

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

OCT 28 2019

David J. Smith
Clerk

CONFIDENTIAL

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

Judicial Complaint No. 11-19-90033

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 January 2016 a federal grand jury issued a superseding indictment charging Complainant with: (1) conspiracy to possess with intent to distribute a controlled substance; (2) possession of a firearm in furtherance of a drug-trafficking crime; (3) conspiracy to commit Hobbs Act robbery; (4) being a felon in possession of a firearm and ammunition; (5) possession of 15 or more unauthorized access devices; and (6) two counts of aggravated identity theft. Following a trial, a jury found Complainant guilty as to six of the seven counts charged in the superseding indictment, and not guilty as to the charge of possession of a firearm in furtherance of a drug-trafficking crime.

At the sentence hearing in June 2016, counsel for Complainant argued as to the sentence Complainant should receive, and the following exchange took place:

[The Subject Judge]: You know what, [counsel], I think that probably the biggest mistake your client ever made was taking the stand. Because I’ve sat here and I’ve watched him testify and I know that the Eleventh Circuit has said more than once that you can take the testimony of a person and a jury or a judge can then infer the opposite of whatever he said.

[Complainant's counsel]: Judge, he didn't testify in his case.

[The Subject Judge]: Oh, I'm sorry. I thought he did.

[Complainant's counsel]: No, not in this case. This case was the one that featured the testimony of the --

[The Subject Judge]: You're right, you're right. I apologize.

Complainant's counsel later noted that he represented Complainant in a state court case where he was acquitted of a charge of manslaughter. After additional discussion, the following exchange took place:

[The Subject Judge]: He is a con man. He thinks he can talk his way out of anything.

[Complainant's counsel]: Well, Judge --

[The Subject Judge]: I heard the tapes. That's where I got mistaken. That's where I got confused is I heard him talking on the tapes.

[Complainant's counsel]: Right. And Judge --

[The Subject Judge]: He's a consummate B.S. artist. Seriously. And not even a good one. Might work real well at the level that he was operating, but you know, he needs to shut his mouth and do some work.

The Subject Judge later stated:

Maybe he should go in the, you know, the crooks' gallery of inept crooks. But the bottom line is, he sure was trying to be a bad guy. He sure was trying to be a hood. And he has now been convicted by a jury of several counts that carry substantial time.

The Subject Judge sentenced Complainant to a total term of 259 months of imprisonment, and Complainant appealed.

In October 2017 this Court vacated Complainant's sentence and remanded for resentencing, holding that the district court had plainly erred in not allowing Complainant to allocute before pronouncing sentence. After that, the Subject Judge again sentenced

Complainant to the same term of imprisonment, and Complainant appealed. In October 2018 this Court again vacated Complainant's sentence and remanded for resentencing, determining that Complainant's counsel and the district court mistakenly believed arguments by counsel for a particular sentence were outside the scope of the remand. This Court also denied Complainant's request that a new district judge be assigned to the case on remand. After a second resentencing hearing, the Subject Judge again sentenced Complainant to a total term of 259 months of imprisonment.

Complaint

In his Complaint of Judicial Misconduct or Disability, Complainant alleges that the Subject Judge's statements at sentencing—that he was a “con man,” a “consummate B.S. artist,” and an “inept crook[]”—reflected a pervasive bias against him that required the Subject Judge's disqualification from the case. He also notes the Subject Judge stated the biggest mistake Complainant made was taking the stand, even though Complainant had not testified. Complainant states he “heard what [the Subject Judge's] frustration [sic] influenced his mind set against” him when his attorney informed the Subject Judge that Complainant was acquitted of a state court charge of manslaughter. Finally, Complainant notes that this Court determined that the Subject Judge mistakenly believed arguments by counsel for a particular sentence were outside the scope of the remand. To his Complaint, Complainant attached excerpts from the transcript of the initial sentence hearing.

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:

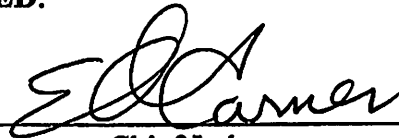
Rule 4(b)(1) tracks the Act, 28 U.S.C. § 352(b)(1)(A)(ii), in excluding from the definition of misconduct allegations “[d]irectly related to the merits of a decision or procedural ruling.” This exclusion preserves the independence of judges in the exercise of judicial authority by ensuring that the complaint 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 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 was biased against Complainant or otherwise engaged in misconduct.

With respect to the Subject Judge's incorrect comment at sentencing that Complainant had taken the stand during trial, the Subject Judge later clarified that he realized Complainant had not taken the stand. Instead, the Subject Judge had heard Complainant talking on tape recordings. The Subject Judge's statements about Complainant at the sentence hearing do not establish bias. Evaluating Complainant's history and characteristics was relevant to the determination of the appropriate sentence to impose. See 18 U.S.C. § 3553(a).

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**.

A handwritten signature in cursive script, appearing to read "J. A. Carner", written over a horizontal line.

Chief Judge