IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,595

INQUIRY CONCERNING A JUDGE :

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

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RESPONDENT'S REPLY BRIEF

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INTRODUCTION

The thrust of the Judicial Qualifications Commission's argument in its Answer Brief appears to be that Judge DeFoor, by appealing his "sentence" to this Court, has mocked the Commission's authority. What the Commission seems to be saying is that Judge DeFoor's assertion of his constitutionally protected appeal right is, in and of itself, proof that he believes he has done no wrong and that he is not repentent.

That position flies in the face of every concept of fairness and due process of law recognized by this Court and belies the fact that counsel for the Commission has overreacted to Judge DeFoor's initial brief, which overreaction is, given the nature and severity of the charges made by the Commission, fundamentally wrong.

For one thing, there was never any "plea bargaining" between Judge DeFoor and the Commission that could have created on the part of the Commission a reasonable expectation that Judge DeFoor would not challenge the Commission's "sentence" before this Court.

Moreover, it is logically inconsistent for the Commission to assert, as it does, an evasion of the "facts" by Judge DeFoor, when the record makes clear that from the very beginning Judge DeFoor acted in absolute good faith toward the Commission, its investigators and its counsel in searching out the information they needed. In fact, even before the investigation was formally under way, (prior to the Rule 6B hearing of July 26, 1985), Judge DeFoor volunteered to meet with counsel for the Commission and agreed to waive his right to be formally summoned to the investigative hearing.

It offends both logic and fairness for the Commission to spend, as it does, several pages of its Answer Brief discussing other allegations and charges that were not part of its "Notice of Formal Proceedings" on which the Findings of Fact, Conclusions of Law and Recommendation were based. Although the Commission may not have intended it that way, it would put Judge DeFoor at a severe disadvantage to have to defend himself now against matters with which he was not charged.

It is manifest, nonetheless, that the Commission, and not Judge DeFoor, now seeks to avoid the effect of the stipulation between the parties, which stipulation makes it clear that Judge DeFoor shall have the right to present such additional facts as he believes the Commission should reasonably and necessarily consider. Judge DeFoor exercised that right by filing the Supplement to Evidentiary Stipulation (A. 4) (Appendix to Respondent's Initial Brief).

In these proceedings Judge DeFoor has now exercised another one of his rights - - his right of appeal.

ARGUMENT

THIS COURT SHOULD REJECT, IN WHOLE OR IN PART, THE RECOMMENDATION OF THE COMMISSION.

COUNT I

If the Commission read anything in Judge DeFoor's Initial Brief which suggested that Judge DeFoor had done nothing wrong insofar as the matters charged under Count I are concerned, then the Commission has misread the brief.

It is undisputed that Judge DeFoor gave into the temptation of openly and publicly supporting certain candidates for public office because (a) of his degree of closeness to the particular candidates in question; and (b) because of his strong desire to improve the system of the administration of justice in Monroe County. When right out of law school Judge DeFoor went to work in the Public Defender's Office in Monroe County, he found the pervasive attitude among lawyers, judges and the general public to be that there were two kinds of law, "Conch law" and "Florida law." One can draw a clear inference from the juxtaposition of those terms. As a Public Defender, then Assistant State Attorney, then County Judge, Judge DeFoor felt first hand the frustration of practicing and serving within such a system.

Perhaps, a more seasoned jurist would not have yielded to the temptation of wanting to help put qualified candidates in office. He was wrong and must accept the consequences of his act.

However, it is a basic tenet of our system of laws that punishment should be compatible with the dictates of justice. Those dictates are shaped and molded by the motivation, experience and age of the person whom we seek to punish.

However, what the Commission seeks (or implies that the Court should do) in its Answer Brief is the equivalent of condemning Judge DeFoor to "judicial death." It is respectfully submitted that the circumstances do not warrant it. He is, as observed by the Commission in its own Findings of Fact, Conclusions of Law and Recommendation, contrite and unlikely to repeat his act.

