

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-11-90001

BEFORE
Lynch, Chief Circuit Judge

ORDER

ENTERED: MARCH 10, 2011

Complainant is an attorney who has represented a defendant in a criminal case before the district judge complained of in the present matter. See 28 U.S.C. § 351 (a). The complaint was filed after a jury found the defendant guilty, and before the defendant's sentencing proceedings. The complainant alleges that the judge engaged in misconduct in connection with the jury trial of the complainant's client.

The complainant essentially makes three claims which are summarized below. First, the complainant alleges that the judge improperly denied the complainant's multiple requests for a trial continuance and, thereby, forced the complainant to try the case unprepared. The complainant states that, although he had explained to the court that the need for trial preparation and appearance in other matters, as well as incomplete discovery in the case at issue, necessitated a continuance of the trial, the court

unreasonably denied his motions and held the trial as scheduled.

Second, the complainant alleges that the judge was hostile to the complainant in the presence of the jury during the trial. The complainant asserts that, during the trial, the judge "demonstrated open hostility" by repeatedly "shout[ing]" hostile remarks, including: "shut up," "sit down," "this is my courtroom and you do what I say," "I don't want to hear it," and other such comments.

The complainant's third charge is that, after the jury rendered its guilty verdict, the judge made statements in the presence of the jury about information the prosecutor had reported earlier to the judge and which had been placed in the record. There is no claim that these comments caused prejudice to the defendant. The claim is rather that the comments harmed the complainant. The information concerned the recordings of telephone conversations between the incarcerated defendant and his wife that been intercepted during the defendant's detention. The prosecution provided this information out of the presence of the jury in connection with the court's denial of the motions for a trial continuance and under Rule 29.

The complainant asserts that the judge made comments after the verdict and in the presence of the jury that the defendant's behavior, as evidenced by the recorded telephone conversations, could warrant an obstruction of justice enhancement at sentencing, and that the complainant's apparent involvement could be conduct which would warrant an investigation into possible ethical violations. The complainant concludes that these comments harmed him personally because they "contaminated the jury pool," and these

jurors might have an unfavorable impression of him in the event they sit in future cases in which complainant is counsel. The judge's statements about matters placed in the record are claimed to have violated the Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct) and the Code of Conduct for United States Judges (Code of Conduct).

As part of a limited inquiry undertaken pursuant to Rule 11(b) of the Rules of Judicial-Conduct, my staff and I have reviewed the misconduct complaint, a responsive memorandum submitted by the judge, the docket, relevant pleadings and court orders, as well as the transcripts of the voir dire and jury trial at issue. (Audio tapes of the trial were not recorded.)

Denial of Motions for Trial Continuance

The allegation that the judge denied the complainant's motions for a trial continuance is not a cognizable misconduct complaint against the judge and reflects nothing more than the complainant's disagreement with the substance of orders issued by the court. See Rules of Judicial-Conduct, Rule 3(h)(3)(A) ("Cognizable misconduct . . . does not include . . . an allegation that is directly related to the merits of a decision or . . . ruling. An allegation that calls into question the correctness of a judge's ruling, . . . without more, is merits-related.") If a judge's rulings denying the motions for a continuance were motivated by bias or other illicit animus, that could provide a basis for a misconduct claim. The record shows absolutely no basis for any such accusation.

The record demonstrates that, in support of his motions for a continuance, the

complainant argued he had commitments to other courts that would interfere with his ability to prepare for trial and appear in court on the scheduled date. These included an alleged trial in state court during the time the trial was scheduled in the present matter. Inquiry by the judge to that court determined that the complainant's representations were not accurate; in fact, the court in which the complainant had stated he was due to appear was in recess during the relevant time period. Accordingly, the court denied the motions for a continuance. It also scheduled a hearing to address the complainant's claim of late discovery. The complainant failed to appear at this hearing.

When, at the beginning of the trial, the complainant reiterated his motion for a continuance, the judge informed him that the local court (in which the complainant allegedly had a conflicting commitment) was in recess. The complainant replied that he was not "aware of that."

Also on the day of the federal trial, it was initially reported to the judge that the defendant was sick and unable to appear. The judge had medical personnel examine the defendant who determined that this claim was false. The defendant was then transported to court where jury selection took place.

In another attempt to delay the trial, the complainant informed the court during a pre-trial colloquy that the defendant intended to dismiss him as counsel. When the judge questioned the defendant, he stated that he wanted to discharge his attorney because he was unprepared, although he considered him to be a "very good attorney." The judge denied the motion to dismiss the complainant as counsel.

There is simply no evidence that the judge harbored any bias or improper motivation in denying the complainant's motions for a continuance. Absent evidence of bias or other illicit judicial motivation -- of which there is none -- the complainant's disagreement with the court's orders denying the motions to continue the trial does not provide a basis for a cognizable complaint of misconduct. Therefore, the claim is dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules of Judicial-Conduct, Rule 11(c)(1)(B).

Further, the assertion that the complainant's client was prejudiced by the judge's denial of the motions for a continuance -- for which no such evidence was offered -- would likewise present an issue for appeal, not for a complaint of misconduct. See 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules of Judicial-Conduct, Rule 11(c)(1)(B). The complainant's related argument that the judge's denial of the motions for continuance somehow prejudiced other state court defendants is not supported by fact. See 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules of Judicial-Conduct, Rule 11(c)(1)(C).

