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

Judicial Council for the Fifth Circuit

Complaint Number: 05-23-90089

MEMORANDUM

Complainant, a federal criminal defendant, has filed a complaint against the subject United States District Judge who is presiding over complainant's criminal proceeding.

Complainant complains that during pretrial and trial proceedings, the judge violated Rule 4(a)(2)(B) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings by "treating [him] . . .in a demonstrably egregious and hostile manner" and violated Rule 4(a)(1)(C) by engaging in ex parte communication with the Government.[1] For example, complainant alleges that the judge:

— "admonished, mocked, harassed, and degraded [me] for asserting my right to [represent myself]";
— "attempted to sway my decision to represent myself, calling me a fool at times and at others using analogies of different professions all in an effort to curb me from asserting my right to self-represent";
— displayed "contempt" and "anger" towards "[me] for having the audacity to represent myself in a legal profession he had practiced for over 49 years";

[1] Because complainant is sometimes uncertain as to the proceeding in which the alleged misconduct occurred, all audio-recordings and (available) transcripts were reviewed in assessing his complaint.

— responded curtly and dismissively in denying complainant's request to have standby counsel sit next to complainant at the defense table during trial;

— displayed "anger" and "would not listen" to standby counsel's argument that his decision was erroneous, and only changed his mind and "mood" in response to the Government's stating it did not oppose the request, thereby showing "favoritism towards the Government" and "prejudice and biased [sic] towards me and this case";

— made "numerous threats . . . to remove me to a cell where I would watch my trial from video feed" (if complainant did not abide by the court's rulings and instructions not to raise irrelevant or impermissible arguments and issues);

— "during the pretrial hearings, . . . never read or allowed for oral argument . . . briefs and other motions" filed by complainant pro se, "but simply ruled upon [sic] without regard for the presiding [sic] case law citing's [sic] supported in the briefs, and never were the conclusions of law provided for denial on the record";

— engaged in ex parte communication during a pretrial hearing by "instruct[ing] the Government to enter [a] Motion in Limine" regarding the admissibility of complainant's Sovereign Citizen argument that the court lacked jurisdiction;

— stated during an arraignment proceeding that he hadn't read the Government's Motion in Limine to Limit Admissible Evidence (filed the previous day) but was inclined to grant it, and did so "to sanction my defense so that he could grant said motion . . . prior to it being submitted . . . and prior to reading its contents";[2]

[2] The record of the relevant hearing indicates that the judge explicitly stated that he would not rule on the Government's Motion in Limine until after complainant filed a written response. Complainant filed his response ten days later. The motion and response were addressed during a hearing and, noting that he had previously denied complainant's challenge to the court's jurisdiction, the judge granted the Government's motion.

— "ask[ed] [me to file] a written reply . . . to the Government's Motion in Limine" but "in another instance essentially called me stupid for supplying the exact reply he asked for";[3] and
— overruled "all legitimate objections [I] made" during trial and "stated that I would have a running objection to the entire proceeding invalidating any objections I may make."

The record shows that the judge conducted an extensive inquiry into complainant's request to represent himself and, during subsequent hearings, the judge confirmed that complainant still wished to represent himself. It was in this context that the judge admonished complainant about the risks inherent in an individual untrained in the law representing himself in a criminal trial, noted that his court-appointed attorney (who was subsequently appointed as standby counsel) was trained in the law and was an experienced criminal trial lawyer, invited complainant to consider other situations—e.g., surgery or plumbing—in which a highly-skilled and experienced professional would do a better job than a layperson, and quoted the adage "He who represents himself has a fool for a lawyer."