If, in the judgment of this Court, his act is so grievous that it warrants a formal reprimand, then Judge DeFoor will accept that punishment with grace and remorse.

COUNT II

None of the acts charged under Count II were allegedly committed by Judge DeFoor until after he had requested and received an advisory opinion from the Committee on the Standards of Conduct Governing Judges (hereinafter "Committee"). The obvious question presented is: Would Judge DeFoor have invested in the corporation that developed the electronic leash device but for the Committee's opinion? The equally obvious answer to this sine qua non is, "No."

The Committee's opinion (A. 8) (Appendix to Respondent's Initial Brief) stated in pertinent part:

> This device is, of course, useful to the criminal justice system in that it provides a measure of confinement without the expense of housing and feeding prisoners. The

> use of such a device is particularly attractive in an era of federally mandated jail caps and court orders ordering the release of defendants . . . of the eight members of the Committee on Standards of Conduct Governing Judges who responded to your inquiry, all were generally of the opinion that you could enjoy the financial fruits of your endeavors but not without problems . . . that member went on to state that he would encourage you to continue your involvement in the development and marketing of the security device, but would stress that such marketing should not be undertaken within the confines of your jurisdiction. In the alternative, he suggested that if the marketing is to be undertaken within your jurisdiction you should refrain from handling any criminal division cases.

(Emphasis supplied).

In its Answer Brief, the Commission points out that the Committee's opinion does not mention "media coverage" and how, if at all, it should be treated by Judge DeFoor. However, the letter from Judge DeFoor which prompted the Committee's opinion (A. 6) (Appendix to Reply to Respondent's Response to Order to Show Cause and Answer Brief of Commission) enclosed a copy of a media letter which was sent to the Committee along with Judge DeFoor's request for the opinion. Judge DeFoor's letter with the enclosed media letter was Exhibit "P" to the Evidentiary Stipulation filed by the parties in this case. (A. 3) (Appendix to Respondent's Initial Brief).

In other words, the Committee, when it gave its opinion, was presumably aware of Judge DeFoor's intended use of media coverage of the device which he planned to help market.

The Commission also argues that Judge DeFoor "misrepresented" his financial obligations when he testified at the Rule 6B hearing on July 26, 1985. It defies reasoning for Judge DeFoor to have done what the Commission suggests

that he did. In the first place, even before the Rule 6B hearing, he had acknowledged to the Commission's counsel that he felt that both he and his wife were obligated as personal guarantors of the line of credit of the corporation that developed the electronic leash device. What could Judge DeFoor have possibly gained by testifying, as he did at the Rule 6B hearing, that based upon a letter from his accountant neither he nor his wife appeared to be personally liable? Certainly, the information necessary to determine the truth of that statement was at all times available to the Commission. In fact, it was not until the parties convened to prepare their Evidentiary Stipulation (A. 3) (Appendix to Respondent's Initial Brief) that Judge DeFoor actually ascertained, upon review of the document itself, the nature of the obligation - - he was personally obligated but his wife was not.

Here again, it is grossly unfair to accuse Judge DeFoor of having "misrepresented" the nature of his obligation under the guarantee when counsel for the Commission knew that it was not until the time that the Evidentiary Stipulation was actually drafted that the fact of Judge DeFoor's personal obligation was dispositively established between the parties.

Accordingly, it is respectfully submitted that this Court should reject the recommended action by the Commission with respect to Count II.

COUNT III

Rule 6.156 of the Florida Rules of Practice and Procedure for Traffic Courts (hereinafter the "Rules") established a committee which is known as the Traffic Court Review Committee. It is from that Committee that Judge DeFoor

requested an opinion concerning his use of the withhold adjudication procedure.[1] The authority and jurisdiction of the Traffic Court Review Committee is set forth in subparagraph (d) of Rule 6.156 which states in pertinent part:

> (d) The Committee shall meet at least once annually on the call of the Chairman and such other times as the Chairman or the Supreme Court may direct. All matters or complaints concerning the administration of these rules by traffic courts shall be considered by the Committee. Any continued or willful violation or evasion of the rules by a judge, official, clerk or other court personnel shall be brought to the attention of the Supreme Court. If the Supreme Court deems it proper, a contempt proceeding may be initiated against the judge, official, clerk or other court personnel . . . .

