

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-21-90085

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

MEMORANDUM OPINION

(Filed: March 24, 2022)

PRESENT: CHAGARES, Chief Judge.

This complaint is 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, a convicted bank robber, alleges that the Subject Judge had an “improper, unauthorized, ex parte” discussion with Complainant’s then-appointed public defender in 2017 (“Attorney 1”). Complainant further alleges that Attorney 1 revealed

privileged information to the Subject Judge which resulted in “in the violation of Complainant’s right to be tried by an impartial judge.”

Complainant also contends that the Subject Judge permitted a conference with prosecutors and Complainant’s trial counsel (“Attorney 2”) after Complainant was escorted from the courtroom. Complainant makes additional complaints about Attorney 2’s representation during his trial and claims that prosecutors presented “false allegations and fabricated evidence.” Complainant complains about Attorney 1’s alleged failure to do work and the Subject Judge’s putative failure to “inquire” about the attorney’s conduct. Ultimately, Attorney 2 withdrew as counsel before sentencing and Attorney 1 was appointed as standby counsel in 2020. In view of Attorney 1’s putative ex parte communication in 2017, Complainant alleges that he had “no other option” but to waive the right to counsel on direct appeal. Complainant maintains that these events and the Subject Judge’s erroneous factual determinations demonstrate the Subject Judge’s prejudice against him.

With respect to the alleged ex parte communication, there is no evidence of judicial misconduct. According to Complainant, the Subject Judge said to the prosecutor in court, and in front of Complainant’s daughters, that the Subject Judge and Attorney 1 “were laughing at the lunch break because this one is an interesting one – huh?” Even assuming arguendo that the Subject Judge made this statement to the prosecutor, this comment is not evidence of an improper ex parte communication with Attorney 1. Canon 3A(4) provides that “a judge should not initiate, permit, or consider ex parte communications . . .

concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested.” There is no indication that the putative communication in question had any bearing on the substance of Complainant’s criminal proceeding or any pending legal rulings. Complainant’s contention that Attorney 1 revealed privileged information is based on sheer speculation. Furthermore, Complainant’s own complaint makes clear that the Subject Judge notified the prosecutor in court about the communication, who made no objection. In addition, when the Subject Judge appointed Attorney 1 as standby counsel approximately three years after the alleged ex parte communication occurred, Complainant did not object. At a hearing following Complainant’s conviction, the Subject Judge granted Attorney 2’s request to withdraw, and then addressed Complainant and Attorney 1 as follows:

THE COURT: As I said, [Complainant], I read my mail. I read that you are persisting in this preferred course of action so I did reach out and make arrangements to have standby counsel, as you wished, become available and that’s . . . [Attorney 1].
So, [Attorney 1], would you come on up, please.

...
THE COURT: I believe you [and Complainant] know each other?
ATTORNEY 1: Yes, Your Honor.
THE COURT: Okay. Do you recognize her, [Complainant]?
THE DEFENDANT: Yes, Your Honor.
THE COURT: Okay. Is this suitable to you?
THE DEFENDANT: Yes, Your Honor.

Complainant agreed on the record that the appointment of Attorney 1 as standby counsel was “suitable” and raised no objection before the Subject Judge.¹ Accordingly, Complainant’s allegations of judicial misconduct with respect to the 2017 communication are dismissed as unsupported by evidence that would raise an inference that misconduct has occurred. 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(D), Rules for Judicial-Conduct and Judicial-Disability Proceedings; see also Rule 11(c)(1)(A), Rules for Judicial-Conduct and Judicial-Disability Proceedings (a complaint may be dismissed in whole or in part to the extent that the chief judge concludes that the complaint alleges conduct that, even if true, is not prejudicial to the effective and expeditious administration of the business of the courts).

The majority of Complainant’s remaining allegations reflect his dissatisfaction with the Subject Judge’s decisions and procedural rulings. Allegations disputing the merits of judicial rulings do not, however, constitute cognizable misconduct under the Judicial Conduct and Disability Act. “Cognizable misconduct does not include an allegation that calls into question the correctness of a judge’s ruling” Rule 4(b)(1), Rules for Judicial-Conduct and Judicial-Disability Proceedings. The “misconduct procedure [under

¹ In the course of his direct criminal appeal to the Third Circuit, Complainant subsequently filed a motion to proceed pro se and discharge Attorney 1 approximately two months after the 2020 hearing quoted above. Complainant sought to proceed pro se in part based on Attorney 1’s alleged violation of client confidentiality when she spoke with the Subject Judge “prior to trial” in 2017. Complainant’s request to proceed pro se on appeal was granted by the Clerk after he filed the waiver of counsel form. Complainant did not raise the putative ex parte communication issue in his pro se brief and the merits panel made no findings with respect to this allegation. In any event, as noted below, Complainant’s conviction was affirmed.

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 subject to dismissal. See 28 U.S.C. § 352(b)(1)(A)(ii); Rules 4(b)(1), 11(c)(1)(B), Rules for Judicial-Conduct and Judicial-Disability Proceedings. Notably, Complainant filed a direct appeal and a panel of Third Circuit judges affirmed his conviction.²

To the extent Complainant alleges that the Subject Judge had an improper motive for the decisions, the allegations are baseless. A review of the record reveals no basis for a conclusion that the Subject Judge's rulings were motivated by bias or any type of discriminatory motive. Accordingly, Complainant's remaining allegations are subject to dismissal as frivolous and unsupported by 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.

Based on the foregoing, this complaint will be dismissed pursuant to 28 U.S.C.

² To the extent Complainant is complaining about his former attorneys' and/or the prosecutor's conduct, these allegations are not cognizable in proceedings under the Judicial Conduct and Disability Act which only applies to federal judges. 28 U.S.C. § 352(b)(1)(A)(i). I express no opinion, moreover, as to any arguments Complainant may raise in any habeas or other post-conviction proceedings.

§ 352(b)(1)(A) (i), (ii), and (iii).

s/ Michael A. Chagares
Chief Judge

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ORDER

(Filed: March 24, 2022)

PRESENT: CHAGARES, 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 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/ Michael A. Chagares
Chief Judge

Dated: March 24, 2022