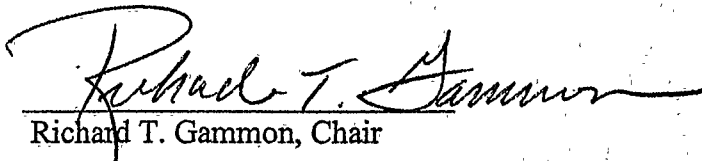
e. Smith shall not be involved directly or indirectly with a case that involves the issue of the death penalty either pre-trial, trial, appellate or post conviction during the period of his stayed suspension.

2. If, upon a motion by the State Bar, a Hearing Committee of the DHC finds that Smith has violated any of the conditions in Section 1(a)-(e) of this Order, the suspension of Smith's license shall be activated. If the suspension is activated, prior to seeking reinstatement of his license, Smith must:

a. comply with all provisions of 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0125(b) of the N.C. State Bar Discipline & Disability Rules; and

b. satisfy all the conditions set forth in section 1. a. - e. above prior to seeking reinstatement. Smith also must execute and attach to his petition for reinstatement a release permitting LAP and any treating medical personnel to discuss with the State Bar Office of Counsel his participation in and completion of the LAP recovery contract and any corresponding evaluation and treatment.

Signed by the chair with the consent of the other hearing committee members, this
the 11th day of February 2003.


Richard T. Gammon, Chair