

Supreme Court of Kentucky

2023-SC-0279-KB

RICHARD BOLING

MOVANT

V.

IN SUPREME COURT

KENTUCKY BAR ASSOCIATION

RESPONDENT

OPINION AND ORDER

Respondent, Richard Boling, moves this Court to enter a negotiated sanction pursuant to Supreme Court Rule (SCR) 3.480(2) to resolve a pending disciplinary proceeding against him. The Kentucky Bar Association (KBA) has no objection. After consideration, we conclude that the proposed sanction is inadequate. We note preliminarily that Richard Boling, KBA Member No. 86116, was admitted to practice law in this Commonwealth on October 16, 1995. His bar roster address is 512 South Abbey Way, Hopkinsville, Kentucky 42240.

BACKGROUND

On July 9, 2021, the Christian County Commonwealth's Attorney Richard Boling presented information to a grand jury in the matter of *Commonwealth v. Seth Henderson*, 21-CR-00399. Henderson and his co-defendant, Joshua Long, were ultimately indicted on one count of complicity to

manslaughter, second degree, in connection with the overdose death of Corbin Bowling. The Commonwealth alleged that Henderson sold pills laced with fentanyl to Long the evening before Bowling's death. An autopsy revealed that Bowling's cause of death was "multiple drug intoxication—fentanyl." The relevant portion of Boling's presentation, when questioning one of the detectives that investigated Bowling's death, was as follows:

Boling: On or about January 9, 2021, Joshua Long contacted Seth Henderson to obtain some pills, is that correct?

Detective: Yes, sir.

Boling: Long purchased four pills for \$92 from Henderson.

Detective: Yes, sir.

Boling: The purchased pills contained fentanyl. **Long and Henderson texted each other** saying, "Y'all be careful man and don't let her take that whole thing. I K, I guess I don't know, uh, she grown, but care about her too." And the response was, "I won't."

Detective: Yes, sir.

(Emphasis added). Boling then explained that Long ingested the drugs, felt sick, then fell asleep. Long woke up to hear Bowling make a gurgling sound and observed vomit on her face and in the bed. Long called Henderson and told him about Bowling, then Henderson called 911 and drove to Bowling's residence. Bowling was transported to the hospital where an autopsy revealed her cause of death as "multiple drug intoxication—fentanyl." Boling then asked the detective the following questions:

Boling: Detective, you interviewed Long and Henderson. Long admitted to buying the four pills and having them in his possession. Long admitted that he and Bowling consumed some of

the purchased pills. **Henderson's phone contained text messages between him and Long about getting the pills and being careful with them. Is that correct?**

Detective: Yes, sir.

Boling: As a result we are seeking an indictment against Joshua Long and Seth Henderson for complicity to Manslaughter, second degree, resulting in the death of Corbin Bowling.

Detective: Yes, sir.

(Emphasis added). Grand jurors asked the detective a few questions about the type of drugs and whether Long and Bowling used the same drugs previously.

Then, Boling stated:

Boling: To me, the most important part about this one is the fact that **Henderson gives the warning about how to use them. So he either has previously used them and has knowledge or whoever he got them from told him these aren't your ordinary pills. You have to treat them differently. I think, to me, when you give somebody that warning, obviously you know there is something going on here.**

(Emphasis added). Henderson and Long were subsequently indicted on one count each of complicity to manslaughter, second degree, in connection with Bowling's death.

Henderson filed a motion to dismiss the indictment. In a May 4, 2022 order, the Christian County Circuit Court explained that during Henderson's grand jury proceedings, the Commonwealth relied on two text messages, purportedly from Henderson to Long, in an effort to show that Henderson was aware of, and consciously disregarded, the risk of Bowling consuming the pills he sold to Long. But the circuit court noted that the Commonwealth knew, prior to its presentation to the grand jury, that the text messages from

Henderson's phone were not sent to Long's known cell phone number, and that the messages were sent two days after Bowling's death. The messages therefore could not form a basis for an allegation that Henderson acted wantonly with regard to Bowling.

