

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-17-90093

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

ORIGINAL PROCEEDINGS UNDER 28 U.S.C. § 351

MEMORANDUM OPINION

(Filed: April 26, 2018)

PRESENT: SMITH, *Chief Judge*.

This is a complaint filed under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-64, against a United States District Judge (the “Subject Judge”). For the reasons discussed below, the complaint will be dismissed.

The Judicial Conduct and Disability Act provides a remedy if a federal judge “has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.” 28 U.S.C. § 351(a). A chief judge may dismiss a complaint if, after review, he or she finds it is not cognizable under the statute, is directly related to the merits of a decision or procedural ruling, or is frivolous or lacks sufficient evidence to raise an inference of misconduct. 28 U.S.C. §§ 352(b)(1)(A)(i)-(iii).

Complainant was a defendant in a criminal proceeding before the Subject Judge. In 2007, the matter was tried before a jury. The jury found Complainant guilty and the

Subject Judge sentenced him to a lengthy term of imprisonment. Complainant appealed and filed a post-judgment motion for acquittal. The Subject Judge granted the motion in part, acquitted Complainant of two counts, and resentenced him accordingly. On appeal, the Court of Appeals affirmed the judgment of conviction and sentence.

In 2013, Complainant filed a motion to set aside, vacate, or correct the sentence pursuant to 28 U.S.C. § 2255. After several continuances, the government responded in 2015. In 2017, the Subject Judge referred the motion to a Magistrate Judge for a report and recommendation. The matter was later reassigned to a new District Judge, who is not a Subject Judge of this complaint. The Magistrate Judge recently issued a report and recommendation, in which he recommended that the § 2255 motion be denied.¹

In this complaint of judicial misconduct, Complainant presents allegations concerning an in-chambers conference that took place during the 2007 criminal trial. The conference included the Subject Judge, a government witness, the witness's mother, and the witness's cousin. Two government attorneys also were present for the final portion of the conference. Complainant and his counsel were not present.

The conference, which was held at the mother's request, lasted about an hour. At that time, the witness expressed to the Subject Judge his anxiety that individuals involved with the defendants were threatening his life to prevent him from testifying, and that police were harassing him in an effort to get him to testify falsely. The Subject Judge

¹ Although Complainant filed a petition for a writ of mandamus alleging undue delay in resolving the § 2255 motion, the petition was dismissed for failure to file a motion to proceed *in forma pauperis* or pay the filing fee.

cautioned the witness to testify truthfully and directed the witness to contact him immediately prior to testifying so the Subject Judge could arrange for protection. The Subject Judge advised the witness not to file a complaint against the police officers at that time to avoid possible retaliation. The witness in question testified at trial the next day. The witness's testimony did not mention his fears about the police or the defendants.

In this complaint of judicial misconduct, Complainant alleges that the Subject Judge "hid" information about the witness conference from him and his attorneys, which, in Complainant's view, prejudiced his defense at trial. Complainant contends that the Subject Judge's decision not to provide information about the conference to the defense and to dissuade the witness from filing a complaint about the police reflects a cover-up, amounts to obstruction of justice, and "infects the public reputation and integrity of the judicial proceedings." Complainant further alleges that the Subject Judge's actions reflect bias against him. In addition, Complainant alleges that "the court's lack of faith in the system to work with regard to protecting the citizenry from abusive police officers and the ensuing misconduct displayed by the court in this instance is unacceptable."

Pursuant to Rule 11(b), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*, the Subject Judge was asked to respond to Complainant's allegations. The Subject Judge responded and included copies of relevant transcripts. The complaint is now ripe for disposition.

As an initial matter, it bears noting that Complainant has presented related allegations concerning the witness conference as a basis for seeking habeas relief in his pending § 2255 petition, a proceeding that seeks to collaterally challenge Complainant’s criminal conviction and sentence. Complainant may not similarly seek to collaterally challenge those judicial rulings in this administrative forum. *See* Commentary on Rule 3, *Rules for Judicial-Conduct and Judicial Disability Proceedings*. Accordingly, allegations concerning the merits of the § 2255 claim are not cognizable and will not be addressed in this opinion.² *See* 28 U.S.C. § 352(b)(1)(A)(ii); Rules 3(h)(3)(A), 11(c)(1)(B), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. This opinion is limited to consideration of whether Complainant has identified conduct on the part of the Subject Judge that rises to the level of judicial misconduct, *i.e.*, “conduct prejudicial to the effective and expeditious administration of the business of the courts.” Rule 3(h)(1), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

Many of Complainant’s allegations necessarily presume that the Subject Judge’s conference with the witness and others, which did not include defense counsel, constituted “improper discussions with parties or counsel for one side in a case” as described in Rule 3(h)(1)(C), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. While Complainant is correct that defense counsel did not participate, this fact, without more,

² At times, it may be appropriate to address a complaint of judicial misconduct after related allegations have been considered on their merits. *See* Commentary on Rule 3, *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. In this case, however, the § 2255 motion has already been pending for a lengthy period of time, and the Subject Judge is no longer assigned to that case.

