O/a 5-5-86

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,595

INQUIRY CONCERNING A JUDGE :

NO. 84-176 (HONORABLE J. ALLISON DEFOOR, II) :

:

RESPONDENT'S INITIAL BRIEF

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INTRODUCTION

Pursuant to Rule 2.140 of the Florida Rules of Judicial Administration, J. ALLISON DEFOOR, II, County Court Judge, Monroe County, Florida (hereinafter "Respondent") was commanded by this Court through its Order issued on February 18, 1986, to show cause why certain recommended action by the Florida Judicial Qualifications Commission (hereinafter "Commission") should not be taken. On March 14, 1986, Respondent filed his Response to Order to Show Cause which he now supplements with this brief.

This matter arose from proceedings which were had before the Commission with reference to Respondent's conduct while a judge, which proceedings resulted in the Commission's filing with this Court on February 5, 1986 a report and recommendation regarding the Respondent pursuant to Article V, Section 12, Constitution of the State of Florida, 1968, as amended, and the Rules of the Commission. The Commission has recommended that this Court publically reprimand the Respondent for certain conduct described in the Commission's Report and Recommendation that is allegedly and collectively violative of Canons 2, 3, 5 and 7 of the Code of Judicial Conduct.

Respondent urges this Court to reject the action recommended by the Commission.

STATEMENT OF THE CASE

On July 26, 1985 the Commission held a hearing in Tampa, Florida pursuant to Rule 6-B, Florida Judicial Qualifications Commission Rules (hereinafter "Rule 6-B") to determine whether there was probable cause to institute formal proceedings against the Respondent. As a result of said hearing, the Commission on September 6, 1985 served on Respondent its Notice of Formal Proceedings (hereinafter "Notice"). (A.1)[1]

The Notice set forth three counts. Count I charged that Respondent had improperly actively participated in political activity inappropriate to his judicial office and violative of Canon 7 of the Code of Judicial Conduct. Count II charged that Respondent had improperly utilized his judicial office and prestige of his office to advance the private and financial interest of himself and others with respect to the use of the "electronic leash" probation monitoring device and the sales and marketing thereof, in violation of Canons 2, 3 and 5 of the Code of Judicial Conduct. Count III charged that Respondent additionally violated Canons 2 and 3 of the Code of Judicial Conduct by improperly establishing a uniform procedure pursuant to which traffic violators, without appearing in court, could pay directly to the Clerk of the Court double the statutory fine and thereby obtain an automatic withhold of adjudication.

On September 26, 1985, the Respondent filed his Answer (A.2) to the Notice. In his Answer, Respondent denied that he violated any Canon of the

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1 References to the Appendix will be denoted as follows: A.___.

Code of Judicial Conduct and specifically denied that his conduct as set forth in the Notice demonstrated present unfitness to hold the office of judge.

Thereafter, on November 15, 1985, the Commission and the Respondent filed an Evidentiary Stipulation as to Facts (hereinafter "Evidentiary Stipulation") (A.3) and on November 26, 1985 the Respondent filed his Supplement to the Evidentiary Stipulation (hereinafter "Respondent's Supplement"). (A.4).

A hearing was held before the Commission at Dade County, Florida on December 3, 1985. The totality of the evidence heard and considered by the Commission consisted of the Evidentiary Stipulation and the Respondent's Supplement. The Commission determined that the Respondent was guilty of the allegations contained in Counts I, II and III of the Notice and accordingly entered its Findings of Fact and Conclusions of Law.

Thereafter, this proceeding ensued wherein this Court has commanded the Respondent to show cause why the recommended action by the Commission should not be taken.

STATEMENT OF THE FACTS

The Respondent, age 32, served as an Assistant Public Defender in the Sixteenth Judicial Circuit in Key West, Florida from September 1979 to December 1980 and served as an Assistant State Attorney in the Sixteenth Judicial Circuit in Key West, Florida from December 1980 to January 1983. In 1982 he was elected Judge of the Monroe County Court for the term January 1983-1987. He sits at the Marathon and Plantation Key Courthouses in Monroe County.