Nevertheless, the court explained that the Commonwealth presented false and misleading testimony to the grand jury by indicating that the text message exchange occurred "on or about January 9, 2021," the day before Bowling's death. The Commonwealth did not clarify that the messages were transmitted two days after her death nor that there was no evidence that the text message sent by Henderson was to Long. Boling then made the unsolicited statement about Henderson warning Long about the pills when there was no evidence that Henderson gave a warning to Long or anyone else about the pills **prior to Bowling's death**. The circuit court concluded that Boling "intentionally elicited and presented false testimony in order to elevate the degree of the offense with which Henderson was to be charged. This conduct was a flagrant abuse of the grand jury process." The circuit court dismissed Henderson's indictment without prejudice.

On September 9, 2022, the Inquiry Commission issued a four-count Charge against Boling based on the May 4, 2022 circuit court order. Count I alleged violation of SCR 3.130(3.3)(a)(1) by knowingly making a false statement to the grand jury regarding the date of Henderson's text messages and/or by failing to correct that same false statement of material fact as described in the circuit court's May 4 order. Count II alleged violation of SCR 3.130(3.3)(a)(3)

for knowingly offering evidence a lawyer knows to be false, and failing to take remedial measures if the lawyer learns of its falsity. Count III alleged violation of SCR 3.130(3.8)(a) for prosecuting a charge that the prosecutor knows is not supported by probable cause. Count IV alleged violation of SCR 3.130(8.4)(c) by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Boling responded to the Charge and asserted that the detective did not tell Boling when the text messages were sent, that Boling did not know the messages were sent after Bowling's death until nine months after the grand jury proceeding, and that probable cause existed before the grand jury even without the text messages. Additionally, detectives did not attempt to determine the identity of the recipient of Henderson's text message. Nevertheless, Boling acknowledged that the information presented to the grand jury about the text messages was false.

The parties participated in a pre-hearing telephonic conference on December 7, 2022 and scheduled a trial for March 27, 2023. On February 14, 2023, the parties tendered an agreed order stating that Boling was resigning as Commonwealth's Attorney, effective February 28, 2023. Thereafter the parties began negotiating an appropriate sanction. During those discussions the parties acknowledged the then-pending disciplinary proceedings against Boling in KRS Files 20-DIS-0010 and 20-DIS-0056, discussed in further detail below.

On June 19, 2023, Boling filed a motion for consensual discipline. SCR 3.480(2) states that the Court may consider negotiated sanctions prior to a

hearing before a Trial Commissioner and “may approve the sanction agreed to by the parties, or may remand the case for hearing or other proceedings” Boling’s motion proposes a one-year suspension to run concurrently with the five-year sanction imposed in *Kentucky Bar Association v. Richard Boling*, No. 2023-SC-0104-KB, 2023 WL 4037412, at *1 (Ky. June 15, 2023).¹ In that case, a Trial Commissioner recommended a five-year suspension to resolve two disciplinary proceedings against Boling. The first disciplinary proceeding stemmed from Boling writing a pardon letter on his official Commonwealth’s Attorney letterhead on behalf of Dayton Jones, who pled guilty to first-degree sodomy, first-degree wanton endangerment, and first-degree distribution of matter portraying a sexual performance by a minor after he and others sexually assaulted a fifteen-year-old boy who passed out at a party. That letter made numerous unfounded and sweeping allegations about alleged improprieties within the local justice system, with statements like the prosecution did not “pass the smell test,” the Democratic Party controlled the case, and alleging that there was corruption between the local democratic party and the Attorney General’s office.

The other disciplinary proceeding originated from *Brafman v. Commonwealth*, 612 S.W.3d 850, 861 (Ky. 2020), in which this Court held that Boling committed prosecutorial misconduct when he avoided eliciting information at trial from a detective about a defendant’s intoxication and eventually opposed a voluntary intoxication jury instruction. In addition,

¹ This Opinion became final on July 6, 2023.

Boling argued to the court that the only evidence of the defendant's intoxication was her own uncorroborated testimony and reiterated to the jury in closing argument that there was no evidence of the defendant's intoxication. *Id.* at 860.

