

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-15-90012

BEFORE
Torruella, Thompson and Barron, Circuit Judges
Casper and Torresen, District Judges

ORDER

ENTERED: MAY 4, 2016

Petitioner has filed a petition for review of Chief Judge Howard's order dismissing his complaint, under 28 U.S.C. § 351(a), against a First Circuit district judge who presided over the criminal prosecution of petitioner's brother. Petitioner alleged that the judge exhibited bias and hostility while handling the case. Chief Judge Howard dismissed the complaint as baseless and not cognizable.¹

Petitioner originally alleged that the judge failed to intervene to protect the defendant from court security officers' use of excessive force during and immediately after the defendant's sentencing hearing. Petitioner contended that the judge should have ordered the security personnel to stop an unjustified "takedown" of the defendant that occurred during the sentencing,

¹ This is petitioner's second misconduct proceeding arising from his brother's legal matters. In 2010, petitioner filed a complaint against another district judge alleging impropriety in a civil case filed by petitioner's brother. Then Chief Judge Lynch dismissed the complaint and the Judicial Council affirmed the order of dismissal. See Lynch, C.C.J., Order, In Re Complaint No. 01-10-90023, March 23, 2011. See also Judicial Council of the First Circuit, Order, In Re Complaint No. 01-10-90023, June 21, 2011.

as well as a second interaction between the security officers and the defendant that took place moments later in the adjacent hallway. Petitioner added that, despite video evidence to the contrary, the judge falsely stated in open court that the security officers had not used excessive force and suggested, without basis, that the defendant might be charged with criminal contempt.

Petitioner next alleged that the judge improperly moved the continuation of the defendant's sentencing forward by a week in order to prevent the defendant's family from attending the proceeding and interfere with the defendant's receipt of necessary documents from his former counsel.² Petitioner further asserted that his brother's sentence exceeded the maximum authorized by the sentencing guidelines and evidenced the judge's disregard for the defendant's health and rights. Last, petitioner contended that the judge twice interfered with the defendant's right to counsel—first, during a pretrial ruling when the judge gave the defendant "a false option" of representing himself or continuing with his existing inadequate counsel, and second, during the defendant's sentencing hearing when the court improperly assigned new counsel to represent the defendant.

Chief Judge Howard dismissed the misconduct complaint as baseless and not cognizable. With respect to the sentencing hearing, the Chief Judge made the following observations based upon the available record. The judge heard from both the government and the defendant at length. When, in reviewing the defendant's conduct, the judge remarked that the defendant is unable to control himself, the defendant repeatedly interrupted the court, prompting the security officer to request assistance and the judge to order a recess. Chief Judge Howard further

² In his complaint, petitioner included claims of wrongdoing by several other parties, including the prosecutor in the criminal case and counsel in the civil case at issue in petitioner's previous misconduct complaint, *see* note 1, *supra*, which Chief Judge Howard appropriately dismissed as not cognizable under the judicial conduct and disability statute. *See* 28 U.S.C. § 351, and Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rule 4.

observed that the video of the incident, which had no accompanying audio, showed the defendant standing up abruptly before being restrained on the floor and removed from the courtroom.³

When the parties briefly reconvened several hours later, the judge rescheduled the continuation of the sentencing hearing. The judge observed that security personnel acted reasonably under the circumstances.

Chief Judge Howard found that the record included no facts suggestive of judicial bias or wrongdoing. The Chief Judge Howard observed that, during the sentencing, the judge "exercised reasonable discretion over [the] . . . courtroom environment" and that there was no evidence that the court "acted for any inappropriate reason or improperly exercised [its] judgment." See Boudin, C.C.J., Order, In Re Complaint No. 429, June 12, 2006, at 4.

Accordingly, Chief Judge Howard dismissed the allegation that the judge improperly failed to intervene in the defendant's interactions with the security officers as "lacking factual foundation and failing to identify any conduct that falls within the proscription of the statute." See id., *citing* 28 U.S.C. §§ 352(b)(1)(A)(i) and 352(b)(1)(B). See also Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rules 11(c)(1)(A) and 11(c)(1)(D), respectively.

Chief Judge Howard determined that each of petitioner's other claims were not cognizable. The Chief Judge observed that, after the court rescheduled the continuation of the sentencing hearing, defendant's standby counsel filed a motion to continue the rescheduled sentencing.⁴ The court moved the hearing forward by a week and imposed a sentence below the

³ There was no video of the interaction between the security personnel and the defendant that allegedly occurred in the hallway after the defendant was removed from court.