For his further Statement of the Facts, Respondent adopts by reference all facts set forth in the Evidentiary Stipulation and Respondent's Supplement.

STATEMENT OF THE ISSUES

I.

WHETHER CRITICAL FINDINGS OF FACT CONTAINED IN THE REPORT AND RECOMMENDATION ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE FREE OF SUBSTANTIAL DOUBTS AND INCONSISTENCIES.

II.

WHETHER RESPONDENT HAD THE RIGHT TO RELY, AND DID RELY JUSTIFIABLY, ON THE ADVISORY OPINIONS OF THIS COURT'S COMMITTEE ON STANDARDS OF CONDUCT GOVERNING JUDGES AND THIS COURT'S TRAFFIC REVIEW COMMITTEE AND WHETHER RESPONDENT ACTED IN GOOD FAITH IN RELYING ON THOSE ADVISORY OPINIONS AND IN APPLYING CERTAIN PROCEDURES OF LAW IN CASES BEFORE HIM.

III.

WHETHER THE DISCIPLINE RECOMMENDED BY THE COMMISSION WAS EXCESSIVE AND UNWARRANTED.

SUMMARY OF ARGUMENT

I.

With respect to Counts II and III of the Notice of Formal Proceedings, several critical findings of fact contained in the Report and Recommendation are not supported by clear and convincing evidence free of substantial doubts and inconsistencies.

II.

With respect to Counts II and III of the Notice of Formal Proceedings, Respondent had the right to rely, and did rely justifiably, on the advisory opinions of this Court's Committee on Standards of Conduct Governing Judges and this Court's Traffic Review Committee, and Respondent acted in good faith in relying on those advisory opinions and in applying certain procedures of law in cases that came before him.

III.

With respect to all counts of the Notice of Formal Proceedings, the public reprimand recommended in the Report and Recommendation is excessive and unwarranted.

A. Respondent has violated no judicial canons with respect to Counts II and III and, accordingly, there is no basis for imposition of discipline by the Commission.

B. The discipline recommended (public reprimand) is logically and legally inconsistent with the conclusions of law set forth in the Commission's Report and Recommendation.

ARGUMENT

I.

SEVERAL CRITICAL FINDINGS OF FACT CONTAINED IN THE REPORT AND RECOMMENDATION ARE NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE FREE OF SUBSTANTIAL DOUBTS AND INCONSISTENCIES.

A. Count II

The misconduct of a judge that would be sufficient to justify the imposition of discipline must be established by clear and convincing evidence free of substantial doubts and inconsistencies. In re Boyd, 308 So.2d 13 (Fla. 1975).

The evidence adduced by the Commission consisted of the Evidentiary Stipulation and Respondent's Supplement and does not support the finding that the Respondent "improperly utilized his judicial office and the prestige of his office to advance the private and financial interests of himself and others." (Count II). That finding is unsupported in the specific factual recitations contained in the Report and Recommendation, and actually conflicts with the finding contained in Paragraph (o) at page 9 thereof that "others utilized Respondent's involvement to promote the electronic leash device." (Emphasis added).

Not only does the factual record fail to establish the allegation that Respondent "improperly utilized his judicial office and the prestige of his office to advance the private and financial interests of himself and others," but also it is evident that the Commission, in making its findings of fact, applied an

improper standard, i.e., a negligence standard, with respect to Respondent's conduct. For instance, at paragraph (q), page 11 of the Report and Recommendation, the Commission found "that the Respondent knew or should have known that his judicial office was being improperly used to promote the device in which he had a financial interest." (Emphasis added). Apparently, the Commission is attempting to premise the conclusion that the Respondent "improperly utilized his judicial office" for his own financial gain (implicitly an offense requiring scienter) on a finding that he "should have known" that other people were using his name to promote the electronic leash device. This is a tacit admission that the charge has not been established. Certainly, the unknowing sufferance of the activities of others violates neither Canon 2 ("a judge should avoid impropriety . . . in all his activities") nor Canon 3 ("a judge should perform the duties of his office impartially and diligently") nor Canon 5 ("a judge should regulate his extra-judicial activities to minimize the risk of conflict with his judicial duties"). (Emphasis added).

