

BEFORE THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT
PANEL B

FILED

IN RE: **JACK R. KEARNEY**
ARKANSAS BAR ID #77194
CPC Docket No. 2010-093

OCT. 21 2011

LESLIE W. STEEN
CLERK

CONSENT FINDINGS AND ORDER

The formal charges of misconduct upon which this Findings and Order is based arose from information provided to the Committee by Mr. Leon Harden III. The information is related to the representation of Mr. Harden on a felony criminal matter by Jack R. Kearney in 2005.

Jack Kearney was retained in 2005 by Leon Harden III to represent him on a possession of controlled substance charge. Harden was charged along with two other co-defendants. The two co-defendants each took plea deals, Harden's case proceeded to trial. Harden was convicted on April 19, 2006, of possession of cocaine with intent to deliver. Following the sentencing hearing, Harden, with no prior felony convictions, was sentenced to eighty (80) years in the Arkansas Department of Corrections.

Prior to Harden's case proceeding to trial, the prosecutor offered Harden's two co-defendant's plea deals and both took the plea deals. Both were offered reduced charges resulting in a twenty (20) year sentence for one and probation for the other. The prosecutor made a plea offer to Kearney for Harden to plead guilty in exchange for a twenty (20) year prison sentence. Kearney responded to the offer in a written letter, dated February 3, 2006. In the letter Kearney told the prosecutor, "With regard to your standing offer, you cannot honestly believe my client would plead guilty and accept a twenty-year sentence when..." Kearney goes on to say in the letter to the prosecutor, "If your offer remains a requirement that my client plead guilty and go to prison, we will go to trial."

After the plea offer was rejected, Harden proceeded to jury trial on the charges.

After the jury verdict of guilty and recommendation of an eighty (80) year prison sentence for Harden, Kearney then requested a sentencing hearing to present evidence. The circuit judge denied the request and sentenced Harden to the jury's recommendation of eighty (80) years in the Arkansas Department of Corrections.

After Harden's conviction, Kearney then filed a Notice of Appeal on May 10, 2006, Motion for Modification of Sentence May 23, 2006, and Motion for New Trial on June 8, 2006. In the Motion for New Trial, one of Kearney's allegations, among other things, was that State had never made a plea offer to Harden. The hearing on the Motions was set for June 19, 2006. At the hearing on the Motion for New Trial, Kearney first argued that the eighty (80) year sentence that Harden received was an illegal sentence. Kearney went on to argue that the statute under which Harden was convicted only carried a sentence of up to forty (40) years. When asked by the court what the maximum sentence was after his comment, Kearney replied, "life in prison." The actual sentence range for Harden's offense was not less than forty (40) years, no more than eighty (80) years or life. Therefore, Harden's sentence was a legal sentence under Arkansas law.

Kearney's second argument for a new trial was that the State was unfair and discriminated against Harden in its approach to the prosecution of Harden, in that Harden was never given a plea offer. When read the February 3, 2006, letter sent from Kearney to the prosecutor in the case, Kearney insisted that there was never any offer, but that he was simply in negotiations with the State. Kearney then went on to admit that he did not inform his client of the plea offer. When asked by the court did he ever tell his client about the plea offer. Kearney responded, "I didn't ever tell my client he'd been offered anything in particular." Kearney continued to argue that because the state offered Harden's co-defendants a plea and they accepted, that action was discriminatory against Harden. The judge did not agree with Kearney, and told Kearney that according to Kearney's own February 6 letter that the State verbally offered him a twenty (20) year deal and

Kearney told them he wouldn't take any prison time, period. Kearney gambled and lost, and his client ended up with an eighty (80) year sentence.

Kearney requested that the court sentence Harden to the twenty (20) years previously offered by the State, the same twenty (20) years that Kearney had previously turned down. The circuit judge rejected Kearney's arguments and denied his Motion for New Trial.

