State of Arizona

COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 10-007

Complainant: No. 1266910810A

Judge: No. 1266910810B

ORDER

A county attorney's office claimed that a superior court commissioner had established a pattern of ruling contrary to the rules of criminal procedure by frequently granting summary judgments that are not subject to appeal. The commission reviewed the matter and found no evidence of ethical misconduct on the part of the commissioner. Accordingly, the complaint is dismissed pursuant to Rules 16(b) and 23.

Dated: June 14, 2010.

FOR THE COMMISSION

\s\ Keith Stott
Executive Director

Copies of this order were mailed
to the complainant and the judge
on June 14, 2010.

This order may not be used as a basis for disqualification of a judge.

2010-007

JAN 07 2010

Maricopa County Attorney

ANDREW P. THOMAS

301 W. JEFFERSON, SUITE 800
PHOENIX, AZ 85003
www.maricopacountyattorney.org

PH. (602) 506-3411
TDD (602) 506-4352
FAX (602) 506-8102

January 4, 2010

Commission on Judicial Conduct
1501 W. Washington Street, Suite 229
Phoenix, AZ 85007

Re: Commissioner

It has been brought to my attention that , a commissioner of the Maricopa County Superior Court, has engaged in conduct warranting a referral to the Commission on Judicial Conduct. This letter is written after a review and recommendation by the Maricopa County Attorney's Office Ethics Committee. It is the conclusion of the Maricopa County Attorney's Office that Comm. conduct in these matters may have violated the Code of Judicial Conduct and should be investigated by the Commission.

Set forth below are four cases in which Comm. granted directed verdicts for defendants under Rule 20, Ariz.R.Crim.P. Although a judge's rulings are not usually grounds for discipline, these rulings show a pattern of conduct in which he chose to preempt trials, rather than allowing empaneled jurors to weigh the evidence, to the benefit of the defendant in each case.[1] Directed verdicts are highly unusual in criminal jury trials, so the number and frequency of Comm. rulings drew attention to his conduct (four directed verdicts between October 2, 2007 and September 2, 2009.) What elevated this conduct to the level of a judicial complaint was that, in the four cases discussed herein, Comm. basis for precluding jury review deviated noticeably from the legal standard required by Arizona case law.

---

[1] A directed verdict is an acquittal of the criminal charges. The State/victim has no opportunity to appeal.

State v. Bauch, CR2006-_____

On March 20, 2006, a witness observed defendant Kevin Michael Bauch driving his personal truck hauling a box trailer attempt to enter a private housing community through the exit only gate. Defendant's truck and trailer hit the exit gate arms while closing, and defendant made no attempt to stop and sped away. The witness, Steven Bigelow, followed defendant to a home in the community and watched defendant pick up his child. Mr. Bigelow took down defendant's license plate number and gave the information to police. The homeowner's association spent $2,597.65 to repair the gate. Mr. Bigelow was president of the HOA.

Defendant was indicted on July 10, 2007, on one count of criminal damage, a class 5 felony. A jury trial was set for January 14, 2008, before Comm. Deputy County Attorney Mark White represented the State, and Sarah Lane represented defendant. The morning of trial, Comm. met with counsel and defendant and discussed the possibility of settlement. The State initially had offered defendant a plea to a class 6 open, which would be designated a misdemeanor upon payment of restitution. The court asked the prosecutor to present what the State's case would be at trial, and the prosecutor explained that Mr. Bigelow would testify that he saw defendant drive through the exit gate, damaging the gate. Mr. Bigelow also would testify as to the amount of damages.

Comm. clarified that the prosecutor would need supervisory approval to re-extend the plea offer, then addressed the defendant: "See, sir, my concern is that if you go to trial, you're going to be found guilty of a Class 5 felony and you're going to have a felony on your record. A Class 6 undesignated felony is not great, but the benefit to you is that if you successfully complete probation, you can earn a misdemeanor." R.T. at 12. When the issue of restitution was raised, defendant said he could not pay it immediately but could probably pay it within two months. The court continued:

> I don't want you to have a felony on your record. And I certainly understand — look, this is absolutely not the crime of the century. You know, in your mind it may have been an accident. I'm just afraid that the jury is going to find that, you know, going into the wrong gate was sort of a reckless act, and that's really all it's going to take them to find you guilty.

> And so I'm concerned that in my opinion it's very possible that they would find you guilty and then you would have — if you think that you could pay off within a couple of months, you know, what I would be willing to do if they can reextend the six open, is I would place you on probation, usually for about a year; but then I could set a status conference and if you will be able to pay it off early, I would be inclined then to designate it a misdemeanor and terminate your probation early.
>
> Because I think that the only issue right here is that the homeowner's association, you know, had to pay for this and they want to be reimbursed for their damages. So if that's something that you could still arrange, do you think that that's something that you would be interested in?

