91-7492

To be Argued by
RICHARD E. GRAYSON

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UNITED STATES COURT of APPEALS

for the

SECOND CIRCUIT

KENNETH E. BRUCE, ESQ.,

Plaintiff-Appellant

-against-

GUY J. MANGANO, AS PRESIDING JUSTICE AND WILLIAM C. THOMPSON, LAWRENCE J. BRACKEN, RICHARD A. BROWN, CHARLES B. LAWRENCE, JOSEPH J. KUNZEMAN, SYBIL HART KOOPER, GERALDINE T. EIBER, THOMAS R. SULLIVAN, STANLEY HARWOOD, VINCENT R. BALLETTA, JR., ALBERT M. ROSENBLATT, SONDRA MILLER, CORNELIUS J. O'BRIEN, DAVID S. RITTER, AS JUSTICES OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT, NEW YORK STATE NINTH JUDICIAL DISTRICT GRIEVANCE COMMITTEE, THE STATE OF NEW YORK, AND THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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BRIEF FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

Although appellant's counsel made it eminently clear in the district court that there were two (2) separate and legally independent, but related cases, the opinion below intertwined the principles applicable in one with the other case.

1. In his first through third causes of action, appellant sought no relief for himself. He challenged the constitutionality of New York State disciplinary statutes, rules, procedures and uniform practices.

To avoid any possible misinterpretation concerning the relief requested, all of appellant's papers specifically and repeatedly cited District of Columbia Court of Appeals v. Feldman, (460 U.S. 462 [1982]).

The success of appellant's challenge on this cause will have no direct effect upon appellant's status at the state bar.

2. Appellant, in a distinct, separate and independent cause, (his fourth cause of action) sought to enjoin the criminal enforcement of his suspension, as provided by other statutes and rules, based on overbreadth.

Here again, to avoid any possible misinterpretation of the relief sought, or the grounds thereof, appellant specifically and repeatedly cited City of Houston v. Hill, (482 U.S. 451 [1987]).

Success on this aspect, unlike the first aspect, would have an immediate and direct personal effect on appellant's status as an attorney.

In recognition of the fact that success by appellant on the first aspect of his case, would not bring any personal, direct or immediate direct relief, appellant did not assert that such success would moot the second cause.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Q1a. Is New York State's 1909 statute, respondents' rules, uniform practices and procedures for disciplining attorneys violative of the United States Constitution?

The District Court did not address the question.

Q1b. Did the District Court admit jurisdiction to adjudicate this claim of unconstitutionality by stating:

> ...plaintiff claims he is not seeking any relief for himself and, therefore, that he is not appealing any state court decision. Instead, he suggests that he is seeking to obtain relief through other similarly situated individuals by having a statute declared unconstitutional.
>
> ...[W]e do recognize that if plaintiff's challenge is actually to a bar rule adopted by the courts, as opposed to a court decision, jurisdiction may ultimately lie in this court.... (at pp. 9-10)

Appellant asserts in the affirmative.

Q1c. Is there any support in the Record for the District Court's statement, employed as a vehicle for dismissing appellant's first cause, at page 10 that:

> ...this contention is belied by the fact that his amended complaint actually seeks to enjoin enforcement of the various disciplinary statutes against him.

Appellant contends in the negative.

Q1d. Assuming, arguendo, the aforementioned statement by the District Court was correct, could and should appellant have been afforded an opportunity to eliminate any personal

or direct relief, which was essentially the course followed by the U.S. Supreme Court in District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)?

Appellant asserts in the affirmative.

Q1e. Does the obiter dictum by the District Court, disclaiming an ability to simultaneously litigate in the federal and state courts, confirm a misunderstanding of District of Columbia Court of Appeals v. Feldman, supra, when the Court stated (pp. 10-11):

> ...[W]e do recognize that if plaintiff's challenge is actually to a bar rule adopted by the courts, as opposed to a court decision, jurisdiction may ultimately lie in this court, assuming standing. See Feldman, 460 U.S. at 486. This issue like that of res judicata need not be resolved at present. [emphasis supplied]

Appellant asserts in the affirmative.

Q2a. Should criminal enforcement have been enjoined, in view of the District Court's finding (pp. 4-5) that:

> ...he [appellant] is admitted to the federal court and complains that he runs the risk of action being taken by the state if he continues to practice in the federal court. His worries in that regard, in my view, were well-founded.

Appellant asserts in the affirmative.

Q2b. Did the District Court err in refusing to enjoin enforcement because, in addition to the above finding, the Court stated at page 5:

> ...plaintiff simply offers a series of conclusory statements and hypothetical questions, with little legal analysis or judicial support....

Appellant asserts in the negative, since the police make "little legal analysis" when they arrest, and the effect of potential enforcement is to "chill" First Amendment rights.

Q3a. Did the District Court err in applying the doctrine of abstention?

Appellant asserts in the affirmative.

STATEMENT OF CASE

Plaintiff-Appellant, Kenneth E. Bruce, Esq. ("Bruce"), filed this case on February 15, 1991. It has two separate and distinct parts: 1) the unconstitutionality of the state's attorney disciplinary procedures and 2) enforcement of the procedures as they relate to appellant. Appellant, who is approximately 70 years old, had been suspended by the New York State Courts for three years effective February 15, 1991.

Bruce moved for summary judgment on the entire case and also sought a temporary restraining notice and preliminary injunction only as to the enforcement aspect. The Defendants- Appellees ("Mangano") cross-moved for summary judgment and opposed the interim relief requested.

