

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-16-90004

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

ORDER

ENTERED: JUNE 1, 2016

Petitioner, an incarcerated criminal defendant, 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. Petitioner alleged that the judge exhibited bias and hostility in imposing a longer sentence on petitioner, after he plead guilty to a weapons possession charge, than recommended in the plea agreement. Petitioner asserted that the sentence was not supported by the record but was based on the judge's personal opinion and included an improper reference to "God" and the local crime rates in the area. Petitioner asked that any further post-conviction proceedings be assigned to a different judge.

Chief Judge Howard dismissed the misconduct complaint as baseless and not cognizable. The Chief Judge first observed that the judicial misconduct complaint process does not provide a mechanism for obtaining the recusal of a judge or the reassignment of a case. See 28 U.S.C. §

351, *et seq.*, and Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rules 11, 19 and 20.

Reviewing the transcript of the sentencing hearing, the Chief Judge found no evidence in support of petitioner's claims that the judge was biased or hostile when he sentenced petitioner. This review included the judge's reference to "God" and the need to protect the public which, in context, were not suggestive of bias, illicit motive or hostility on the part of the judge. Finding no facts in support of petitioner's claims, Chief Judge Howard dismissed the complaint as baseless, pursuant to 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules of Judicial-Conduct, Rule 11(c)(1)(D). Because the misconduct complaint was based exclusively on petitioner's disagreement with the sentence imposed by the court, it was dismissed 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).

In the petition for review, petitioner first asserts that Chief Judge Howard's order dismissing the misconduct complaint should be "stricken" because the Chief Judge was a member of the panel that affirmed the petitioner's sentence on appeal. Petitioner next contends that the Chief Judge neglected to note in the dismissal order that the district judge had imputed petitioner with a "nefarious" motive for possessing the weapon, although this fact was directly contradicted by the government and never proven. Petitioner reiterates his objection to the district judge's reference to the local crime rate in sentencing petitioner and asks the Judicial Council to assign his cases to a different judge and to sanction the subject judge.

The petition for review is baseless. First, as Chief Judge Howard explained, the judicial misconduct complaint procedure does not provide a means for reassigning cases. See 28 U.S.C. § 351, *et seq.*, and Rules of Judicial-Conduct, Rules 11, 19 and 20. Furthermore, the Chief Judge's participation in the appeal of petitioner's underlying case does not disqualify him from

reviewing the misconduct complaint. Under the governing rule, it is within a judge's discretion when to determine whether the circumstances warrant disqualification, see Rules of Judicial-Conduct, Rule 25(a), and a judge should fulfill "his or her duty to participate" in a misconduct matter so long as "the judge believes that he or she can be 'fair-minded' [despite] prior knowledge of the case and even a previously held opinion" Judicial Conference of the United States Committee on Judicial Conduct and Disability, Memorandum of Decision, In Re: Complaint of Judicial Misconduct No. 09-01, October 26, 2009, at 21-22. There is no information in the present matter that suggests that Chief Judge Howard's participation in petitioner's appeal influenced his ability to impartially consider the subsequent misconduct complaint.

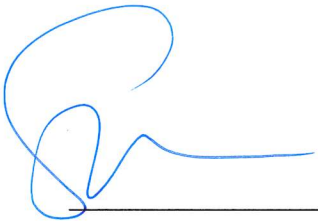
Petitioner's other claims amount to nothing more than continued objections to the sentence imposed by the court. Chief Judge Howard thoroughly reviewed the record of the case, including the transcript of the sentencing hearing, and found no evidence of improper judicial motive. There was no information suggesting that the district judge relied on any improper or extraneous information in considering petitioner's intended use for the weapon in his possession. While petitioner may dispute the district judge's conclusions in this regard, the Chief Judge appropriately determined they are not indicative of hostility or personal bias on the part of the judge. See e.g., Boudin, C.C.J., In Re: Judicial Misconduct Complaint No. 444, January 23, 2007, at 3-4 ("It is well settled that judges are entitled to form views about the merits, and to express them, during the course of the case so long as judgments rest on the evidence and arguments in the proceeding itself").

The same holds true for petitioner's continued objection to the district court's reference to the local crime rate. This challenge was among those considered and rejected by the appellate court and, as the Chief Judge determined, does not evidence bias or improper judicial motive.

Accordingly, Chief Judge Howard properly dismissed the complaint as baseless and as not cognizable, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(iii) and 352(b)(1)(A)(ii). See also Rules of Judicial-Conduct, Rules 11(c)(1)(D) and 11(c)(1)(B), respectively.

For the reasons stated herein, the order of dismissal issued in Judicial Misconduct Complaint No. 01-16-90004 is affirmed. See Rules for Judicial-Conduct, Rule 19(b)(1).

6/1/16
Date



Susan Goldberg, Secretary