

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. Nos. 03-14-90074, 03-14-90075

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

MEMORANDUM OPINION

Filed: December 18, 2014

PRESENT: McKEE, Chief Judge.

This complaint is filed under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-64, against a United States Magistrate Judge (“Subject Judge I”) and a United States District Judge (“Subject Judge II”). 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).

In 2005, while Complainant was under investigation for alleged participation in a drug distribution ring, Subject Judge I (in his former career as an Assistant United States Attorney) applied to Subject Judge II for a wiretap of two of Complainant's cell phone numbers.¹ Subject Judge II issued orders authorizing the wiretaps. In 2007, Complainant was charged by a grand jury of numerous offenses. Prior to trial, Complainant's attorney moved to suppress the wiretap evidence. The motion was denied. Ultimately, after a jury trial, Complainant was convicted of numerous charges and was sentenced to a lengthy term of imprisonment.² Recently, he filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct the sentence, which is pending.

In this complaint of judicial misconduct, Complainant alleges that Subject Judges I and II “knowingly and intentionally, or in reckless disregard of the truth ‘bent the letter of the law’ to achieve this conviction.” Specifically, Complainant alleges that the wiretap application and authorization improperly “includ[ed] a separate and totally independent communication, in the form of a ‘direct connect’” without the approval of the attorney general, and that this constitutes a “violation of the Title III wiretap statute.” According to Complainant, 96% of the pertinent evidence collected in the course of the wiretap consisted of “walkie talkie” calls that were not properly authorized for interception.

¹ Subject Judge I became a Magistrate Judge nearly a decade later.

² The Court of Appeals affirmed the judgment “on all contested counts,” but, without opposition from the government, vacated the conviction on two counts and remanded for the purpose of entering an amended judgment reflecting the change. An amended judgment was entered. Complainant again appealed, and the Court of Appeals affirmed the amended judgment.

Complainant therefore contends that both the grand jury indictment and the ultimate conviction are called into question because they both relied on allegedly “inadmissible” and “unlawfully intercepted wiretap conversations.”

Complainant further alleges that, because the wiretap application and authorization order allegedly misdescribe the operation of the “direct connect” feature and/or its associated “UFMI number,” they are “fraudulent” and contain “materially false” statements. In addition, Complainant alleges that Subject Judge I, while acting in his role as prosecuting attorney, “obstructed my or my attorney’s access to evidence . . . by disguising ‘direct connect’ calls, as ordinary telephone calls. . . .”

Complainant elaborates in technical detail on the operation of the “direct connect” calls versus typical cellular phone calls and cites case law from another jurisdiction in support of his legal position on the alleged inadmissibility and/or illegality of the intercepted communications. In addition, the complaint is accompanied by correspondence reflecting the history of Complainant’s efforts to raise the same claims against Subject Judge I (in his role as an Assistant United States Attorney) as well as another Assistant United States Attorney, including correspondence with a state attorney disciplinary board and the United States Department of Justice. He also states that he attempted to file a civil complaint raising these claims, although it does not appear that a civil complaint is pending.

First, it cannot be overlooked that all of the allegations about Subject Judge I pertain to actions taken while he was an Assistant United States Attorney, many years

before he joined the federal bench. While he was an Assistant United States Attorney, Subject Judge I was not covered by the Judicial Conduct and Disability Act or by the Rules for Judicial-Conduct and Judicial-Disability Proceedings. A complaint filed under the Rules “may concern the actions or capacity **only of judges** . . . [including] United States Magistrate Judges. . . .” Rule 4, Rules for Judicial-Conduct and Judicial-Disability Proceedings (emphasis added). Because the allegations set forth in this complaint do not concern Subject Judge I’s actions taken in his role as a federal judge, they are subject to dismissal. See 28 U.S.C. §§ 351, 352(b)(1)(A)(i); Rule 4, Rules for Judicial-Conduct and Judicial-Disability Proceedings.

Second, it is apparent that all of the allegations against Subject Judges I and II are intended to challenge the validity of the collection of the wiretap evidence used in the course of Complainant’s criminal trial and, in turn, to challenge Complainant’s criminal conviction. Accordingly, they are all merits-related. “An allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse, without more, is merits-related.” Rule 3(h)(3)(A), Rules for Judicial-Conduct and Judicial-Disability Proceedings. Merits-related allegations are not cognizable misconduct under the Judicial Conduct and Disability Act. See 28 U.S.C. § 352(b)(1)(A)(ii) (chief judge may dismiss a complaint if he or she finds that it is directly related to the merits of a decision or procedural ruling); Rule 11(c)(1)(B), Rules for Judicial-Conduct and Judicial-Disability Proceedings (a complaint must be dismissed in whole or in part to the extent that the chief

judge concludes that the complaint is directly related to the merits of a decision or procedural ruling).

This administrative proceeding is not an appropriate forum for raising a collateral challenge to Complainant's criminal conviction. Indeed, Complainant already has presented these claims to the District Court in his motion to vacate, set aside, or correct his sentence, which has not yet been adjudicated. The "misconduct procedure [under the Act] is not designed as a substitute for, or supplement to, appeals or motions for reconsideration. Nor is it designed to provide an avenue for collateral attacks or other challenges to judges' rulings." In re Memorandum of Decision of Judicial Conference Committee on Judicial Conduct and Disability, 517 F.3d 558, 561 (U.S. Jud. Conf. 2008). Accordingly, Complainant's merits-related allegations are dismissed.

Finally, to the extent Complainant's remaining allegations of intentional wrongdoing are not merits-related, they are entirely unsubstantiated. Complainant offers nothing to support his contention that Subject Judges I and II "knowingly and intentionally, or in reckless disregard of the truth 'bent the letter of the law' to achieve this conviction," or otherwise acted inappropriately. The record lends no support to such claims. Accordingly, Complainant's remaining non-merits-related allegations are subject to dismissal as frivolous and unsupported by any evidence that would raise an inference that misconduct has occurred. 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(C), (D), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

For the foregoing reasons, this complaint is dismissed pursuant to 28 U.S.C.
§§ 352(b)(1)(A)(i), (ii), and (iii).

s/ Theodore a. McKee
Chief Judge

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ORDER

Filed: December 18, 2014

PRESENT: McKEE, 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)(i), (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 clerk of the court of appeals within **35 days** of the date on the clerk's letter informing the parties of the chief judge's order.

18(b) Form. The petition should be in letter form, addressed to the clerk of the court of appeals, 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 Clerk’s Office of the Court of Appeals for the Third Circuit and on the Court of Appeals’ internet site, www.ca3.uscourts.gov.

s/ Theodore A. McKee
Chief Judge

Dated: December 18, 2014