"Hostile" Behavior

Review of the record shows that the complainant's allegation that the judge acted with "open hostility" toward the complainant during the trial is baseless. The complainant fails to cite to the record for the contentions that the judge said: "shut up," "sit down," "this is my courtroom and you do what I say," "I don't want to hear it," and other such comments as alleged. Not only does the record fail to support the charge that the judge made these statements or otherwise treated the complainant with hostility, it

conclusively refutes it.¹

The judge did not make any comments that could "reasonably be interpreted as harassment, prejudice or bias." Code of Conduct, Canon 3(A)(3) *Commentary*, or otherwise inconsistent with the Code of Conduct. See also U.S. v. Rodriguez-Rivera, 473 F.3d 21, 27 (1st Cir. 2007), and cases cited ("[T]rial judges are justifiably accorded broad latitude to ensure proper courtroom behavior This latitude extends to . . . rebuking counsel for inappropriate behavior.") The judge's handling of the present case did not come close to approaching the limits of his discretion. The judge "corrected [complainant] before the jury only when he disregarded instructions the court had previously given." Rodriguez, *supra*, at 28. See also U.S. v. Balthazard, 360 F.3d 309, 319 (1st Cir. 2004), *citing* U.S. v. Gomes, 177 F.3d 76, 79-80 (1st Cir. 1999) (It is not improper for a trial judge to instruct counsel in the presence of the jury to refrain from commenting on or arguing with the court's evidentiary rulings.); and Boudin, C.C.J., Order, In re: Complaint No. 320, January 14, 2002, at 4 ("While it is conceivable that, in some circumstances, verbal attacks of counsel by a judge in open court may sufficiently exceed the bounds of propriety so as to raise a statutory issue of misconduct, a certain

¹At one point, the judge instructed the complainant not to interrupt the court. When the complainant subsequently argued with the court's evidentiary rulings, the judge stated: "Counsel, sit down, please. When I give a ruling, you obey it." The judge instructed the complainant not to argue with a witness. At another point, the complainant objected to the fact that the prosecution was repeatedly pausing a video that it was showing to the jury. The court denied the objection and told the complainant that, on cross-examination, he would be able to play the video as he wished.

amount of animated dialogue is to be expected in the courtroom environment."). In the present matter, the judge did not verbally attack the complainant or otherwise engage in conduct that even approached the "bounds of propriety." Id. See 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial-Conduct, Rule 11(c)(1)(A).

Statements About Record Evidence of Intercepted Telephone Conversations

Finally, the judge did not engage in misconduct when, in the presence of the jury after the verdict and as the court was discussing future sentencing proceedings, the court commented on the contents of the intercepted telephone conversations between the defendant and his spouse which had earlier been placed in the record (out of the presence of the jury). The record demonstrates that the judge was first informed of the recorded conversations by the prosecution, apparently in further support of the judge's rejection of the continuance motions as reiterated in defendant's Rule 29 motion. (Pursuant to prison policy, the defendant and his spouse had apparently been informed that their calls would be monitored and recorded.) This was not done in the jury's presence. The judge then listened to the recordings in open court (but not in the jury's presence) and ordered that they be included in the record. This was done and complainant was fully aware of their contents. The recordings raised the prospect of an attempt to obstruct justice by the defendant in which complainant may have been involved. The court then offered the complainant an opportunity to respond, which he declined.

Thereafter, the judge called the jury back, closing arguments were presented, the jury deliberated, and the jury returned a guilty verdict. After receipt of the verdict and in

front of the jury, the court scheduled the sentencing proceedings. The court told counsel that the pre-sentence report should address whether the recorded conversations would merit an obstruction of justice enhancement at sentencing. The judge summarized the intercepted conversations. The summary included defendant's apparent attempt, in cooperation with the complainant, to delay the trial, which included tactics designed to force the judge's recusal from the proceeding, the defendant's feigning illness, and the defendant's discharging the complainant as counsel. The judge stated that the defendant's statements as captured on the tapes "borders on obstruction of justice." He also stated that he intended to refer the matter for a "disciplinary investigation" of the complainant. At no time did the complainant object, ask that the jury be excused or that this matter be discussed outside of the presence of the jury.

The complainant fails to explain why what the judge did when he described the intercepted telephone calls and related events in the presence of the jury was misconduct. As the verdict of guilt had already been delivered by the jury, there was and could be no issue of influencing the jury's decision as to the defendant's guilt in the case.

The complainant appears to argue that the judge was obligated to refrain from making these remarks in front of the jury because of the potential for them to harm the complainant's reputation. This is not a claim of misconduct. Further, there was no impropriety. The judge had just set the schedule for sentencing and was giving defendant and counsel for both prosecution and defense notice that the issue of obstruction of justice required further inquiry and was germane to sentencing. Further, the judge placed

complainant on notice that he could be subject to a "disciplinary investigation." Both matters were to be investigated and there would be further proceedings before they were resolved. It was entirely appropriate that the judge placed these matters on the record. Complainant is also well aware that criminal trials are open public proceedings.

Nor does this constitute evidence of bias by the judge as part of a misconduct complaint.

Opinions formed by a judge on the basis of facts introduced or events occurring in the course of current or prior proceedings ordinarily do not constitute bias or partiality. Strongly stated judicial views rooted in the record . . . should not be confused with judicial bias.

Guide to Judiciary Policy, Vol. 2B, Ch. 2 § 220, Committee on Codes of Conduct, Adv. Op. No. 66. The judge's comments in this matter were narrowly tailored to events that occurred exclusively "in the course of [the] current . . . proceeding." Accordingly, this claim is dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial-Conduct, Rule 11(c)(1)(A).

For the reasons stated, Complaint No. 01-11-90001 is dismissed, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), 352(b)(1)(A)(ii), and 352(b)(1)(A)(iii). See also Rules of Judicial Misconduct, Rules 11(c)(1)(A), 11(c)(1)(B), and 11(c)(1)(C).

Date

3/10/11

Chief Judge Lynch