does not establish that the conference was improper. Under appropriate circumstances, a judge is authorized to initiate, permit, or consider *ex parte* communication “for scheduling, administrative, or emergency purposes,” so long as the communication “does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result. . . .” Canon 3(A)(4)(b), Code of Conduct for United States Judges.³

In his response to the complaint of misconduct, the Subject Judge makes clear that the witness conference was held on an emergency basis to assess the mother’s claim that the witness’s life would be put in jeopardy if he were to be called to testify at trial. The Subject Judge therefore anticipated that the conference would not address substantive matters. The Subject Judge confirmed that, as expected, the conference focused on witness safety and did not delve into the substance of the trial, and a review of the transcript corroborates the Subject Judge’s recollection. Indeed, when the witness and his mother began to discuss the substance of his expected testimony, the Subject Judge cautioned them to stop. Because the conference was emergent in nature, was not substantive, and concerned witness safety, it was not “improper” under Rule 3(h)(1)(C), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

³ The Code of Conduct for United States Judges is designed to provide guidance to judges, but is not a set of disciplinary rules. “Ultimately, the responsibility for determining what constitutes misconduct under the statute is the province of the judicial council of the circuit subject to such review and limitations as are ordained by the statute and by these Rules.” Commentary on Rule 3, *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

Moreover, although the Subject Judge has stated that he specifically considered Canon 3(a)(4)(b) when he conducted the conference and concluded that the matters fell within its authorization, he also anticipated that the defense might wish to challenge that assessment. The Subject Judge therefore had the conference transcribed specifically for the purpose of ensuring that the defense would have the ability to raise such a challenge, emphasizing, “[m]y foremost concern at all times has been Defendant’s right to a fair trial.” The existence of the transcript of the conference corroborates the Subject Judge’s response in this regard.

In addition, the record does not support Complainant’s contention that the Subject Judge “hid” information from Complainant and his attorneys for an illicit purpose. Rather, the Subject Judge states in his response that he declined to include defense counsel because he “was concerned that if [he] did so, [he] could be placing [the witness] at even greater risk.” This view was reasonable in light of the safety concerns that the witness presented to the Subject Judge at the time. In addition, the docket sheet reflects that the transcript of the conference was available to the defense by June 2007, before Complainant filed for a judgment of acquittal or a new trial and before Complainant’s appeal from the judgment of conviction. By that time, at the latest, the discussion during the conference was known to the defense.⁴

⁴ Counsel’s decision not to raise the issue in the post-judgment motions or on appeal forms the basis of one of Complainant’s habeas claims in the pending § 2255 proceeding. Again, it is emphasized that this opinion does not address the merits of the pending habeas claims.

Finally, the Subject Judge’s act of discouraging the witness from filing a complaint against the police at that particular time, when reviewed in context, does not reflect a “cover-up,” bias, or any other form of judicial misconduct. Rather, given that the trial was ongoing, that the witness was scheduled to testify the day of the conference or the following day, and that the witness was expressing concern that his life was in danger, the Subject Judge’s advice appears to have been for the specific purpose of ensuring the witness’s personal safety. The Subject Judge involved the prosecution, and not the defense, at the end of the witness conference, because “[t]he prosecution – not the defense – was in the position to take steps to provide for [the witness’s] safety and immediately deter any further harassment so that [the witness] could testify freely and truthfully.”

In conclusion, upon careful review, the allegations of this complaint do not establish conduct on the part of the Subject Judge that rises to the level of judicial misconduct. Rule 3(h)(1), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. Accordingly, the complaint is subject to dismissal. 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(A), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

Based upon the foregoing, this complaint will be dismissed pursuant to 28 U.S.C. §§ 352(b)(1)(A)(ii) and (iii).

s/ D. Brooks Smith
Chief Judge

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IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
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ORDER

(Filed: April 26, 2018)

PRESENT: SMITH, *Chief Judge*.

On the basis of the foregoing opinion entered on this date, it is ORDERED AND ADJUDGED that the written complaint brought pursuant to 28 U.S.C. § 351 is hereby dismissed under 28 U.S.C. § 352(b)(1)(A)(ii) and (iii).

This order constitutes a final order under 28 U.S.C. § 352(c). Complainant is notified in accordance with Rules 11(g)(3) and 18, *Rules for Judicial-Conduct and Judicial-Disability Proceedings*, of the right to appeal this decision by the following procedure:

Rule 18(a) Petition. A complainant or subject judge may petition the Judicial Council of the Third Circuit for review.

Rule 18(b) Time. A petition for review must be filed in the Office of the Circuit Executive within **42 days** after the date of the chief judge's order.

18(b) Form. The petition should be in letter form, addressed to the Circuit Executive, and in an envelope marked "Misconduct Petition" or "Disability

Petition.” The name of the subject judge must not be shown on the envelope. The letter should be typewritten or otherwise legible. It should begin with “I hereby petition the judicial council for review of . . .” and state the reasons why the petition should be granted. It must be signed. There is no need to enclose a copy of the original complaint.

The full text of the *Rules for Judicial-Conduct and Judicial-Disability*

Proceedings is available from the Office of the Circuit Executive and on the Court of

Appeals’ internet site, www.ca3.uscourts.gov.

s/ D. Brooks Smith
Chief Judge

Dated: April 26, 2018