The judge's tone and demeanor were stern during these inquiries, and he repeatedly emphasized the dangers inherent in self-representation. The judge occasionally displayed exasperation, skepticism, or annoyance in response to complainant's arguments that the court lacked subject matter jurisdiction (even after the court ruled that it had jurisdiction), in response to complainant raising irrelevant issues or impermissible arguments (even after the court had admonished him that the issues were irrelevant or the arguments were

[3] According to the transcript of the relevant hearing, complainant expressed concern that the Government had never filed a reply to his response to its Motion in Limine. The judge sought clarification from the Government, and the AUSA summarized the relevant filing history, noted it responded orally to complainant's "motion in response" during the prior hearing, and confirmed that the Court had already granted the Motion in Limine. Based on the AUSA's mischaracterization of complainant's response as a "motion in response," the judge commented: "You don't file a motion in response to a motion. That's why you need a lawyer. But that's your choice." Even if the judge's remark was erroneous, he neither stated nor implied that complainant was "stupid."

impermissible), but the judge's demeanor was not "large[ly] one of anger" towards complainant for choosing to represent himself.

Complainant further claims that other "contemptuous" remarks made by the judge have been omitted from the transcripts. The sole example complainant offers is that "when I objected to the government's opening statement," the judge remarked "[i]f I [sic] had only gone to a law school then I would understand." It appears that complainant is referring to a remark made during a hearing on his Motion to Suppress. In objecting to the Government's playing body-camera footage of his arrest, complainant asked the judge how the footage was relevant to the suppression hearing. The judge, sounding mildly exasperated, replied: "It's laying the background, Mr. [X]. If you'd gone to law school, you'd know."

When read in context, the remarks complained about do not appear to have been aimed at mocking, harassing, or degrading complainant for deciding to represent himself. To the extent that complainant alleges that the judge's occasional displays of impatience, annoyance, or anger, constitute evidence of prejudice and bias against him, the Supreme Court of the United States has held that "expressions of impatience, dissatisfaction, annoyance, and even anger" do not constitute evidence of judicial bias. *Liteky v. U.S.*, 510 U.S. 540, 555-556 (1994).

To the extent that these allegations relate directly to the merits of procedural rulings or decisions, they are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). To the extent that complainant alleges that the judge engaged in ex parte communication with the Government, the record shows that the remarks at issue were made in the presence of complainant and standby counsel, and the allegation therefore is subject to dismissal as frivolous under 28 U.S.C. § 352(b)(1)(A)(iii). To the extent that complainant asserts that some of the judge's remarks at issue were omitted from the transcript, comparisons of the audio-recordings and transcripts demonstrate that this assertion is unfounded and is therefore subject to dismissal under 28 U.S.C.

§ 352(b)(1)(A)(iii). In other respects, there is insufficient evidence to support an inference that misconduct has occurred, and the allegations are therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant also complains that during the voir dire proceeding, "as a platform for his own agenda," the judge played "a movie … [about] how the United States and our government was fought for by so many service men and women throughout our history." He claims that the judge's "speech and [the] movie depicted the Government and the prosecution as always being righteous," thereby "creating further prejudice and bias for my defense [and] predisposing the jury panel to [reach] compulsory conclusions."

The transcript and the audio-recording show that in talking to the venire panel about jury service, the judge extolled the virtues of the jury system as an integral part of United States democracy and remarked that jury service was a rare opportunity to participate in the third branch of government and a privilege not afforded to citizens in some other democracies. A video was played in the courtroom, following which the judge spoke briefly about the history underpinning citizen-participation in United States democracy. Based on the judge's additional comments—introducing court personnel who had served in the United States Armed Forces and others whose relatives had died serving their country—it appears that the video was intended to evoke a sense that jury service was a vital way in which United States citizens could participate in the democracy others had risked, and even sacrificed, their lives to protect.

There does not appear to have been anything prejudicial or improper in showing a video about citizens serving their country to the venire panel, and complainant's allegation that the video was played for the express purpose of causing potential jurors to be biased in favor of the prosecution is entirely speculative.

To the extent that the allegation relates directly to the merits of the judge's decision to show the video, it is subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, any assertion of prejudicial motive 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."