R.T. at 13-14. Defendant responded that he would consider the offer, and Comm. asked the prosecutor to contact his supervisors. When Mr. White returned, he said that the supervisors had rejected reoffering the original plea, but they may be amenable to a harsher plea. When court resumed after lunch, Mr. White said that the State had followed up with two additional offers: one was a class 6 designated, and the second was a class 6 undesignated with 48 hours jail. The defendant rejected both offers. A jury was then empaneled.

Trial continued on January 15, 2008, and Mr. Bigelow testified for the State. After the State rested, defense counsel moved for a judgment of acquittal under Rule 20. The court granted the motion and made the following findings in the January 15 minute entry:

> To conclude that an action was recklessly performed requires showing of the following: That a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such a nature and degree that the disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.
>
> Reckless conduct is a species of unintentional conduct. It does share some elements in common with ordinary or civil neg-

ligence. However, it is clear to this Court that the terms consciously disregards, substantial and gross deviation are suggestions that the legislature did not intend to criminalize acts or omissions amounting to no more than civil negligence.

While inadvertence is sufficient to constitute civil negligence, recklessness requires that a person be aware of and consciously disregard risk his conduct as created.

Now, in this particular case the State has produced Mr. Bigelow to testify. I found that he was a very credible witness and I appreciated his candor. He testified that he observed a truck driven by the defendant enter into the exit gate. He also observed the defendant picking up his child from the childcare provider and leaving the complex. As certainly Mr. Bigelow's right, he elected not to confront the defendant about the damage to the gate, but just provided the police with the necessary information as to locate this person.

It is clear to this Court that a gross deviation of acceptable behavior required for criminal recklessness must be markedly greater than mere inadvertence or heedlessness sufficient for negligence. In this particular case the State was required to prove that the defendant consciously disregarded a substantial and unjustifiable risk that the result will occur or that the circumstance exists.

In this case it's clear the defendant was trying to enter into the community to pickup his child. I think it is significant that the vehicle he was driving was actually a work vehicle. His decision to enter through the exit gate led to the damage of the gate.

However, this was not a case of the defendant engaging in an inherently dangerous activity or using an inherently dangerous instrumentality. The State did not show recklessness on the part of the defendant. This is a civil matter.

> As a result, the Court does not believe the State has met its burden, and is granting the Rule 20 Motion for Judgment of Acquittal.

Language in Comm. minute entry was taken almost verbatim and without attribution from *In re William G.*, 192 Ariz. 208, 963 P.2d 287 (App. 1997), in which an adjudication of delinquency for criminal damage was reversed.

This is perhaps the most egregious of the four cases, because Comm. stated on the record before trial that he was concerned the jury would find defendant guilty. He then tried to get the State to re-offer a favorable plea, which defendant rejected. The State's case included witness Steven Bigelow testifying that he saw defendant damage the gate by entering through the exit. Because that could be considered reckless conduct, the jury should have been allowed to reach a verdict. Instead, Comm. improperly took the decision away from the jury and granted the Rule 20 motion. In addition, the fact that Comm. had the language from *William G.* tends to show that he had already made up his mind as to how he would rule regardless of the evidence presented. It was not for the court to determine that the case was a "civil matter."

State v. Meier, CR2007-_____

Aaron James Meier was charged with forgery, a class 4 felony. He rejected a plea to possession of a forgery device, class 6 undesignated. After a jury was empaneled the preceding day, trial began on October 2, 2007. Daniel Hernacki represented the State, and Deputy Public Defender Vanessa Smith represented defendant. The State was required to prove that defendant presented a forged instrument with intent to defraud.

During her opening statement, Ms. Smith said defendant was hired by a man named Nathan to help clear a field. When Nathan opened his wallet to pay him, defendant saw cash and checks. Defendant asked to be paid in cash, but Nathan refused and wrote a check for $100, signing it "Nathan Farley." The check was drawn on Bank of America, so defendant took it to the branch at 16th Street and Osborn. When he tried to cash it, the teller determined it was forged and contacted police.

The State called Mr. Farley, who testified that he had not signed the check or given it to defendant. The State then called the bank teller, Raquel Marquez. She testified that defendant presented the check and his I.D., but looked "a little jittery." When she started looking through the check, defendant told her to call the check owner because he did not think the check was good. She said this occurred about four minutes after he gave her the check. Ms. Marquez stated that the signatures did not match, and when she called Mr. Farley, he said he did not know defendant. The police were then contacted.

