

State of Arizona
COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 12-029

Complainant: David Osterfeld

Judge: Michael Lester

ORDER

The complainant alleged Judge Lester acted improperly in handling a criminal case. After reviewing the judge's response, the commission finds that the judge violated the Code of Judicial Conduct in this case.

Rule 1.2 of the Code requires judges to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." Rule 2.2 similarly requires judges to perform all judicial duties fairly and impartially. Finally, Rule 2.3 prohibits a judge from exhibiting bias or prejudice.

In this case, Judge Lester made an improper statement while accepting a plea suggesting that he endorsed the criminal conduct for which the defendant was pleading guilty. The judge's statement undermines the rule of law and also gave the appearance that the judge lacked impartiality.

Accordingly, the judge is hereby reprimanded for his conduct pursuant to Rule 17(a), and the record in this case, consisting of the complaint, the judge's response, and this order, shall be made public as required by Rule 9(a).

Dated: June 1, 2012,

FOR THE COMMISSION

Louis Frank Dominguez
Commission Chair

Copies of this order were mailed to the complainant and the judge on June 1, 2012.

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

Complaint Against a Judge

In the matter CR2011-0477

On September 6, 2011, Steven Riddle (Defendant) punched me in the face with a closed fist on the Watson Road off-ramp of the I-10 freeway in Buckeye, Arizona. After the assault, Defendant fled the scene of the crime and I reported the criminal act. The Buckeye Police Department investigated the matter and cited Defendant for the criminal act of assault. The State of Arizona charged Defendant with assault. When I reported the crime, I asked that the criminal justice system observe my rights as a victim of crime pursuant to the guarantees afforded that status under Article II, Section 2.1 of the Arizona Constitution and A.R.S. § 13-4401 *et seq.*

I attended Defendant's initial appearance scheduled for October 11, 2011. On that day, I met the prosecutor, Manny Bustamante, and asked to address the court. Mr. Bustamante told me that that was not the appropriate time to do so and did not present me to the court during his appearance. Mr. Bustamante advised me that the state could offer Defendant a plea agreement of just over \$600 dollars with no other conditions, or it could reduce the fine and recommend that Defendant complete anger management counseling/therapy. I told Mr. Bustamante that I believed money would not help solve the problem—that Defendant should instead receive anger management counseling. Mr. Bustamante agreed that he would pursue anger management counseling as a condition for any plea / sentence.

On the state's assurance that I would be notified of all future hearing dates and would be given the opportunity to provide an impact statement to the court as allowed under A.R.S. 13-4401 *et. seq.*, I did not attend the next two pre-trial hearing dates of November 2 and November 16, 2011. On November 22, 2011, I called Mr. Bustamante's office to learn of the outcome of the pre-trial hearing held on November 16, 2011. To my surprise I learned that the matter had pled and that the court had sentenced Defendant to simply pay a fine for a conviction for disorderly conduct, with no anger management treatment required or imposed. I obtained an audio recording of the sentencing hearing. A copy of that recording is attached to this report.

The recording shows that the Hon. Michael Lester failed to seek any statement or presentation from the state on the victim's position as to the recommended plea, that the state can not be heard offering any information to the court, and that the court heard its factual basis solely from Defendant.

What is more, it appears that the Hon. Michael Lester: (1) stated that although he probably shouldn't say so, he had no problem with Defendant's admitted actions of hitting the victim; (2) advised Defendant that he might have a provocation defense; (3) advised Defendant whether the charge would interfere with Defendant's status as a commercial truck driver, and (4) advised Defendant of the method in which Defendant could get the conviction set aside.

As a note: The Defendant appears to say that he wished he would have ^{to the judge} hit me harder and the judge laughs. Finally, the defendant was found guilty of assault after I filed a request for re-examination by a different judge.