In addition, complainant claims that the judge was "found to be sleeping" on one occasion during the trial, "and was awoken only to make a ruling on my objection." Complainant protests that the judge overruled the objection without "hav[ing] heard the content." Complainant further claims that when he asked standby counsel "if it was common to find [the judge] asleep during proceedings," standby counsel "stated it was quite common and that she had noticed him sleeping on numerous other occasions in [sic] he presided over."

A review of the audio-recording of the relevant proceeding indicates no obvious delay in the judge's overruling complainant's objections, i.e., there is nothing to suggest that the judge had to be "woken" to make a ruling. As part of a limited inquiry conducted pursuant to 28 U.S.C. § 352(a) and Rule 11(b), standby counsel was asked about complainant's claims. Standby counsel stated that she did not specifically recall seeing the judge asleep at any particular point during the trial. However, she did recall telling complainant that she had seen the judge fall asleep once before during a jury trial in "the COVID era," and she surmised that she must have said that to complainant after noticing the judge sleeping at some point during the trial. She denied telling complainant that it was "common" for the judge to fall asleep during trials.

To the extent that this aspect of the complaint relates directly to the merits of the judge's decision to overrule complainant's objection, it is subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, the two reported instances—one by complainant and one by standby counsel—of the judge allegedly falling asleep during a proceeding do not constitute sufficient evidence to raise an inference that the judge is suffering from a disability, and

the allegation is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant further complains that after the jury returned its verdict, the judge treated him in "a demonstrably egregious and hostile manner" by "inform[ing] the jurors of other possible pending allegations and charges in a State matter against myself which further tainting [sic] and prejudiced the jury pool for future proceedings."

There was nothing prejudicial or improper in the judge's telling the jury about complainant's pending state charges after the verdict was returned, and the judge emphasized that complainant was presumed innocent of the state charges. This allegation is insufficient to raise an inference of misconduct and is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant also recounts that after the conclusion of a pretrial proceeding, the judge commented "casually" to one of the Assistant United States Attorneys ["the AUSA"] "concerning how pretty she is." Complainant protests that the comment was "unprofessional," "border[ed] upon sexual harassment in open court," and "show[ed] favoritism" towards the Government. In response to a request for more information in support of this claim, complainant reports that he "did not see if the comment was made directly to [the AUSA] as I was focused on [standby counsel] and our conversation." Complainant submits that standby counsel can "verify" that the judge made the comment.

Although the audio-recording of the relevant hearing continues for several minutes after the hearing concluded, there are multiple conversations occurring simultaneously and it is not possible to confirm or refute complainant's claim. As part of the limited inquiry conducted pursuant to Rule 11(b), both the AUSA and standby counsel were asked about complainant's claim, and both denied that the judge made any such remark during the pretrial

hearing or any other hearing.[4] The allegation is therefore subject to dismissal as insufficient to raise an inference of misconduct under 28 U.S.C. § 352(b)(1)(A)(iii).

Finally, complainant asserts that (unnamed) fellow county correctional center detainees with (unspecified) cases pending before the judge told complainant that they had heard the judge make "similar comments" in the courtroom. This accusation is insufficient to raise an inference of misconduct and is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii). See *In re Memorandum of Decision of Judicial Conference Committee on Judicial Conduct and Disability,* 591 F.3e 638, 646 (U.S. Jud. Conf. Oct 26, 2009) ("Rule 6(b) makes clear that the complaint must be more than a suggestion to a Chief Judge that, if he opens an investigation and the investigating body looks hard enough in a particular direction, he might uncover misconduct. It must contain a specific allegation of misconduct supported by sufficient factual detail to render the allegation credible.").

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

[4] There is no evidence of such a comment in the audio-recordings of the other hearings.

United States Court of Appeals
Fifth Circuit
FILED
February 16, 2024
Lyle W. Cayce
Clerk

Before the Judicial Council of the Fifth Circuit

Complaint Number: 05-23-90089

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.**

February 12, 2024
Date

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