

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

SEP 05 2019

David J. Smith
Clerk

CONFIDENTIAL

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

Judicial Complaint No. 11-19-90031

IN THE MATTER OF A COMPLAINT FILED BY _____

IN RE: The Complaint of _____ against United States District Judge
_____ of the United States 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”).

Background

The record shows that in September 2012 a federal grand jury indicted Complainant on six counts, including multiple counts of aggravated identity theft. At a calendar call in November 2012, Complainant’s attorney did not appear, and the Subject Judge granted Complainant’s motion to continue the trial. The case proceeded to trial in December 2012. On the first day of it, the government called Detective _____ to testify, and counsel for Complainant later cross-examined the witness. During cross-examination, the Subject Judge asked how much longer questioning would be, and counsel for Complainant stated that it could last for half an hour. The Subject Judge responded, “Oh, no. You will have to ask your best questions first. The direct was 53 minutes. The cross should not be longer than the direct. So get to it. You have until 3:51.”

On the next day, Complainant’s counsel stated he would call Detective _____, and the Subject Judge responded, “Officer _____ already was a witness. You cross-examined. I don’t have witnesses be called again. You had plenty of time to cross-examine him. So that takes care of that. You didn’t even list him. You don’t call the same witness twice. I just don’t allow that.” Counsel stated that “all [he] was going to ask” Detective _____ was if he had information he previously indicated he would provide. The Subject Judge responded that counsel could “ask him

whenever there's a break to see if he has anything of significance." The jury later found Complainant guilty as charged in the indictment.

A sentence hearing was held in March 2013, and the Subject Judge sentenced Complainant to a total term of 192 months of imprisonment. After the sentence was announced, Complainant stated that his lawyer had misinformed him that he would be sentenced to approximately seven years if he lost at trial. The Subject Judge responded:

Well, you know, sentencing in Federal court especially is up to the Court, and I made some findings. The lawyer can never guarantee to you what you're going to get Whatever your lawyer told you is between you and your lawyer and you went to trial and you testified under oath and lied.

Complainant appealed, and in February 2014 this Court affirmed Complainant's convictions and sentences. This Court held that Complainant had not established the Subject Judge had abused his discretion by limiting the defense's cross-examination of Detective _____. The Court noted that although the Subject Judge had initially stated that Detective _____ could not be recalled as a witness, after that the judge told defense counsel that he could discuss his proposed line of questioning of Detective _____ off the record before calling him again. Defense counsel did not seek to recall Detective _____.

In March 2014 the Subject Judge issued an order for Complainant to show cause why he should not be held in contempt for violating the court's orders not to contact the jurors. After a hearing, the Subject Judge discharged the show cause order. There were additional proceedings in the case, and Complainant filed another appeal that this Court clerically dismissed for want of prosecution.

The record also shows that in December 2016 Complainant filed a second amended 42 U.S.C. § 1983 complaint against a city and two police officers, alleging in part that the officers took his personal property without his consent and that one officer told other officers to take his property so they could sell it and split the proceeds. In June 2017 a magistrate judge issued a report recommending that: (1) Complainant's claims against the officers in their official capacities be dismissed as "redundant"; (2) his claims against the officers in their individual capacities be dismissed as barred by the applicable statute of limitations; (3) his state law claims against the officers be dismissed for lack of pendent-party jurisdiction; (4) his state law claims against the city be dismissed for failure to state a claim; and (5) he sufficiently stated a Fourth Amendment claim that the city had an unconstitutional custom or policy, and that this claim be allowed to proceed.

Over Complainant's objections, in November 2017 the Subject Judge entered an order adopting the report and recommendation, directing that Complainant's custom or

policy claim against the city would proceed and dismissing the remaining claims. After various proceedings, in August 2018 the city filed a motion for summary judgment.

In December 2018 the magistrate judge issued a report recommending that the city's motion for summary judgment be granted, generally finding that Complainant had failed to present any evidence to support his Fourth Amendment claim. Over Complainant's objections, in January 2019 the Subject Judge adopted the report and recommendation and granted the city's motion for summary judgment. Complainant appealed, and in June 2019 this Court clerically dismissed the appeal for want of prosecution.

Complaint

In his Complaint of Judicial Misconduct or Disability, Complainant asserts that the Subject Judge "is very bias and his impartiality is questioned," and Complainant believes that the bias stemmed from his attorney's failure to attend the calendar call in November 2012. Complainant states that the foreperson of his jury taught at the same school where the Subject Judge teaches law, and that, during voir dire, neither the Subject Judge nor the juror "stated their affiliation as teachers for" the school. He contends that during trial, the Subject Judge did not allow the defense to impeach the government's "star witness," limited the amount of time the defense could question that witness, and did not allow the witness to be called twice.

Complainant alleges that the Subject Judge arrived in the courtroom with the verdict in his hands, and "[n]o one knows how . . . [he] got that paper because he is not suppose[d] to have any contact with the jurors." Complainant states that the Subject Judge "kept a U.S. Marshal[] hold on" him for 36 months and "did not release it until he wanted to[]." Complainant states that, at sentencing, after he told the Subject Judge his attorney had informed him he would receive five-and-a-half years if he lost at trial, the Subject Judge responded, "You should never listen to your attorney because he does not write the law." He contends that the court reporter did not put those words in the transcript. He also states that the Subject Judge denies every motion he files and "does not send [him] the denial."

Complainant takes issue with the Subject Judge's orders in the civil case, contending that a defendant had admitted everything that Complainant had alleged. He asserts that the Subject Judge did not want the civil complaint to proceed because he knew that "the testimony and [Complainant] winning" could be used as newly discovered evidence that would help him overturn his criminal conviction. Complainant requests that the Subject Judge be recused from his cases and that he be allowed to refile his civil complaint. He attached documents to his Complaint, including affidavits from five people who attested that they attended the sentence hearing and heard the Subject Judge state, "you should have not listen[ed] to your attorney because he does not write the law."

Discussion

Rule 4(b)(1) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States, “Allegations Related to the Merits of a Decision or Procedural Ruling,” provides in part that “[c]ognizable misconduct does not include an allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse.” The “Commentary on Rule 4” states in part:

Rule 4(b)(1) 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 authority by ensuring that the complaint procedure is not used to collaterally call into question the substance of a judge’s decision or procedural ruling. Any allegation that calls into question the correctness of an official decision or procedural ruling 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 the cases, 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 was biased against Complainant, was not impartial, had a conflict of interest, 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