By decision and order dated April 12, 1991, the District Court Judge, Gerard L. Goettel, without a hearing or a trial, granted summary judgment to Mangano, dismissed the complaint and denied Bruce's motion for summary judgment and for a preliminary injunction.

STATEMENT OF FACTS

None of the facts are in dispute.

Bruce is a paraplegic and an amputee of West Indian ancestry. He has spent much of his 40 years in practice representing ethnic minorities.

On February 15, 1991, Bruce filed the case now before this Court. It is imperative to note that this case has two distinct independent and unrelated parts: 1) an attack on the overall unconstitutionality of the state's attorney disciplinary procedure and 2) an attack on the enforcement as it relates solely to Bruce.

On April 12, 1991, the District Court, by the Hon. Gerard L. Goettel, granted summary judgment to Mangano, dismissed Bruce's complaint, motion for a preliminary injunction and motion for summary judgment.

POINT I

THE FEDERAL DISTRICT COURT HAS ORIGINAL JURISDICTION IN THIS CASE

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) gives the federal district court original jurisdiction over this matter.

POINT II

ASSUMING, AS THE DISTRICT COURT ASSUMED, THAT THE TWO CAUSES ARE INTERTWINED, THE FACT THAT THE PLAINTIFF HAD TO DO "FANCY MANEUVERING" TO RAISE FEDERAL ISSUES IN STATE COURT WARRANTS JURISDICTION IN THE FEDERAL DISTRICT COURT

The Supreme Court, in Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982) reversed the Third Circuit Court of Appeals because the New Jersey state court changed the rules to allow the New Jersey lawyer to raise federal issues in the state court. That did not occur in the Bruce case.

Bruce certainly had no adequate opportunity in his pro se defense at his disciplinary proceeding to raise constitutional challenges. For example, Bruce certainly did not know, as 99.9 percent of all lawyers admitted to practice law in New York State, do not know that:

1. Before the authorization of every disciplinary proceeding against an attorney by the Appellate Division, a confidential report is filed by the Grievance Committee with the Appellate Division.

2. The accused attorney is not informed of prior dispositions, which, under substantially similar facts, resulted in findings favorable to other accused attorneys, nor is such information available to the accused attorney because of Judiciary Law Section 90(10), which states

> Any statute or rule to the contrary, notwithstanding, all papers, records and documents... upon any complaint, inquiry,

> investigation or proceeding relating to the conduct of discipline of any attorney or attorneys, shall be sealed and be deemed private and confidential.

3. The attorney who prosecutes every disciplinary proceeding against all attorneys as counsel for the Grievance Committee, is appointed, serves at the pleasure of, and can be terminated, not by the Grievance Committee, but by the Appellate Division. In point of law, counsel for the Grievance Committee is really counsel for the Appellate Division.

4. As a result, every accused attorney is prosecuted by the attorney for the Appellate Division, before a referee designated by the Appellate Division, and the final determination is made by the Appellate Division, which almost always is not any further reviewable.

The only lawyers who know these above facts are current and former prosecutors at the various Grievance Committees throughout New York State. Therefore, Bruce, who had no knowledge of these facts, could not have had the knowing opportunity to raise them in his disciplinary proceeding.

This point is recognized by Justice Marshall in his concurring opinion in Middlesex, where he stated at page 438:

> As the Court acknowledges, absent an ongoing judicial proceeding in which there is an adequate opportunity for a party to raise federal constitutional challenges, Younger is inapplicable. Ante, at 432, 73 L.Ed. 2d 488, 93 S.Ct. 1689 (1973).

The District Court stated at page 8 that for Bruce to raise federal issues in the state court, "the opportunity clearly exists although at this late stage it may require some fancy maneuvering before the New York Court of Appeals." [emphasis added.] If the appellant has to do "fancy maneuvering" to raise federal issues in state courts, then the appellant is not getting a fair shake and jurisdiction is warranted in the district court.

That is the case here. Bruce's first cause is a "general challenge...to state bar rules," while his second is a "challenge...to state court decisions in particular cases arising out of judicial proceedings."

That such parallel litigation can exist is made clear by the dissent of Mr. Justice Stevens in District of Columbia Court of Appeals v. Feldman, supra. As the Justice noted:

> State created rules governing the grant or denial of licenses must comply with constitutional standards and must be administered in accordance with due process of law. Given these acknowledged constitutional limitations on action by the State, it should be beyond question that a federal district court has subject matter jurisdiction over an individual's lawsuit raising federal constitutional challenges either to licensing rules themselves or to their application in his own case....
>
> If a challenge to a state court's decision is brought in United States District Court and alleges violations of the United States Constitution, then by definition it does not seek appellate review. It is plainly within the federal-question jurisdiction of the federal court. 28 USC Sec. 1331 (460 U.S. at 488, 490).

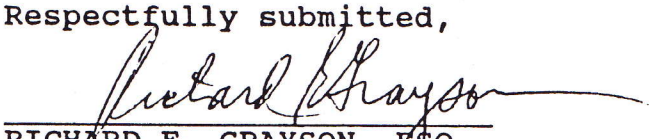
However, unlike Justice Stevens' dissent, there is no claim at bar of any invidious selectivity, but of a uniform constitutional infirmity applied equally and uniformly against all members of the bar. Zimmerman v. Grievance Comm., 726 F2nd 85 (2nd Cir.-1984), cert. den. 467 U.S. 1227 (1984)).

Therefore, the simultaneous parallel litigation should not have resulted in the dismissal of Bruce's complaint.

CONCLUSION

For the foregoing reasons, the decision and order of the District Court should be reversed.

Respectfully submitted,



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