United States Court of Appeals
Fifth Circuit

FILED

January 10, 2022

Lyle W. Cayce
Clerk

Judicial Council for the Fifth Circuit

Complaint Number: 05-21-90156

MEMORANDUM

Complainant, a federal prisoner, has filed a complaint alleging misconduct by the subject United States District Judge who presided over complainant's criminal proceedings.

Complainant alleges that the judge violated his Sixth Amendment rights by allowing him—an "indigent incarcerated defendant"—to proceed pro se at sentencing despite knowing that the facility in which complainant was detained "[did] not have a law library." He submits further that the judge then intentionally "ignored all request[s] for law library support," and "leverage[d]" his lack of law library access to deny "multiple motions based on no case law."

To the extent that these allegations relate directly to the merits of the judge's decisions, they are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, such conclusory allegations of improper motive and bias lack sufficient evidence to raise an inference that misconduct has occurred and are therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant also alleges that the judge's remarks during a hearing on his motion for release on bond pending sentencing, and her decision to deny the motion, were "to help [the] political campaign" of the prosecutor, a Democratic candidate for the United States Congress. In support of this claim, complainant claims:

— The judge "knowingly permitted" the prosecutor to "politically posture in court to gain earned [sic] media in the District's largest newspaper on the District's biggest public corruption case."

— The prosecutor "urged" the judge to deny the bond motion because complainant is "a veteran Republican operative with a successful track record of opposition research and tactics in the [relevant] Congressional District" and "a Democrat running in [that District] would be wise to keep [me] locked up."

— In denying the motion, the judge "stat[ed] in open court . . . that [the prosecutor] was keeping someone confined who was a danger to all especially the elderly as an electronic swindler," thereby garnering media coverage for the prosecutor "a few months from the Democrat[ic] Primary."

Complainant does not described the prosecutor's "political postur[ing]," he does not identify any newspaper which reported on the bond hearing, and he has provided no evidence that the judge was aware of the prosecutor's intention to run for office more than two weeks before he publicly announced that intention. A cursory internet search indicates that the arrests, prosecution, and convictions of complainant and his co-defendants on public corruption charges garnered local, national, and international media attention, but there does not appear to have been any coverage of the bond hearing. An article published in a prominent newspaper the day before the prosecutor publicly announced his intention to run for office referred to his securing the convictions of the complainant and a co-defendant. It appears that local news coverage of the Democratic primary race, including a run-off election involving the prosecutor, simply referred to him as a former federal prosecutor with experience prosecuting public corruption cases.

A review of the transcript of the bond hearing shows that the prosecutor told the court that complainant was the subject of a separate FBI investigation regarding financial fraud committed while on pretrial release, and the investigators had identified several victims, most of whom were elderly, in another State. He submitted that this fraudulent conduct demonstrated that complainant was a "financial predator" and the court should deny the motion for release on bond. A police officer assigned to the FBI's public corruption task force testified about the investigation, and defense counsel cross-examined the witness.

At the conclusion of the hearing, the judge remarked that complainant clearly had no qualms about taking advantage of the elderly and had done so via telephone and computer while on pretrial release, and held that complainant was "a danger to the community" who should be denied release pending sentencing. There is nothing in the record to support complainant's claim that the judge credited the prosecutor with "keeping . . . an electronic swindler" confined to prison. Contrary to complainant's contention that the judge denied his motion to boost the prosecutor's profile as a Democratic primary candidate (two weeks before he publicly announced his candidacy), there appears to have been ample evidence to support the decision.

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). To the extent that complainant alleges that the judge's negative statements about his character and conduct demonstrated bias, 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, 551 (1994). In other respects, the conclusory assertion that the judge "used the bench to assist" the prosecutor's political campaign appears entirely derivative of the merits-related charges, but to the extent the

allegation is separate, it is wholly unsupported, and 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."

The judge convened attorney status hearings in several unrelated criminal proceedings after the Chief District Judge forwarded to her letters from the defendants complaining about the actions of defense counsel and the court. In the hearings, the defendants—three of whom told the court they could not read or write English—said the letters they signed were written by complainant, a fellow inmate in the jail where they were detained. The defendants complained that their attorneys were responsible for delays in their proceedings, but claimed that complainant encouraged them to make other serious allegations that were untrue—e.g., defense counsel failed to communicate or lied, the judge was incompetent—or they were unaware that those untrue allegations were included in the letters.

Complainant alleges that the judge denied his motions for copies of the transcripts of those hearings "to conceal her own misconduct" and to conceal (unspecified) "new evidence." For example, he asserts:

- The judge convened the hearings—which "require an inmate [to] wake up at 3:30 am and [spend] at least 9 hours with hands and feet chained" and one of the defendants was in such poor health that he was transported to a hospital "from the hearing stress"—"as retribution against inmates who write voicing concerns about their appointed counsel."

- Rather than ask the defendants about their concerns, the judge "lectured" them, saying: "(1) your letter is wrong and a waste, (2) you are being helped write by an inmate that was never a good lawyer and is crazy, [and] (3) NO MORE LETTERS or it will get worse with no other messages."

— The hearings were "an overt attempt to conceal violations of civil rights (i.e., failure to provide assistance of counsel for defense.)"

There was nothing improper in the judge's decisions to convene hearings based on the defendants' letters complaining about their attorneys. Complainant was himself the beneficiary of such a hearing when his attorney filed a motion to withdraw after complainant expressed dissatisfaction with his representation and sought substitute counsel. A review of the audio-recordings of the hearings indicates that the judge addressed the defendants respectfully and did not threaten them for writing the letters "voicing concerns about their appointed counsel." However, she did caution them against signing any letter without knowing what it said, especially when it contained serious allegations that they admitted to the court were not true. The judge also commented that the defendants should consider that, if complainant was such a good lawyer, he wouldn't be sitting in jail with them, and she opined that they should take no further legal advice from him, but there is no evidence that she said complainant was "crazy" or "was never a good lawyer."

To the extent that these allegations relate directly to the merits of the judge's decisions to convene the attorney status hearings and to deny complainant's motions for transcripts of those hearings, they are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). To the extent that complainant alleges the judge threatened the defendants and remarked that complainant was "crazy" and "was never a good lawyer," the record does not appear to support these claims and they are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii). In other respects, the conclusory assertion of retaliatory motive in convening the hearings appears entirely derivative of the merits-related charges, but to the extent the allegation is separate, it is wholly unsupported, and 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 R. Owen
Chief United States Circuit Judge

December 28, 2021

United States Court of Appeals
Fifth Circuit
FILED
February 4, 2022
Lyle W. Cayce
Clerk

Before the Judicial Council of the Fifth Circuit

Complaint Number: 05-21-90156
The Petition for Review by [redacted] Against [redacted]

[redacted]

Under the Judicial Improvements Act of 2002.

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 R. Owen, filed January 10, 2022, dismissing the Complaint against [redacted] [redacted] under the Judicial Improvements Act of 2002.

The Order is therefore **AFFIRMED.**

February 1, 2022
Date

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