The State called Micah Kaskavage, one of the officers who responded. He testified that he and Ofc. Rivera went with defendant to the field where defendant allegedly had worked. He said the field was mainly dirt with a lot of weeds, grass and trash. Ofc. Kaskavage stated that it did not look like three men had worked there for five hours. Testimony also was taken from Jacinta Rivera, the officer who interviewed defendant at the scene. She said he had been cooperative and relayed the story about getting the check from Nathan. She also said he did not look dirty or sweaty as if he had been doing yard work.

After the State rested, the court told the jury to take a break and asked defense counsel if she had a motion. She moved for a directed verdict and argued that the State had not proven intent to defraud. The prosecutor responded:

> There certainly has been evidence where Mr. Meier derived intent to defraud. First he didn't mention anything about the concern about the check until a few minutes had passed and it appeared to be — there appeared to be some problem with the check and then he said oh, yeah, I think there is something wrong with the check.
>
> There is evidence that he gave a story that is not plausible, that he was going to be paid $20 an hour along with two other men to clear a lot, and that the officers then went to the lot and his story didn't pan out.
>
> Everybody will concede and everybody will agree that his intent was to get money for that check, and the crux then is whether he had any information which he could reasonably believe that this was a forged check, and he did. He set — even the

> defense counsel argument was that he was concerned he had a bad gut instant, [sic] but he presented that check anyways, your Honor, he presented it to the teller asking for money, and then later on he came back and said well, maybe it's not a good check, maybe you should check.
>
> After you have already committed an act, you can't go back afterwards and say oh, wait a minute, I didn't know.

R.T. at 64-65. The court then granted the Rule 20 motion, finding:

> There is no substantial evidence that the defendant had the intent to defraud. It is uncontroverted from all the testimony, especially from Ms. Marquez, that at the four, five-minute mark or two, three-minute mark, before she mentioned anything about the check, he asked her to contact the owner to make sure it was a valid check.

R.T. at 65. Once again, substantial evidence existed here for the case to go to the jury. The jury could have weighed the testimony of the bank teller and the officers and determined whether or not defendant had the intent to defraud. Comm. erred in taking that decision from the jury.

State v. Hursey, CR2008-

On June 27, 2008, Shauntay Hursey and Jamhere Dean allegedly robbed a Circle K. They were indicted on July 10, 2008, on one count of armed robbery, a class 2 felony. According to the prosecutor, Hursey was wearing gloves and looking down during the incident. He and Dean went to the far end of the sales counter. Hursey stayed at that location and continued looking down. Dean walked behind the cashier, who was walking behind the counter. He racked his BB gun and pointed it at the victim and demanded money. During this time, Hursey paced in front of the counter and continued to look down. Dean demanded that the victim open the "lower drawer." She said there was none, and Hursey looked inside the drawer. He then walked to the front door and walked back to the counter. Dean took cash and two rolls of quarters. They sped away from the Circle K and were arrested later after a traffic stop. Phoenix Police Officer Camblin found the stolen money inside the center console and the BB gun hidden under the console.

The victim was brought to the scene, and she identified both individuals. The crime was captured on a clear videotape, and Hursey appeared to be helping to commit the robbery by acting as a lookout and outnumbering the clerk.

On September 30, 2008, Dean pleaded guilty to the charge. Hursey's jury trial began on February 25, 2009, before Comm. On February 26, counsel made opening statements. The State called the cashier from the Circle K, and she made an in-court identification of defendant. Officer Camblin testified, and the State rested. Defendant moved for a directed verdict under Rule 20. After argument was heard, the court recessed for about 20 minutes and then granted the motion. The minute entry stated:

> The Court, having reviewed the surveillance tape and the case submitted by Defense counsel regarding accomplice liability,
>
> THE COURT FINDS there is no substantial evidence presented by the State to warrant a conviction based on the accomplice liability statute.
>
> IT IS ORDERED granting the Defendant's Rule 20 motion and finding a Judgment of Acquittal.

Defendant had cited *State v. Noriega*, 187 Ariz. 282, 285, 928 P.2d 706, 709 (App. 1996). In *Noriega*, the court discussed the "mere presence doctrine" and concluded that in a prosecution for accomplice liability based on actual presence, the trial judge must give a mere presence instruction if requested. "Accomplice" is defined in A.R.S. § 13-301 as a person "who with the intent to promote or facilitate the commission of an offense: 1. Solicits or commands another person to commit the offense; or 2. Aids, counsels, agrees to aid or attempts to aid another person in planning or committing an offense. 3. Provides means or opportunity to another person to commit the offense."