⁴ The record indicates that, at the defendant's request, defense counsel assumed standby status after the trial but before the sentencing.

guidelines range. Finding no evidence of improper motivation in the court's orders rescheduling the sentencing hearing or imposing the defendant's sentence, the Chief Judge dismissed petitioner's objections to these rulings as directly related to the merits. See 28 U.S.C. § 352(b)(1)(A)(ii), and Rules of Judicial-Conduct, Rule 11(c)(1)(B).

The Chief Judge similarly resolved the claims that the judge interfered with the defendant's right to counsel. The Chief Judge observed that at a pretrial conference, the judge discussed with the defendant and counsel the issues raised in counsel's motion to withdraw, and all parties agreed that the defendant would proceed with appointed counsel. Chief Judge Howard further observed that the court had initially appointed a duty attorney to represent the defendant at the continuation of the sentencing when it appeared that standby counsel would not be available.⁵ Because the Chief Judge found no facts to suggest that the judge acted with improper animus in connection with either of the rulings pertaining to defendant's counsel, these claims were also dismissed as not cognizable. See 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules of Judicial-Conduct, Rule 11(c)(1)(B).

Throughout the petition for review, petitioner asserts that Chief Judge Howard failed to adequately investigate and address each of petitioner's allegations of misconduct. Petitioner repeats his objections concerning his brother's sentencing, asserting that the judge's failure to intervene in the altercations between the defendant and the security officers constituted egregious and hostile conduct, in violation of Rule 3(h)(D) of the Rules of Judicial-Conduct. Petitioner adds that the judge was "disingenuous" in stating that the security officers did not use excessive force and "facilitat[ed] perjury on the part of Deputy US Marshals."

⁵ The court did not resume sentencing that day and standby counsel appeared with the defendant at the continued hearing.

Petitioner again asserts that the judge harbored an improper motive in allegedly assigning new counsel to represent the defendant when the court reconvened several hours after the sentencing hearing was continued "for the sake of the defendant having counsel when a criminal contempt charge was asserted." Petitioner also repeats the claim that the judge improperly rescheduled the continuation of the defendant's sentencing hearing without notice, which prevented the defendant from receiving timely medical treatment. Last, petitioner reasserts that the court was improperly motivated when it sentenced the defendant allegedly in excess of the applicable guidelines.

The petition for review is meritless. At the outset, the order of dismissal demonstrates that Chief Judge Howard reviewed petitioner's complaint, the record in the case and other available information, in accordance with the governing statute, 28 U.S.C. § 352(a), and Rules of Judicial-Conduct. See Rules of Judicial-Conduct, Rule 11(b) ("In determining what action to take under Rule 11(a), the chief judge may conduct a limited inquiry.").

Moreover, petitioner offers no facts suggesting bias, improper judicial motive or other wrongdoing that would undermine Chief Judge Howard's findings. First, petitioner's allegations regarding the judge's handling of the sentencing hearing remain utterly unsupported and raise no indication that the court "acted for any inappropriate reason or improperly exercised its judgment." Boudin, C.C.J., Order, In Re Complaint No. 429, June 12, 2006, at 4. As Chief Judge Howard determined, the record demonstrates that the judge attempted to conduct the proceedings while preserving a secure courtroom and personally observed that security personnel acted reasonably. There remains no indication that the judge was hostile, improperly motivated or abused his discretion in managing the volatile situation or in remarking on the conduct of security personnel. Accordingly, Chief Judge Howard properly dismissed these claims, pursuant

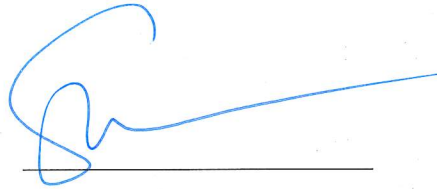
to 28 U.S.C. §§ 352(b)(1)(A)(i) and 352(b)(1)(B). See also Rules of Judicial-Conduct, Rules 11(c)(1)(A) and 11(c)(1)(D).

Chief Judge Howard appropriately dismissed the remaining claims as not cognizable. There is no information suggesting there was any improper motivation in connection with any of the court's rulings, including those pertaining to counsel, the rescheduling of the defendant's continued sentencing or the substance of the defendant's sentence (which was in fact below the guideline range). These claims were properly dismissed as not cognizable. See 28 U.S.C. § 352(b)(1)(A)(ii); see also Rules of Judicial-Conduct, Rule 11(c)(1)(B).

For the reasons stated herein, the order of dismissal issued in Judicial Misconduct Complaint No. 01-15-90012 is affirmed. See Rules for Judicial-Conduct, Rule 19(b)(1).

5/4/16

Date



Susan Goldberg, Secretary