

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

OCT 30 2018

David J. Smith
Clerk

CONFIDENTIAL

**BEFORE THE CHIEF JUDGE
OF THE ELEVENTH JUDICIAL CIRCUIT**

Judicial Complaint No. 11-18-90064

IN THE MATTER OF A COMPLAINT FILED BY _____

IN RE: The Complaint of _____ against _____, U.S. District Judge for the U.S. District Court for the _____ District of _____, under the Judicial Conduct and Disability Act of 1980, Chapter 16 of Title 28 U.S.C. §§ 351-364.

ORDER

_____ (“Complainant”) has filed this Complaint against United States District Judge _____ (the “Subject Judge”), pursuant to Chapter 16 of Title 28 U.S.C. § 351(a) and the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States (“JCDR”).

As an initial matter, after Complainant filed his Complaint, he filed a supplemental statement. The filing of the supplemental statement is permitted. See 11th Cir. JCDR 6.7.

Background

The record shows that in February 2017 a federal grand jury indicted Complainant on one count of “knowingly and willfully” attempting to possess with intent to distribute five kilograms or more of cocaine. _____ was appointed to represent him. In October 2017 Complainant, through _____, filed a motion to suppress statements and evidence, arguing that the statements and evidence were obtained in violation of his Miranda rights. Complainant also filed a pro se “Omnibus Motion for Discovery, Suppression and Dismissal” raising various arguments.

At an October 2017 hearing on the motion to suppress, a government agent testified that he had informed Complainant that he had been the subject of audio and video recording during the investigation. The Subject Judge later stated that he was going to deny the motion to suppress based on a determination that Complainant had voluntarily waived his Miranda rights during a post-arrest interview with agents. The Subject Judge noted that Complainant was cooperative during the interview and stated:

And it makes sense for him to cooperate under the circumstances in this case which he was caught basically with his hand in the cookie jar with those recorded phone calls and videos. I think most any reasonable person

would think first about well, how do I help myself in this case because they got me cold turkey.

Later in the hearing, Complainant made various requests that the Subject Judge denied. At one point, Complainant asked to subpoena a "call log," and the Subject Judge stated, "_____, could you translate that for me?" After another exchange about a case being quoted in discovery materials, the Subject Judge stated, "Could you translate that for me, _____? I'm totally befuddled." The Subject Judge later stated, "What you're saying right now doesn't make any sense to me." After that, Complainant generally took issue with the representation he received from _____ and stated that he wished to represent himself, and the Subject Judge appointed _____ as stand-by counsel. The Subject Judge entered orders denying the motion to suppress and Complainant's omnibus motion. The case proceeded to trial.

On the first day of trial, _____ stated that Complainant had indicated that he would like to be represented by her. The Subject Judge noted that _____ had filed a motion in limine that morning and asked why she had not called his office or consulted with opposing counsel before filing it. _____ twice apologized to the court, and the Subject Judge responded, "I don't want your apologies."

On the second day of trial, _____ proffered Complainant's testimony in support of a defense of coercion and duress, including that he and his family had been threatened in _____ where he had several businesses, and that he did the drug deal to come up with money to pay off a debt in an effort to protect his family. The Subject Judge ruled that such testimony would not be allowed because Complainant did not meet the standard for establishing coercion and duress. _____ argued that Complainant should be able to testify about why he committed the offense, and the Subject Judge stated that the proffered testimony was irrelevant.

_____ then stated, "Your Honor, I'm sorry," and the Subject Judge responded, "No, you are sorry. Here is the thing. I am back there waiting. The jury is now waiting, and if you want to make further arguments you should have said to somebody come out early so we don't have to keep the jury waiting. But go ahead." _____ then moved for a mistrial on the ground that the court's ruling had denied Complainant his constitutional right to present testimony, and the Subject Judge stated that his ruling was not a basis for a mistrial. Later that day, Complainant generally testified as to the circumstances in _____ and stated that he did not do the drug deal voluntarily. The Subject Judge later noted that, despite his earlier ruling, Complainant had testified about threats and the government did not object. The Subject Judge determined that he would allow the jury instruction on coercion and duress.

After that, there was discussion about removing a jury instruction on willfulness. _____ noted that the indictment used the terms "knowingly and willfully" and stated the instruction should stay for consistency. The Subject Judge noted that the statute did not include "willfully," and the instruction should come out unless _____ had

authority for keeping it in. _____ responded, “No, your Honor, I was just looking at the indictment.” On the third day of trial, the jury found Complainant guilty as charged.

After that, Complainant, through _____, filed a motion for a new trial, and Complainant filed a pro se “Motion for a Mistrial and/or Acquittal.” At a status conference in December 2017, the Subject Judge noted that he would “make an exception to the normal rule” and consider both the pro se and counseled motions. At a hearing the next day, after ruling on various issues, the Subject Judge addressed Complainant, stating, “I have come to the conclusion that you won’t listen to anybody else, and I am not going to listen to you anymore, because you won’t take anybody’s advice. You won’t take my advice, and I am not trying to tell you what to do or what not to do.” The Subject Judge then entered an order denying the motion for a new trial and pro se motion for a mistrial. After that, Complainant filed additional pro se motions, and the Subject Judge entered an order striking certain motions because Complainant was represented by counsel. The Subject Judge later denied other pro se motions Complainant had filed.