The basis for Comm. ruling was that defendant's actions did not meet the level of aiding or attempting to aid, *e.g.*, the act of looking over the register was too brief to aid in the commission, and defendant was not a lookout because he was looking down. However, once again these were questions of fact for the jury. The jurors should have been able to weigh the evidence, including the

2010-007

surveillance tape, and determine whether or not Hursey aided in commission of the robbery.

State v. Driscoll, CR2008-_____

According to the probable cause statement in the complaint, on November 29, 2008, at approximately 2:00 a.m., Officers Burke and Coudret responded to a call of a trespasser. The officers arrived in uniform in a marked car. They contacted the subject, who was seated between two security guards, and ran a records check. The officers told defendant to stand up and said he had trespassed on the property. Ofc. Burke asked if he had any drugs or weapons on him, and defendant patted the outside of his pockets and said no. He then reached into his right pocket and withdrew a folding knife. The blade was clicked open as it left his pocket. Defendant brought the blade up and pointed it directly at Ofc. Burke, who was about three feet away. Ofc. Coudret, who was less than two feet away, grabbed defendant's right hand. Both officers yelled for defendant to drop the knife. Ofc. Burke had his weapon drawn. After several seconds of struggle, defendant dropped the knife and was taken to the ground. He put both hands on the front of his body and refused to bring them around to his back. The officers had to force his hands back to handcuff him. During this time, defendant produced a pen-sized X-Acto knife from an unknown location, which was knocked away in the struggle. The two security guards observed the incident.

Defendant was indicted on December 8, 2008, on Count 1, aggravated assault against Ofc. Coudret, a class 2 dangerous felony; Count 2, aggravated assault against Ofc. Burke; and Count 3, resisting arrest, a class 6 felony. The aggravated assaults were charged as intentionally placing the officers in "reasonable apprehension of imminent physical injury," in violation of A.R.S. § 13-1203, § 13-1204, and other statutes. Under § 13-604(U), a person must receive at least the presumptive sentence for aggravated assault on a peace officer (10.5 years).

On August 25, 2009, the case was placed before Comm. for jury trial. The State began its case on August 31 and continued the following day. Both officers testified. After the State rested, defendant made a Rule 20 motion, and the court took the matter under advisement. On September 2, Comm. denied the motion as to Count 3, stating in the minute entry: "The Court has carefully considered the argument from both sides with regard to Count Three, and the testimony was very clear from Officer Burke that initially Mr. Driscoll tucked his arm

underneath him to make it difficult for them to affect the arrest. But then when his arm was pulled away, he then used additional force to try and put his arm back underneath him, and I think that is an issue of fact for the jury to determine." The court granted the motion as to Counts 1 and 2:

> For both Counts one and two, it is charged that Timothy James Driscoll, on or about the 29th day of November, 2008, using a knife, a deadly weapon or dangerous instrument, intentionally placed Brian Burke and Jacob Coudret in reasonable apprehension of imminent physical injury.
>
> In this particular case, I think that the testimony of both officers was extremely credible. They each had a clear recollection of what occurred and it was remarkably consistent.
>
> The testimony of the two security officers, who called the police officers, were remarkably consistent as well.
>
> All four of the witnesses who testified for the State, who were there at the time that the incident occurred, indicated that the defendant was asked to stand up, he was asked if he had any weapons, and that he made a motion patting that he didn't have any, but then he reached into a pocket and he pulled out a knife. It's undisputed that the knife clicked open. And frankly, it's undisputed that the knife was pointing at Officer Burke approximately five to six feet away from Officer Burke.
>
> Officer Coudret indicated that he heard the click. He was aware of what that might be because he owned a similar type of knife. He then almost instantaneously, saw the knife and immediately and frankly heroically took the risk and took the defendant down to the ground and disarmed him. His immediate thinking probably saved Mr. Driscoll's life because I think Officer Burke was justified in pulling his sidearm and I think there's a real chance that Mr. Driscoll would have been justifiably shot and killed if he had made any movement towards either of the two officers.