Buckeye Magistrate Court

100 N. Apache Rd., Suite C1 • Buckeye, Arizona 85326
(623) 349-6510 • Fax (623) 349-6511

APR 19 2012

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

Re: Response to Complaint (Case No. 12-029)

Dear Commission Members:

Please accept this letter and attachments per your request for a formal response to the claim by a victim that there were irregularities in my overall management of a guilty plea proceeding in the Buckeye Magistrate Court.

For the reasons that follow, I respectfully submit that the claim is without merit as it pertains to my ethical conduct and the complaint should be dismissed as groundless. I offer this letter, as you know from my file history, as a judge who has served the State of Arizona for some 35 years, during which tenure my conduct has been honorable, competent, and fully consistent with the highest measure of professional and ethical behavior.

It must be emphasized that any aspect of the proceedings that resulted in the victim perceiving that any victim's rights were not fully protected was unintended and, at most, completely procedural in nature. Presiding over full dockets involves coordinating staff, prosecutors, defense attorneys, defendants, victims, members of the public, and law enforcement. It is inherent in the process of adjudicating a large number of cases in one session, that the court is presented with pleas, motions, and proposed orders where the prosecutors have, by long standing practice, waived their presence. When the papers presented to the court appear to be properly prepared and ready for judicial review and action, the case is processed. Consistent with the rules, the court always is alert to a notation or comment from the prosecution that a victim wishes to be heard. In this case, when I was provided a written plea, there were no other indications that the court could not conduct a change of plea as normally done.

When the issue arose to the terms of sentence with regard to victim input, the matter was brought to the court's attention, and immediately set for hearing. At the conclusion of the hearing the proceedings were fully restored to the prior status quo and ALL rights of both the defendant and the victim were given full recognition. There was no prejudice to any party or victim at any time. As you know, the case was finally resolved with another guilty plea.

I did not respond to the letter dated December 16, 2011 from a compliance officer at the Attorney General's Office. The letter only indicated that it "appeared" the court did not seek information from the prosecutor regarding the victims' input, and I had already concluded a hearing regarding this issue on December 13, 2011.

I have attached a more detailed fact statement to the victim's allegations that I failed to seek a victims impact statement and that I made inappropriate comments during a plea proceeding. Also enclosed is a recording of the hearing held on December 13, 2011 regarding the victims' rights issue.

I trust this is helpful and provides the Commission with an adequate response. Please do not hesitate to let me know if I may provide additional information.

Submitted this 18th day of April, 2012.

Sincerely,

Michael Lester
Presiding Judge
Buckeye Magistrate Court

ML:je
Enclosures

BUCKAMANTE & KUFFNER, P.C.

Phone (602) 523-0234

910 West McDowell Road
Phoenix, Arizona 85007

Fax (602) 307-5608

BUCKEYE TOWN PROSECUTOR'S OFFICE

Dear Sir / Madame:

It is unfortunate to hear that you were a victim of a crime. To assist you in this matter we have enclosed an overview of the Procedural Steps in a Criminal Prosecution, a Misdemeanor Victim Rights Notification & Victim Impact Statement, and a list of Victim's Rights. An Arizona Emergency Resource List Brochure and a Domestic Violence Safety Plan Brochure are available at the Buckeye Magistrate Court located at 100 North Apache Road, Suite C. Please keep our office informed of any change of address and/or phone numbers. Failure to do so could result in conclusion of your rights as a victim.

Please fill out and return to our office the Misdemeanor Victim Rights Notification & Victim Impact Statement if you wish to invoke your rights and/or provide your views concerning plea negotiations and/or the appropriate sentence. Please mail or fax the Misdemeanor Victim Rights & Victim Impact Statement to our office. The charges against the defendant and the defendant's next court date are listed on this form. If you wish to confer with the prosecutor about the disposition of this case you may call our office to talk directly to a prosecutor. If we do not hear from you five days prior to the defendant's court date we will assume that you do not wish to exercise your right to confer with the prosecutor. **Please note a defendant may enter a plea agreement and be sentenced at any court proceeding.** Please be aware that the Misdemeanor Victim Rights Notification & Victim Impact Statement, with the exception of your contact information, may be submitted to the judge for his/her consideration in imposing sentence and may be disclosed to the defendant or defendant's attorney.