All three canons, Canons 2, 3 and 5, look toward the conduct of the judge himself, and do not suggest that a judge can be liable vicariously for activities of persons who are neither bound by the canons nor under his control.

With respect to Count II, the Report also emphasizes Respondent's supposed misrepresentation concerning his execution of a personal guarantee in connection with the line of credit of the corporation that developed the electronic leash. In Paragraph (r) at page 12 of the Report and Recommendation, "the Commission further notes that since July 26, 1985 Rule 6-B hearing, the Respondent incorrectly represented that he had not signed a

personal guarantee." In fact, the transcript of the Rule 6-B hearing (A.5) reveals, at pages 35-36, that Respondent told the Commission exactly what he knew about his obligation, i.e., "there is a note and I originally thought when I shared with Mr. Caruana that I was personally liable on it. I had the accountant check and he sent me a letter indicating that I was not, which relieved me very much." He went on to advise the Commission that the accountant had also looked into his wife's liability "and he [the accountant] indicated that she signed in capacity as the treasurer or secretary, one or the other, of the corporation, and that neither she nor I apparently - - none of us are apparently liable."

The Respondent went on to state that he was surprised, indeed shocked, by the accountant's letter. It should be pointed out that Respondent, from the moment that this investigation began, has given to the Commission's investigator his full cooperation and has disclosed everything that was requested of him. As suggested in the above referenced testimony, the Respondent "shared with Mr. Caruana" (the Commission's special counsel investigating this case) that he was personally liable on the note. However, he had the accountant check into this assumption, and was advised by the accountant that he was not personally liable. Based on the accountant's advice, he concluded that neither he nor his wife "are apparently liable." However, by the time this matter had been fully investigated by all parties, the Evidentiary Stipulation was presented to the Commission and signed by the Respondent acknowledging that review of the original document, (i.e., the line of credit) contains the Respondent's continuing guarantee (paragraph 10 at page 11 of the Evidentiary Stipulation).

It is apparent from the above chain of events that the Respondent initially told the Commission's investigator that he thought he was personally liable on the line of credit, received the letter from his accountant saying that he was not, and subsequently learned from examination of the original documents that he was. There is nothing in this series of events that justifies the Commission's characterization of his testimony as a misrepresentation. Here again, the Commission has misapplied a negligence standard finding that "Respondent knew, or should have known, whether he executed such a guarantee without reference as to whether his accountant recalled it or not." (Emphasis added). The Commission impugned Respondent for a lapse of memory and his justifiable reliance on an accountant's review of corporate affairs. Even if the negligence standard were the proper measure of his responsibility, how could any active professional be expected to recall with precision every document which he is required to sign in the course of securing bank credit?

B. Count III

Following the Rule 6-B hearing in Tampa, the Commission issued its Notice containing Count III which charged that Respondent "improperly established a uniform procedure pursuant to which traffic violators (speeders) could, without appearing in court, pay directly to the Clerk of Court double the statutory fine and thereby obtain an automatic withhold of adjudication in violation of Canons 2 and 3 of the Code of Judicial Conduct."

Respondent and his counsel, Mr. Hendrick, understood this charge to be a criticism of the procedure created by the Respondent with respect to

withholding adjudication upon payment of double the fine. In fact, Paragraph 3 of Respondent's Answer is a general explanation of how the procedure was used by the Respondent, never even mentioning the "waiver information" (A.6) form.

Notwithstanding the omission of the "waiver information" form from both the Notice and Answer, the Commission's Report and Recommendation focused its attention on Respondent's alleged impropriety in using the "waiver information" form, which every county judge in Monroe County had been using (A.7) since no one apparently realized that it was outdated and prohibited by Rule 6.340 of the Florida Rules of Practice and Procedure for Traffic Courts.

The "waiver information" form was merely inherited by the Respondent; he did not establish it as a procedure. When in the course of these proceedings it came to the Respondent's attention that the use of the form was objectionable, he immediately informed his fellow Monroe County judges of its deficiency and advised that they discontinue its use.