In adopting the five-year suspension, this Court recognized the egregious nature of Boling's misconduct given his position as the Christian County Commonwealth's Attorney and his broad duty to the public and justice system. *Boling*, 2023 WL 4037412 at *10. We concluded

Boling misused his current position of trust, attacked the prosecutorial discretion of the predecessor Commonwealth's Attorney and cast doubt on the integrity of the former prosecutor, the Christian Circuit Court and Jones's defense counsel. It is immaterial that Boling believed, given the eleventh-hour submission of the letter, that then-Governor Bevin would not see the letter, or that the pardon would not be granted. In addition, although Boling now attributes the political and subjective statements to the Joneses, even time constraints seem an unlikely reason for his failure to distinguish those from his own legal analysis in a relatively brief letter. As for the Brafman matter, we are likewise troubled by Boling's actions that led this Court to conclude the trial was "fundamentally unfair" and characterize Boling's conduct as "unnecessarily exploitative and dishonest."

In his motion for consensual discipline, Boling acknowledges that he failed to fully and properly review the evidence and testimony available to him prior to his presentation to the grand jury regarding Henderson's case. He also admits that his conduct "fell below that required of an attorney" and admits the violations in the Charge. In mitigation, Boling asserts that shortly after the grand jury presentation, defendant Henderson was interviewed by law enforcement and stated that he knew of the serious dangers of the drugs

Bowling took. The KBA does not object to the proposed negotiated sanction. Finding the proposed sanction of one year sufficient, but rejecting the sanction on the basis that running it concurrently with the previous five-year suspension in effect results in no additional accountability for the present misconduct, we remand this case for further proceedings as detailed below.

ANALYSIS

The KBA asserts that case law supports imposing a one-year suspension to run concurrently to the five-year suspension. In *Kentucky Bar Association v. James*, 575 S.W.3d 687, 688 (Ky. 2019), the Court suspended an attorney for three years for his violations of multiple rules, including SCR 3.3(a)(1) by knowingly making a false statement of fact or law to a tribunal when he made false statements to the Supreme Court of Indiana about his reinstatement status. James, who had a lengthy disciplinary history, continued practicing law in Indiana while suspended, violated the order prohibiting him from practicing law, and falsely told the court he had been readmitted to practice in Indiana. *Id.* The Court reasoned that a three-year suspension was consistent with other disciplinary cases and considered the *ABA Standards for Imposing Lawyer Sanctions*,² acknowledging that five aggravating factors applied to James's case. However, James was not a Commonwealth's Attorney.

² American Bar Association, *Standards for Imposing Lawyer Sanctions* (2d ed. 2019).

Additionally, the KBA suggests further analysis using the *ABA Standards* supports a one-year suspension. While the *ABA Standards* are not binding, we note the aggravating factors present here:

- (1) Violated ethical duties owed to the public – failure to maintain personal integrity and failure to maintain public trust;
- (2) Violated ethical duties owed to the legal system – false statements, fraud and misrepresentation;
- (3) Intentionally, or at a minimum, knowingly violated the Supreme Court Rules; and
- (4) Caused injury because the indictment was dismissed and new counsel had to take over the Henderson matter.

See *ABA Standards* §§ 6.0 and 6.1. Further, the KBA notes that the following aggravating circumstances are present: Boling’s substantial experience in the practice of law, and that Boling committed misconduct while serving as a public official. See, e.g., *Gentry v. Kentucky Bar Ass’n*, 644 S.W.3d 502 (Ky. 2022); *Kentucky Bar Ass’n v. Ballard*, 349 S.W.3d 922 (Ky. 2011).³

In *Kentucky Bar Association v. Calilung*, 2022-SC-0469-KB, 2023 WL 2623209, *2 (Ky. March 23, 2023),⁴ this Court recently considered whether an attorney’s near thirty years of experience practicing law should serve as an aggravating factor “given that he should know that much more is expected of seasoned lawyers than lack of diligence, honesty, and candor which he

³ The KBA also lists “imposition of other penalties or sanctions,” *ABA Standards* § 9.32(a), as a mitigating factor here because Boling resigned as the Commonwealth’s Attorney under threat of impeachment. However, Boling’s decision to resign as the Commonwealth’s Attorney was not a penalty or sanction **imposed** on him. Rather, that decision was of his own volition.

⁴ This Opinion became final on April 13, 2023.

displayed towards both his clients and the Probate Court.” Likewise, Boling had nearly twenty-six years of experience practicing law when he committed the misconduct in the present case, and eight of those years were spent serving as the Commonwealth’s Attorney in Christian County.