> But here's where I agonize and here's the problem, both officers were perfectly honest and they said that Mr. Driscoll made no movement in any direction towards them, that the quick thinking of Officer Coudret was so fast that he didn't have the ability to move.
>
> The security officers, who witnessed this, both agree that there was no movement towards Officer Burke by the defendant.
>
> The way aggravated assault is charged in this case, the State has to prove that he intentionally tried to place the officers in imminent fear of physical injury. I have absolutely no doubt that both officers were in fear for their safety, as they should have been, that's undisputable. I have no doubt that they both behaved professionally. Officer Coudret I think behaved heroically and I think Officer Burke did a good job as well. Under the law, there has to be evidence that a reasonable person can think that the defendant intentionally placed them in fear. I don't see any evidence that he intentionally placed them in fear. I know they were placed in fear that's not in dispute, but because he had no time to make any motion towards the officers, I don't see any intent. Unfortunately, in following the law, I'm going to have to grant the motion for Rule 20 on Counts One and Two.

The court dismissed Counts 1 and 2 with prejudice, and the prosecutor moved to reconsider. After a recess was taken, the court stated the previous ruling would stand. Defendant then said he wanted to plead guilty to Count 3. Counsel for the State objected, but the court stated that defendant had the right to plead guilty at any time. The court proceeded with the change of plea. Defendant also acknowledged the existence of a prior aggravated assault conviction from 1995. On October 27, 2009, defendant was sentenced to 1.5 years in DOC.

Comm. said he did not see any intent because defendant did not make any motion toward the officers with the knife. However, one could infer that just pulling the knife showed the required intent. The aggravated assault statute does not require any particular "motion" toward the victim. Therefore, whether defendant intentionally placed the officers in fear was a question that should have been determined by the jury rather than the court.

2010-007

Analysis

Under Rule 20, a court is "required to enter the judgment of acquittal if no substantial evidence warranted conviction. . . . '"Substantial evidence" is evidence that reasonable persons could accept as adequate and sufficient to support a conclusion of the defendant's guilt beyond a reasonable doubt.' *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). **When reasonable minds may differ on inferences drawn from the facts, the case must be submitted to the jury, and the trial judge has no discretion to enter a judgment of acquittal.**" *State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997) (emphasis added). "Where the evidence discloses facts from which the jury could legitimately deduce either of two conclusions, it is sufficient to overcome a motion for acquittal." *State v. Garcia*, 138 Ariz. 211, 214-215, 673 P.2d 955, 958-959 (App. 1983). "[T]he credibility of the witnesses and the weight to be given to their testimony is to be determined by the trial jury and not by the trial judge when the case is tried before a jury." *State v. Just*, 138 Ariz. 534, 545, 675 P.2d 1353, 1364 (App. 1983).

In *State v. Nelson*, 129 Ariz. 582, 633 P.2d 391 (1981), Nelson was McLoughlin's accomplice in a robbery and murder. He argued on appeal that the trial court should have granted his motion for directed verdict. However, the evidence showed that witnesses saw a pickup truck "take off" after McLoughlin ran out of the liquor store and jumped into the passenger side. Shortly thereafter, a police officer saw Nelson and McLoughlin drive past the crime scene "scrunched down" in their seats. "These facts could lead a reasonable mind to infer that appellant was the driver of the pickup that fled the crime scene and that he was an active participant in the crime. Therefore, the trial court was under no duty to direct a verdict of acquittal and properly denied appellant's motion." *Id.* at 587, 633 P.2d at 396.

In each of the above cases in which Comm. ruled, the State presented credible witnesses to the charged offenses. Substantial evidence clearly existed. Even if reasonable minds could differ on inferences drawn from the facts — such as whether a defendant had the required intent — the case had to go to the jury. Therefore, Comm. abused his discretion when he acquitted these defendants. The State is at a particular disadvantage here, because such erroneous rulings cannot be appealed.

Rule 2.2, Ariz. Code of Judicial Conduct, states: "A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." Comment 3 to the rule states: "A good faith error of fact or law does not violate this rule. However, a pattern of legal error or an intentional disregard of the law may constitute misconduct." These cases represent a pattern of error. The Ethics Committee, which is comprised of veteran prosecutors, finds the number of Rule 20 acquittals here highly unusual. Directed verdicts in criminal jury trials are rare, because they are warranted only when *no* substantial evidence exists. In the *Bauch* case, Comm. actually stated that he was afraid the jury would convict. His motive in the other cases is less clear, but his conduct prevented the juries from considering whether defendants were guilty of serious crimes. Rule 20 cannot be used to allow defendants to avoid potentially adverse verdicts. The State, just like the defendant, is entitled to have a jury weigh the evidence in a criminal case.

Therefore, I respectfully request that the Commission investigate this matter and take whatever action it deems appropriate. If you have any questions or need additional information, please feel free to contact me at , or Barbara Marshall, Ethics Committee Chair, at .

Sincerely,

cc: Barbara Marshall, Chair, MCAO Ethics Commitee