At the sentence hearing in March 2018, another attorney moved to be substituted in place of _____, and the Subject Judge granted the motion. The attorney then stated that Complainant did not want the attorney representing him, and the Subject Judge responded, “Well, we’re going to proceed with the sentencing.” Complainant later stated that his lawyer was unprepared and had come to meet him without a transcript of the trial, and the Subject Judge noted that there was no transcript of the trial proceedings. Complainant stated that he had fired his lawyer. The Subject Judge stated, “We’re going to proceed today. You can proceed with or without counsel, it’s your choice,” and Complainant responded that he would proceed without counsel. The Subject Judge ruled on Complainant’s objections to the Presentence Investigation Report and later sentenced him to a term of 121 months of imprisonment.

Complaint

In his Complaint of Judicial Misconduct or Disability, Complainant alleges that the Subject Judge “show[ed] bias, prejudice, discrimination and failed to exhibit patience, lacked being dignified and respectful, or courteous,” in violation of Canons 1 through 3 of the Code of Conduct for United States Judges. Complainant specifically alleges that during the suppression hearing, the Subject Judge stated ““that this matter was one that doesn’t warrant being b[r]ought to trial’ since it is quite clear that the defendant; [Complainant] was clearly caught with ‘his hands in the cookie jar.’” Complainant states that this statement showed bias, prejudice, and a lack of impartiality. He alleges that the Subject Judge threatened and sought to intimidate him, arguing that the Subject Judge did not allow him the opportunity to present his motion in full before denying it, in violation of his due process rights.

Complainant asserts that the Subject Judge also threatened and intimidated him by stating ““I think you should sit down now, and not present any further points, for you ([Complainant]) are digging a hole for yourself and would have to reappear before him

([the Subject Judge]) again at sentencing.” Complainant contends that the Subject Judge assumed Complainant was guilty and “had already convicted [him] owing to the biased and prejudicial statements made.” He alleges that the Subject Judge sought to belittle and humiliate him by repeatedly asking for a “translation” from _____, which insinuated he was not capable of speaking proper English due to his national origin.

Complainant states that on the first day of trial, the Subject Judge “verbally assaulted,” insulted, humiliated, and intimidated _____, called her “‘Sorry,’” and sought to hinder the effective assistance of counsel. He alleges that the Subject Judge denied him his constitutional right to testify in his own defense and the opportunity to present a complete and consistent defense. Complainant states that the Subject Judge improperly ordered that Complainant could not: (1) testify about the “reasons and the atmosphere which caused the unlawful actions”; (2) mention the contents of his “interrogation interview” or any statements made at his arrest; and (3) be asked about the circumstances of his home country of _____.

Complainant asserts that the Subject Judge tried to persuade him to accept a plea deal and not to testify in his own defense, in violation of his constitutional rights. He also takes issue with the jury instructions, contending they were designed to ensure that Complainant could not prove his duress defense. He further alleges that the Subject Judge, “in conjunction with the Prosecution,” unlawfully constructively amended the indictment by omitting certain words from the jury instructions, which he asserts “was done with the clear intent to prejudice and select a directive verdict of ‘GUILTY’ by the jury.”

Complainant complains that the Subject Judge accepted certain pro se motions but struck others because he was represented by counsel, and he contends that the rulings were inconsistent, discriminatory, and unconstitutional. He also alleges that the Subject Judge did not give the government an opportunity to respond to his pro se motions, and he asserts that the Subject Judge stated that transcripts had not been prepared, “which was untrue.” Complainant alleges that the Subject Judge was acting as a “surrogate prosecutor” and “in collusion with the government in furtherance of the conspiracy to violate” his constitutional rights. Finally, he asserts that the Subject Judge unconstitutionally sentenced him without counsel. He attached documents to his Complaint.

Supplement

In his supplemental statement, Complainant states that he has again been “confronted by actions that maybe [sic] construed as bias, prejudice and discriminatory,” and he complains that the district court failed to docket his notice of appeal. He attached documents to his supplement.

Discussion

Rule 3(h)(3)(A) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States provides that cognizable misconduct does not include “an allegation that is directly related to the merits of a decision or procedural ruling.” The Rule provides that “[a]n allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse, without more, is merits-related.” *Id.* The “Commentary on Rule 3” states in part:

Rule 3(h)(3)(A) tracks the Act, 28 U.S.C. § 352(b)(1)(A)(ii), in excluding from the definition of misconduct allegations “[d]irectly related to the merits of a decision or procedural ruling.” This exclusion preserves the independence of judges in the exercise of judicial power by ensuring that the complaint procedure is not used to collaterally attack the substance of a judge’s ruling. Any allegation that calls into question the correctness of an official action of a judge—without more—is merits-related.

To the extent Complainant’s allegations concern the substance of the Subject Judge’s official actions, findings, rulings, and orders in Complainant’s case, the allegations are directly related to the merits of the Subject Judge’s decisions or procedural rulings. Complainant’s remaining claims are based on allegations lacking sufficient evidence to raise an inference that the Subject Judge acted with an illicit or improper motive, was biased or prejudiced against Complainant, discriminated against him based on his national origin, treated him or his attorney in a demonstrably egregious and hostile manner, colluded or conspired with the government, violated the Code of Conduct for United States Judges, or otherwise engaged in misconduct.

The allegations of this Complaint are “directly related to the merits of a decision or procedural ruling,” JCDR 11(c)(1)(B), and the Complaint “is based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred or that a disability exists,” JCDR 11(c)(1)(D). For those reasons, pursuant to Chapter 16 of Title 28 U.S.C. § 352(b)(1)(A)(ii) and (iii), and Rule 11(c)(1)(B) and (D) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States, this Complaint is **DISMISSED**.



Chief Judge