It is grossly unfair to accuse the Respondent, as the Commission does in Paragraph (k) at page 15 of the Report and Recommendation of having "misrepresented to the Commission the nature of the form he had been utilizing." The form was not even mentioned in the Notice issued by the Commission with respect to its formal charges against Respondent. In point of fact, the Respondent had given the form itself to the Commission's special counsel during his initial investigation. Here again, the Commission has inserted in its Findings of Fact the "knew or should have known" test with respect to Respondent's use of the form, thereby making unknowing errors a violation of the judicial canons.

Therefore, critical findings of fact made by the Commission in its Report and Recommendation are unsupported by the record or, if partially supported, they are not supported by the degree of evidence required in this case. For instance, the record shows that the Respondent never authorized the Clerk of the Court to dispose of minor traffic offenders (charged with speeding) without judicial consideration of each case. It is further borne out by the record that the withhold adjudication procedure was not "automatic" because Respondent personally reviewed each affidavit and traffic citation to ascertain that the circumstances warranted withholding adjudication. Moreover, Respondent did not withhold adjudication, but instead rejected tendered pleas in cases involving aggravating circumstances such as speeding in school zones, or extremely high speed. This is further indicia of the case-by-case determinations made by the Respondent. Accordingly, the record is rife with doubt and inconsistencies insofar as the charge that Respondent actually violated Canons 2, 3 and 5 of the Code of Judicial Conduct.

II.

RESPONDENT HAD THE RIGHT TO RELY, AND DID RELY JUSTIFIABLY, ON THE ADVISORY OPINIONS OF THIS COURT'S COMMITTEE ON STANDARDS OF CONDUCT GOVERNING JUDGES AND THIS COURT'S TRAFFIC REVIEW COMMITTEE AND RESPONDENT ACTED IN GOOD FAITH IN RELYING ON THOSE ADVISORY OPINIONS AND IN APPLYING CERTAIN PROCEDURES OF LAW IN CASES THAT CAME BEFORE HIM.

A. Count II

The central flaw in the Commission's findings with respect to Count II is that it gives no weight to Respondent's before-the-fact inquiry to this Court's

Committee on Standards of Conduct Governing Judges. Before he acquired any financial interest in the corporation that developed the electronic leash, Respondent set out in detail by letter to the Committee on Standards his involvement in the development of the electronic leash device and his desire to participate in the fruits of his labor if he could do so within ethical bounds. In its Opinion No. 84/3 (A.8), the Committee responded that all of its eight members "were generally of the opinion that you can enjoy the financial fruits of your endeavors," provided that certain problem areas were avoided. The replies of two members were quoted at length in the opinion. Both of the quoted opinions cautioned against the impropriety which would appear as a result of the purchase of the device in the Respondent's county, marketing within the confines of the Respondent's jurisdiction or "benefitting from sales of these devices" in his county.

In view of the specific admonitions of the Committee's opinion, it is difficult to understand the Commission's decision to disregard the opinion because it "nonetheless contains certain limitations which would prohibit the misuse of judicial office for financial gain." Those "certain limitations" were scrupulously followed by the Respondent, who neither allowed the device to be marketed in Monroe County nor took any active role in the business (marketing or otherwise) of the corporation.

Apparently, the Commission's real reason for chastising the Respondent's reliance on the opinion of this Court's Committee on Standards is that the Commission disagrees with that opinion. However, if a judge can be found guilty of unethical behavior notwithstanding his reliance on the specific opinion of this

Court's Committee, of what use is the Committee? The Commission correctly notes that the Committee's opinion is not binding on it. However, this Court's Order creating the Committee on Standards of Conduct Governing Judges states that the Committee's opinion may be considered as "evidence of a good faith effort to comply with the Code of Judicial Conduct."

Of course the Commission does not state that it rejects the Committee's opinion; rather it implies that the Respondent did not abide by "certain limitations" recommended in the opinion. However, because he did conform to those limitations, it is apparent that the Commission simply chose to reject the opinion. There is no justification for ignoring the good faith inherent in Respondent's prior submission of his proposed course of conduct for an advisory opinion. The obvious question presented is: would the Respondent have invested in the corporation that developed the electronic leash device but for the Committee's opinion?