(Emphasis supplied).

The provision of this rule makes at least two things abundantly clear: (a) it is the Traffic Court Review Committee which is vested by this Court with the authority to determine whether a judge has violated or evaded the Florida Rules for Traffic Courts (as the Commission argues that Judge DeFoor has done); and (b) the parameters of that determination are limited to "any continued or willful violation or evasion of the rules."

The sanctions to be imposed against a judge found to have violated those rules are likewise set forth under Rule 6.156(d).

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[1] The Initial Brief filed by Judge DeFoor incorrectly states that he had obtained approval from the Traffic Court Review Committee prior to implementing the withhold adjudication procedure. In fact, Judge DeFoor had used that procedure a few months before he obtained the Committee's opinion. Judge DeFoor, through his undersigned counsel, apologizes for that error.

Even if the Commission had the jurisdiction to punish Judge DeFoor for misapprehending or misapplying the Florida Rules for Traffic Courts, it is nevertheless clear that the Commission has applied the wrong standard, to wit: that Judge DeFoor "knew or should have known" that his use of the "Waiver Information" form (A. 6) (Appendix to Respondent's Initial Brief) contravened Rule 6.340 of the Rules. It is clearly contemplated by the provision of Rule 6.156(d) that only "continued" or "willful" violations shall be addressed. In other words, a mere error in the application of these rules, absent a finding of bad faith, does not warrant the imposition of sanctions against the judge under Rule 6.156(d). It follows that such conduct also does not constitute a violation of the judicial canons.

One other point made by the Commission in its Answer Brief merits some explanation. In footnote 5 at page 35 of its Answer Brief, counsel for the Commission suggests that there is no proof that the "Waiver Information" form was used by any other judge in Monroe County besides Judge DeFoor.

This is an incredible position taken by the Commission and its counsel, who know that it was the practice of the Clerk's Office in Key West to use the "Waiver Information" form to accept guilty and nolo contendere pleas from persons charged with traffic violations. In fact, the form was still in use as of November 21, 1985 when Tom Long, Court Executive of the Sixteenth Judicial Circuit of Florida, wrote his memorandum to Judge DeFoor (A. 7) (Appendix to Respondent's Initial Brief) wherein he stated:

> Per your request, I have checked into the practice of using a waiver information form to accept guilty and nolo contendre pleas by mail from persons that are charged with a traffic citation. I have found that this form is currently used by the Clerk's Office in Key West to accept such pleas by mail. I have been undetermined

> when this form was developed. However, it appears as though this practice has been in existence for some time. I have not seen any correspondence from this office or from the Clerk of the Court recommending that this form not be used in citation type cases. Therefore, it appears as though the use of this form has been standard practice in this Circuit for some time . . .

(Emphasis supplied).

Accordingly, it is respectfully submitted that this Court should reject the recommended action by the Commission with respect to Count III.

CONCLUSION

Judge DeFoor is a young, competent jurist. He works hard at his bench. He shares his time and his knowledge with his colleagues in one CLE program after another. He is kind and respectful. He is human. If there is a fault to be identified here, it is one of over-zealousness in the name of improving the administration of justice. He tread in the political arena where he should not have. He acknowledges his error. He is sorry. And he has already been taken to the judicial woodshed.

This issue here is one of fundamental fairness. Indeed, the maxim "let the punishment fit the crime" was never more apropos.

WE HEREBY CERTIFY that a true copy hereof was this 29th day of April, 1986, mailed to JOHN S. RAWLS, General Counsel, Florida Judicial Qualifications Commission, The Historic Capitol, Room 102, Tallahassee, Florida 32301; ALBERT G. CARUANA, ESQ., Wright & Caruana, P.A., Roberts Building, Suite 1000, 28 West Flagler Street, Miami, Florida 33130 and JAMES T.

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