United States Court of Appeals
Fifth Circuit
FILED
January 3, 2024
Lyle W. Cayce
Clerk

Judicial Council for the Fifth Circuit

Complaint Number: 05-23-90075

MEMORANDUM

Complainant, a federal prisoner, alleges that the subject United States District Judge has "consistently treated [him] in a demonstrably egregious and/or hostile manner" in criminal proceeding and has done so because complainant is a "poor [Person] of Color."

Complainant recounts that in the thirty-one months prior to his jury trial, he "filed several pro se motions . . . telling [the court] about the appointed attorneys' refusals to fairly challenge the Government's false and/or fabricated material evidence or its affidavits concerning evidence that does not exist." He complains that the judge: ordered that the pro se motions be stricken from the record; threatened to impose sanctions if he continued to file pro se motions while represented by counsel; and "tactically appointed a CJA counsel without notifying [me]" to avoid having to address those claims of prosecutorial misconduct. Complainant appears to further complain that by ordering that his post-trial pro se motion to dismiss the indictment be stricken from the record, the judge "ignore[d] Congressional Acts of law concerning jurisdiction." He also alleges that the judge violated his constitutional rights by denying his request to represent himself on the third day of the jury trial.

These allegations relate directly to the merits of decisions or procedural rulings and are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, any assertions of bias or discrimination

appear entirely derivative of the merits-related charges, but to the extent the allegations are separate, they are wholly unsupported, and are therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii) as "lacking sufficient evidence to raise an inference that misconduct has occurred."

— *Day 3 of Jury Trial*

Complainant alleges that before the jury was called on the third day of the trial, during a discussion of complainant's request to represent himself, the judge engaged in "name calling and insults," i.e., comparing complainant to "boiled okra" and implying that he was "slick with a slimy character" and was "probably guilty."

A review of the audio-recording of the hearing shows that approximately 45 minutes into the questioning complainant about the basis of his request to represent himself, the judge remarked that complainant's answers were evasive, i.e., like boiled okra, the answers were slippery and hard to grasp. However, the judge's tone and demeanor in making the remarks were neutral and he neither stated nor implied that complainant had "a slimy character" and/or was "probably guilty."

Regardless, even if the judge's remarks were construed as expressing a negative opinion of complainant and/or his conduct during the hearing, the Supreme Court of the United States has held that "[t]he judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant. . . . But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings. . . ." *Liteky v. United States*, 510 U.S. 540, 550-551 (1994). The allegation is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

— *Day 4 of Jury Trial*

A review of the audio-recording of the fourth day of trial shows that during a recess approximately 90 minutes into the proceeding, complainant asked to address the court. He submitted that one of the Assistant United

States Attorneys ["the AUSA"] prosecuting the case was not licensed to practice law in the State because he was not admitted to the State Bar or to the Bar of the district court. He argued that pursuant to the court's local criminal rules and 28 U.S.C. § 530B, the AUSA was ineligible to appear before the court.

Complainant claims that the judge improperly "declared that he did not have to listen to all of that federal stuff coming out of Washington because all that ends at the [State's] borders."

Complainant is mistaken. The audio-recording of the hearing shows that the judge said that state officials—e.g., State Bars, governors, and attorneys-general—have no jurisdiction over what happens in a federal court. The allegation is contradicted by the record and is therefore subject to dismissal as frivolous under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant recounts that before he could read 28 U.S.C. § 530B into the record, the judge interrupted, asking: "Mr. [X], what does all of this mean?" Complainant protests that by not directing the question to defense counsel, the judge was "play[ing] games with my Constitutional rights at [a] crucial moment in the middle of trial."

Complainant is mistaken. The audio-recording of the hearing shows that the judge said "Mr. [X], what was your point again?" after pausing the proceeding for five minutes to review the applicable provisions of the local rules, whereas complainant did not attempt to read 28 U.S.C. § 530B into the record until a few minutes later. Regardless, there does not appear to have been anything improper or prejudicial in a judge asking a defendant who had asked to address the court to restate or clarify his claims, and the allegation is subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii) as "lacking sufficient evidence to raise an inference that misconduct has occurred."

Complainant recounts that in response to the judge's question, he explained that "[i]t means that the indictment is invalid" and, "without one word to the [AUSA]," the judge "immediately grabbed his pen and

announced: "I'm going to nunc pro tunc [the AUSA's] admittance into the record"." Complainant posits that the judge ignored the (purported) invalidity of the indictment "not only to assist the Government and save its case, but also . . . to save [the AUSA's] future" because he "is African-American."

Complainant's recollection is incorrect. The audio-recording shows that the judge did not mention the indictment during the hearing.[1] The judge ordered that the AUSA be admitted nunc pro tunc after complainant refused to accept the judge's explanation that, as provided by the local criminal rules, the AUSA was eligible to appear on behalf of the Government because he was admitted to the highest court of another State.

Regardless, to the extent that these allegations relate directly to the merits of decisions or procedural rulings, they are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, any assertions that the judge demonstrated biased in favor of the Government or a personal or racial motive in admitting the AUSA nunc pro tunc appear entirely derivative of the merits-related charges, but to the extent the allegations are separate, they are wholly unsupported, and are therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii) as "lacking sufficient evidence to raise an inference that misconduct has occurred."

— *Faretta hearing*

Complainant alleges that during a *Faretta* hearing, the judge "appeared to try to make me seem like an idiot who just didn't understand plain English not to mention law books and its [sic] language and meanings."

A review of the audio-recording of the hearing shows that, as required by *Faretta v. California*, 422 U.S. 806 (1975), the judge asked complainant

[1] A review of the docket appears to indicate that complainant first proposed that the AUSA's (purported) ineligibility to practice in the district court rendered the indictment invalid in a pro se motion filed more than three weeks after the hearing. The pro se motion was stricken from the record.

detailed questions about his education in, and understanding of, the laws, rules, and guidelines applicable to sentencing. The judge also sought to confirm that complainant understood the risks—which the judge explained at length—inherent in someone untrained in the law representing himself at sentencing. While the judge's demeanor was stern throughout the 75-minute hearing, and he occasionally displayed annoyance in response to complainant's answers, nothing in the record supports the contention that the judge intentionally disparaged his intelligence.

The allegation is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii) as "lacking sufficient evidence to raise an inference that misconduct has occurred."

Judicial misconduct proceedings are not a substitute for the normal appellate review process, nor may they be used to obtain reversal of a decision or a new trial.

An order dismissing the complaint is entered simultaneously herewith.

Priscilla Richman

Priscilla Richman
Chief United States Circuit Judge

December 26, 2023

Before the Judicial Council of the Fifth Circuit

Complaint Number: 05-23-90075

Petition for Review by [redacted]
Regarding Complaint of Misconduct and/or Disability Against
[redacted]

Under the Judicial Improvements Act of 2002, 28 U.S.C. §§ 351-364.

ORDER

An Appellate Review Panel of the Judicial Council for the Fifth Circuit has reviewed the above-captioned petition for review, and all the members of the Panel have voted to affirm the order of Chief Judge Priscilla Richman, filed January 3, 2024, dismissing the Complaint of [redacted] against [redacted] under the Judicial Improvements Act of 2002.

The Order is therefore **AFFIRMED.**

April 23, 2024
Date

Jennifer W. Elrod
Jennifer W. Elrod
United States Circuit Judge
For the Judicial Council of the Fifth Circuit