The Commission should not have failed to recognize the Respondent's securing an advisory opinion as good faith evidence of his attempt to comply with the strictures of the judicial code. It should at least have expressed some reason for finding an absence of good faith. Because the Report gives no reason why the opinion was wrong, the Report, with respect to its findings on Count II, should be rejected.

Moreover, the Evidentiary Stipulation executed by the parties in lieu of testimony recites in pertinent part at page 12, paragraph 16 that "Judge DeFoor's involvement with the electronic leash has been utilized by others who have an entrepreneurial interest in the device." (Emphasis added).

The record establishes that Respondent was merely a stockholder, but neither a director nor an officer, of the corporation which developed the

"electronic leash" and that he had no active role of any sort (and indeed was prohibited by general corporation law, as well as Canon 5, Code of Judicial Conduct, from taking an active part in the affairs of the corporation).

Accordingly, the finding that Respondent utilized his office and the prestige of his office to advance his financial interests and the interests of others is not borne out by the record.

The Commission also found that Respondent's improper extra-judicial activities "related to the sales and marketing promotion" of the electronic leash. However, Respondent had nothing to do with the sales and marketing promotion of the device. The Report and Recommendation creates an inference of improper conduct, at paragraph (9) at page 11, by stating that "no public disclosure of Respondent's financial interests in [the corporation that developed the electronic leash] was made" at a conference of County Court Judges held January 30 through February 2, 1985. However, what the Report and Recommendation fails to point out is that Respondent's only involvement in that conference was to discuss a matter unrelated to the electronic leash device, i.e. to lecture on telephone conferencing. It should be noted that the Respondent is a regular lecturer in that judicial conference which has no nexus imaginable to Respondent's fulfillment of his general duties as a judge. Moreover, had Respondent disclosed his financial interest, in all likelihood the Commission would have viewed that disclosure at the judicial conference was opportunistic and self-interested and, in itself, violative of the judicial canons.

B. Count III

With respect to the procedure of withholding adjudication upon payment of double the amount of the fine, when the procedure was first questioned by the

Clerk of the Court in Monroe County, the Respondent wrote to this Court's Traffic Court Review Committee. The Traffic Court Review Committee by letter dated June 27, 1985 advised the Respondent as follows:

> The question you raised concerning the permissibility of utilizing the procedure of routinely withholding adjudication in certain speeding cases was brought to the attention of the Traffic Court Review Committee when it met on June 19, 1985 in Key West. At that time, the Committee declined to take a specific position on this procedure in light of that fact that any opinion would become moot on October 1st when Senate Bill 1183 (Chapter 85-250, Laws of Florida) goes into effect. As you will see when you receive a copy of the minutes of the meeting, the Committee did take note of the fact that a similar procedure was being utilized elsewhere and expressed no specific objection to utilization of such procedure. (Emphasis added). (A.9)

As in Count II, the Commission appears to be rejecting yet another Committee's opinion and does not even accord it the status of evidence of good faith in Respondent's favor.

Even before the Traffic Court Review Committee issued its advisory opinion, the Respondent had sought an opinion with respect to the withhold adjudication procedure from the Court Executive of the Sixteenth Judicial Circuit of Florida who, in turn, advised Respondent that the Director of the Traffic Court Review Committee "was not aware of any prohibition against such a practice and that this appeared to be a proper use of judicial discretion." (A.10)

The Florida Legislature has now codified the practice of "automatic withholding of adjudication," effective October 1, 1985.

Assuming arguendo that Respondent's use of the withhold adjudication procedure were not authorized, his obvious good faith belief that he had the right to use the procedure should bar the imposition of discipline against him.

It has been held that mere errors of law and simple abuses of judicial discretion, absent a finding of bad faith, do not constitute violations of the judicial canons. In the Matter of Billy Joe Sheffield, a Judge, 465 So.2d 350 (Ala. 1984).