The decision was made by Harden and his new attorney to dismiss his appeal and proceed with a Rule 37 Petition in circuit court. The appeal was dismissed on July 2, 2007, and the Rule 37 Petition was filed on August 30, 2007. The hearing on the petition was held in October 2007. After the hearing the Court granted the Rule 37 Petition. The circuit judge entered his Findings and Conclusions from the Rule 37 hearing on November 27, 2007, finding that Harden's conviction remained unaffected by his decision and that he was not vacating Harden's sentence. The circuit judge, did however, rule that because of some crucial errors by Kearney, Harden was entitled to a new trial on the issue of punishment alone.

The circuit judge made several findings to support his decision that Kearney provided ineffective assistance of counsel to Harden, including that Kearney failed to disclose and discuss the plea offer of twenty (20) years with Harden. The circuit judge also found that those errors also violated the Arkansas Rules of Professional Conduct.

Given all the errors the circuit judge found were made by Kearney, a new jury trial was held on Harden's punishment in June 2008. At this trial, Harden was sentenced to a term of fifty-five (55) years incarceration in the Arkansas Department of Corrections. There was no appeal of this sentence by Harden.

Upon consideration of the formal complaint and attached exhibit materials, the response, the consent proposal, and other matters before it, and the Arkansas Rules of Professional Conduct, Panel B of the Arkansas Supreme Court Committee on Professional Conduct finds:

1. That Jack R. Kearney's conduct violated Rule 1.4(a)(1) when he failed to advise his client, Harden, of the State's twenty (20) year plea offer. Kearney rejected the offer and all future offers that involved jail time for Harden, in writing, without discussing it with Harden and without Harden's consent. Arkansas Rule 1.4(a)(1) states that a lawyer shall promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined by rule 1.0(e), is required by these Rules.

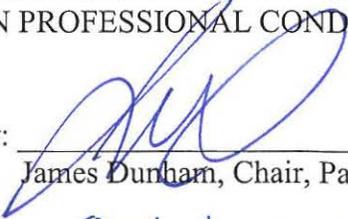
2. That Jack R. Kearney's conduct violated Rule 3.1 when (1) he argued to the court during the hearing on his Motion for New Trial that the sentence imposed on his client, Harden, was an illegal sentence, despite the fact that the sentence was within the range of sentencing as required by the Arkansas statute under which Harden was convicted, and (2) Kearney plead in his Motion for New Trial, and argued at the hearing on the Motion, that his client, Harden, had never been offered a plea deal by the State and that it was discriminatory against Harden because the two co-defendants were made plea offers and accepted. Kearney made this argument despite the fact that he had, in a written letter, declined the plea offer of twenty (20) years one day after the offer was made. Arkansas Rule 3.1 states, in pertinent parts, that a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

3. That Jack R. Kearney's conduct violated Rule 3.3(a)(1) when he pled in his Motion for New Trial to the court that the State had never made a plea offer to Harden. However, the State had made such an offer, which was rejected by Kearney by letter written February 3, 2006, and (2) when he made an argument to the court that the State had never made a plea offer to Harden. However, Kearney had previously rejected the State's offer of twenty (20) years in a letter written to the State on February 3, 2006. Arkansas Rule 3.3(a)(1) states that a lawyer shall not

knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

WHEREFORE, it is the decision and order of the Arkansas Supreme Court Committee on Professional Conduct, acting through its authorized Panel B, that Jack R. Kearney, Arkansas Bar ID# 77194, be and hereby is, **CAUTIONED** for his conduct in this matter. Pursuant to Section 18.A of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law (2011), Mr. Kearney is assessed the costs of this proceeding in the amount of **EIGHT HUNDRED FIFTY THREE DOLLARS (\$853.00)**. In addition, pursuant to Section 18.B of the Procedures, Mr. Kearney is ordered to pay a fine in the amount of **FIVE HUNDRED DOLLARS (\$500.00)**. The costs assessed and fine ordered herein, totally **\$1,353.00**, shall be payable by cashier's check or money order payable to the "Clerk, Arkansas Supreme Court" delivered to the Office of Professional conduct within thirty (30) days of the date this Findings and Order is filed of record with the Clerk of the Arkansas Supreme Court.

ARKANSAS SUPREME COURT COMMITTEE
ON PROFESSIONAL CONDUCT - PANEL B

By: 
James Dunham, Chair, Panel B

Date: October 21, 2011