

JUDICIAL COUNCIL
FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS

FILED

OCT 23 2019

FIFTH CIRCUIT
LYLE W. GAYNE, CLERK

Complaint Number: 05-20-90006

MEMORANDUM

Complainant, a federal prisoner, has filed a judicial misconduct complaint against the subject United States District Judge who presided over the underlying criminal proceeding.

Complainant claims that because it was “a child pornography case,” the judge and defense counsel “thought nobody would care what they were doing to me” and they conspired to withhold the presentence report from him. “I cannot prove the court was involved but can [the] court prove that it wasn’t[?]”

A review of the record shows that during an April 2014 hearing, complainant claimed not to have previously reviewed the presentence report, and the judge stopped the hearing so complainant could review the report with defense counsel. When the hearing resumed, defense counsel and complainant confirmed the time had been sufficient to review the presentence report. Defense counsel further advised the court that because complainant had not realized that a document shown to him months earlier by defense counsel was called a presentence report, complainant had mistakenly told the court he had not previously reviewed it. The record further shows that during a sentencing hearing when complainant again claimed not to have reviewed the presentence report, the judge afforded him another opportunity to read the report, following which complainant confirmed the time was sufficient to discuss the contents of the report fully with defense counsel.

To the extent, if any, that the allegation relates directly to the merits of the judge’s decisions to accept that the document shown to complainant by defense counsel in the courtroom was the presentence report, it is subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, the conclusory assertion of conspiracy is insufficient to support a finding of judicial misconduct and is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

During the sentencing hearing, the judge asked complainant whether he recalled that the plea agreement included a waiver of his right to appeal the guilty plea and sentence. Complainant asserts that when he asked whether the waiver applied even if there was judicial misconduct, the judge became “so upset” because she “thought I had discovered [the] scam” to withhold the presentence report from him. A review of the audio-recording of the hearing shows that the judge’s tone of voice was stern during parts of this discussion and she appeared annoyed by complainant’s suggestion that she engaged in misconduct in accepting his plea when, in her view, she had afforded him an opportunity to withdraw his plea and proceed to a jury trial.

The allegation is construed as being aimed at the judge’s demeanor in responding to the accusation of judicial misconduct. The U.S. Supreme Court has held that judicial bias is not established by a judge’s “expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge’s ordinary efforts at courtroom administration—even a stern and short-tempered judge’s ordinary efforts at courtroom administration—remain immune.” *Litky v. U.S.*, 510 U.S. 540, 555-556 (1994). The allegation is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant further alleges the judge demonstrated prejudice against him through her demeanor prior to a pretrial conference. He claims that “when [the judge] was in her chambers” immediately prior to the commencement of the hearing, “one could hear her screaming at something or somebody.” He submits the judge “intentionally worked herself into a rage before entering the court; to deny defendant justice, this prejudiced the entire judicial proceeding by setting the tone of her decisions.” The audio-recording of the hearing commences only a few seconds before the judge entered the courtroom, and no yelling is audible.

Regardless, even if the judge had yelled at someone in her chambers, complainant does not claim the target of the judge’s alleged outburst was anyone associated with his trial and the contention that the judge “intentionally worked herself into a rage” for the express purpose of denying complainant justice is utterly conclusory. The allegation of prejudicial demeanor is insufficient to support a finding of judicial misconduct and is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant also asserts that during the pretrial conference, the judge improperly and prejudicially “advocat[ed] what strategy [I] should not use or use,” “denied [me my] right to defend [myself] by denying [me] a legitimate defense,” and “entrapped . . . coerced and manipulated [me] into pleading guilty.” A review of the statements at issue, in context, shows that the judge explained that complainant’s arguments did not constitute a viable legal defense. Indeed, the judge even paused the hearing and instructed defense counsel to review with complainant the applicable section of the Federal Rules of Criminal Procedure, after which complainant explicitly confirmed that he did not want to withdraw his guilty plea.

To the extent that these allegations relate directly to the merits of the judge’s decisions or procedural rulings, they are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, the assertion that the judge “entrapped” or “coerced” complainant into pleading guilty by discounting his “legitimate defense” is subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii). Judges are given wide latitude to express their views—even strong views—as to the merits of a case (see *Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice*, 64 (2006)).

In addition, complainant claims the following examples of the judge’s demeanor and statements during the pretrial conference demonstrate she is suffering from a mental illness:

- The judge “lost her temper several times” during the hearing which shows she “is bipolar.” A review of the audio-recording of the hearing shows that the judge did not “lose her temper” or conduct herself other than with patience and courtesy towards complainant.
- The judge said: “I was looking at you, you thought I was not looking at you, you were talking to your attorney.” Complainant claims he is quoting directly from the transcript and he proposes that while the statement “seems as [sic] harmless ranting but it goes to mental illness, . . . it is not normal for a sane human being.” There is no such statement, or any similar statement, in the record of the hearing (or any other hearing). Regardless, even if the judge made the statement, it is insufficient to support a finding of mental illness.
- After the judge explained at length that complainant’s arguments did not constitute a viable legal defense, complainant asked, “Why not?” The judge answered,

“Because.” Without acknowledging the lengthy discussion preceding the judge’s answer, complainant submits that the answer is proof of “mental defect” because “courts do not deny defendants’ right[s] to defend themselves because of *because*.”

— The judge’s statement emphasizing that the court did not want to give complainant any grounds to say he had been forced to maintain the guilty plea constituted “a threat thinly disguised, plea[d] guilty or I will give you the maximum sentence,” and “advocate[d] that what I’ve been saying is not true. . . . Only a con[n]iving, ment[a]lly unstable mind would do this.”

A review of the record shows that nothing in the judge’s demeanor or statements constitute sufficient evidence to support a finding of judicial disability, and the allegations are therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

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 R. Owen
Chief Judge

October 22, 2019