This view is consistent with the view taken by this Court in judicial discipline cases. For instance, this Court has held that objective and not merely subjective misconduct warrants judicial discipline and that only when a judge who has intentionally committed an act which he knew was beyond his power is he guilty of misconduct. In re Dekle, 308 So.2d 5 (Fla. 1975).

The Commission should not have failed to recognize Respondent's securing an advisory opinion as good faith evidence of his attempt to comply with the strictures of the judicial code. It should at least have expressed some reason for finding an absence of good faith. Because the Report and Recommendation gives no reason why the advisory opinion was wrong, the Report and Recommendation, with respect to its findings on Count II and III should be rejected.

III.

THE PUBLIC REPRIMAND RECOMMENDED IN THE REPORT AND RECOMMENDATION IS EXCESSIVE AND UNWARRANTED.

A. Respondent has violated no judicial canons with respect to Counts II and III and, accordingly there is no basis for imposition of discipline by the Commission.

It is a well established principle that this Court can reject any discipline recommended by the Commission when it finds that the Judge whom the Commission would seek to discipline has violated no canon of the Code of

Judicial Conduct. Moreover, this Court has the inherent authority to reject the degree of discipline recommended by the Commission.

It is manifest from the foregoing argument (Parts I and II) that the record fails to establish that the Respondent violated Canons 2, 3, 5 and 7 of the Code of Judicial Conduct.

Accordingly, the Respondent urges this Court to reject the recommended action by the Commission with respect to Counts II and III.

B. The discipline recommended (public reprimand) is logically and legally inconsistent with the conclusions of law set forth in the Commission's Report and Recommendation.

Historically, a public reprimand in judicial discipline, as well as attorney discipline, cases serves a purpose of deterrence with respect to future and/or contemplated conduct by those who would otherwise engage in ethical violations. No such reasons or circumstances are present here.

In its conclusions of law, the Commission stated, in pertinent part, that:

> "The Respondent's contrite demeanor, cooperation and acknowledgment of the seriousness of his admitted conduct, and his new understanding of the limits of the power and prerogatives of his office, demonstrates a present appreciation for the responsibilities of that office."

Moreover, the Commission concluded that:

> To the extent that the Respondent may have failed to conform to these standards in the past, the Commission believes that, under the circumstances, such occurrences will not likely be repeated in the future. (Emphasis added).

Thus, assuming arguendo that this is a case which warrants the imposition of discipline against the Respondent, it does not appear from the Report and Recommendation, or upon the record as developed before the Commission, that a public reprimand of the Respondent would serve the purpose for which such reprimands are clearly, and usually, intended.

Moreover, there is an amalgam of personal circumstances which clearly militate against a public reprimand of the Respondent, primarily his excellent record and his relative youth at the time of the alleged ethical violations. As his resume (A.11) clearly indicates, and as this Court is probably already cognizant of, the Respondent is the author of a rule of procedure concerning the use of telephones in hearings. He has published extensively, taught in numerous legal education and related education programs, and has an impressive background of community and church service, all of this attained by the age of 32.

Far from serving any purpose to the Respondent, to the judiciary, to the legal community, or to the general public, a public reprimand of the Respondent will merely act to discourage, and possibly end, a nascent judicial career which until now had been filled with promise and accolade. As his resume makes amply clear, the Respondent has applied his energy and intelligence to virtually everything he has done throughout his legal and judicial career, all of which points to his great involvement in improving the justice system. Moreover, he has already been sufficiently punished. The maxim "let the punishment fit the crime" was never more appropros than in this case.

CONCLUSION

For the foregoing reasons, the Respondent urges this Court to reject the action recommended by the Commission in its Report and Recommendation.

WE HEREBY CERTIFY that a true copy hereof was this 18th day of March, 1986, mailed to JOHN S. RAWLS, General Counsel, Florida Judicial Qualifications Commission, The Historic Capitol, Room 102, Tallahassee, FL 32301; ALBERT G. CARUANA, ESQ., Wright & Caruana, P.A., Roberts Building, Suite 1000, 28 West Flagler Street, Miami, FL 33130 and JAMES T. HENDRICK, ESQ., Albury, Morgan & Hendrick, P.A., P.O. Box 1117, Key West, FL 33041.

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