This Court’s Opinion in *Boling*, 2023 WL 4037412, at *1, was rendered three days after the KBA filed its response to Boling’s motion for consensual discipline in this case. Therefore, we must also consider the aggravating factors of prior disciplinary offenses and a pattern of misconduct. *ABA Standards* § 9.22(a) and (c). While Boling had not been formally disciplined by this Court at the time he committed misconduct in this case, the Inquiry Commission issued a complaint in the Jones misconduct matter on February 28, 2020, and the Court rendered its Opinion in *Brafman* on December 17, 2020. Further, Boling filed a motion for consensual discipline to resolve both disciplinary cases on February 5, 2021 and presented the Henderson matter to the grand jury on July 9, 2021. Therefore, Boling was aware that his actions in writing the Jones pardon letter and his representation of the Commonwealth in *Brafman* were being scrutinized by the KBA and this Court well before he presented to the grand jury in the Henderson matter.

We found Boling’s prior misconduct cases particularly difficult given his position as a Commonwealth’s Attorney and the serious nature of his misconduct. “A prosecuting attorney has a broader duty to the public and to our system of justice than to obtain convictions.” *Brafman*, 612 S.W.3d at 862. The Commonwealth’s Attorney for Christian County is in a position of trust

and represents the people of that county. Boling's actions here undoubtedly undermined the integrity of the Commonwealth's Attorney's office and potentially casted doubt on the justice system as a whole. In *Kentucky Bar Association v. Carmichael*, 244 S.W.3d 111, 112 (Ky. 2008), the Court permanently disbarred a Commonwealth's Attorney who extorted money from criminal defendants in exchange for agreeing not to prosecute. In considering aggravating factors, the Court was particularly troubled by Carmichael's position of authority and influence as a Commonwealth's Attorney. *Id.* at 115. While Carmichael's conduct was certainly more egregious than what is presented here, we consider Boling's position as Commonwealth's Attorney a relevant factor in assessing the appropriate discipline.⁵

In essence, proposing that the sanction in this case run concurrently with the five-year sanction previously imposed provides an unwarranted benefit, effectively resulting in no separate sanction for this misconduct. Boling's misconduct in the Henderson matter is serious and deserving of its own punishment, not a punishment tacked on to a previously imposed punishment. Again, Boling was aware of the misconduct proceedings against him at the time he presented the Henderson matter to the grand jury and nevertheless presented false testimony to secure an indictment, actions that contravened our rules of professional conduct.

⁵ See also *Kentucky Bar Association v. Dixon*, 373 S.W.3d 444, 451 (Ky. 2012), in which Dixon, a County Attorney, requested a private reprimand for his misconduct. The Court determined that the misconduct warranted a greater sanction, in part because Dixon, as an elected official, was "entrusted by the citizens of Knox County to act as Knox County Attorney." *Id.*

After considerable deliberation, we reject the negotiated sanction. While we agree that a one-year sanction is likely appropriate given the misconduct here, this instance of misconduct is serious and deserving of separate discipline, as opposed to discipline that runs concurrently to a sanction imposed for two separate, but likewise serious and alarming, instances of misconduct.

CONCLUSION

For the foregoing reasons, we reject the proposed discipline but reiterate that while we find a one-year suspension to be an appropriate sanction for Boling's misconduct in the Henderson matter, we cannot accept that punishment running concurrently with the previously imposed five-year suspension.

ACCORDINGLY, IT IS ORDERED THAT:

1. Richard Boling's motion for this Court to impose a one-year suspension to run concurrently with the discipline imposed in the Opinion and Order in 2023-SC-0104-KB, dated June 15, 2023, is denied.
2. Boling's KBA file number 22-DIS-0105 shall be remanded to the KBA for further disciplinary proceedings pursuant to SCR 3.480(2). In the event Boling and Bar Counsel fail to reach a different proposal for consensual discipline within ninety days after the date of this order, the matter shall proceed as a contested matter in accordance with the Supreme Court Rules and any subsequent orders of this Court.

All sitting. VanMeter, C.J.; Bisig, Conley, Keller, and Lambert, JJ.,
concur. Nickell and Thompson, JJ., dissent without opinion.

ENTERED: August 24, 2023.


CHIEF JUSTICE