You have the right to appear at all court proceedings related to this case. However, you are only required to appear at trial or pre-trial hearings for which you will receive a separate letter or subpoena. When you appear in court please check in with the prosecutor upon arrival.

If you are requesting restitution (out of pocket losses incurred as a direct result of the crime) you must provide copies of the bills or receipts and/or written estimates of your losses. Please note that all information must reach this office no later than two days prior to the defendant's scheduled court appearance. If you fail to provide restitution information to our office prior to the defendant's sentencing you may waive your right to restitution through this criminal proceeding.

If you have any questions or concerns regarding this case, the procedures involved, or the information provided please do not hesitate to contact us. Your cooperation in this matter is greatly appreciated.

Sincerely,

Manny Bustamante & Alan Kuffner

Manny Bustamante and Alan Kuffner
Buckeye Town Prosecutors

PROCEDURAL STEPS IN A CRIMINAL PROSECUTION

Initial Appearance: At the initial appearance, the defendant makes his first appearance in front of a judge. If the defendant is arrested and held in custody, this hearing should take place within 24 hours of his/her arrest. If the defendant is cited or served with a summons to appear, the initial appearance will be set on the citation or, if the defendant is charged by long form complaint, on a summons. At the initial appearance, the judge informs the defendant what the charges are against him/her. The judge will also determine the conditions of release that will apply to the defendant while the case is pending resolution. These conditions may include release on his/her own recognizance, release to a third party; or release after posting a bond to secure his/her appearance at future court proceedings. The judge also may impose additional conditions to protect society and/or the victim. For example, the court may require that the defendant not return to your address or contact you in any way.

Arraignment: This hearing should be set no later than ten days after the initial appearance. Usually, it takes place at the same time as the initial appearance. At the arraignment, the defendant appears before the judge and enters a plea of either guilty, not guilty or no contest. The judge will set a date for a pre-trial conference and may also consider modifications to conditions of release.

Change of Plea: This is a proceeding at which a defendant changes his plea from not guilty to guilty or no contest. Usually, the change of plea is a result of a plea agreement. A change of plea can occur at anytime including the Initial Appearance, Arraignment, or Pre-Trial Conference.

Pre-Trial Conference: This proceeding is usually scheduled for approximately four to six weeks after the arraignment. At this hearing, the state will usually make a plea offer to the defendant. A plea offer includes what offense(s) the defendant will admit to committing and what sentence or range of sentence he will be exposed to. It may include provisions for jail, a fine, probation, counseling and/or restitution. The defendant may plead guilty pursuant to a plea agreement at the pre-trial conference. There may be one or more pre-trial conferences while the State and the defendant negotiate a plea agreement or some other case disposition. Because this is a misdemeanor case, the court will usually sentence the defendant right after the guilty plea.

Trial: If the case is not resolved at a pre-trial conference, it will be set for trial. A trial may be before a judge or a jury depending on the type of charge involved in the case. A trial is held to determine the guilt or innocence of the accused. To find the defendant guilty, the judge/jury must conclude that the state has proven its case beyond a reasonable doubt. Your testimony will be essential for the judge or jury to make that determination. At trial, you will swear or affirm to tell the truth, and you will testify about the facts of the crime. A prosecutor will ask questions, and then the defendant or his attorney may ask you questions. The State may present other witnesses, such as officers or other civilian witnesses. Once the State is finished presenting witnesses, the defendant has an opportunity to testify or present witnesses on his behalf. After the defense presents its case, the State may present any rebuttal evidence it has. After all of the evidence is presented, both the prosecutor and the defendant have a chance to present closing arguments to the judge/jury. The judge/jury then deliberates until they reach a verdict about the defendant's guilt.

If the judge/jury finds the defendant guilty the court will usually sentence the defendant immediately. If the judge/jury finds the defendant not guilty, the case is over and the State cannot appeal the judgment.

Sentencing: Once the defendant has either pled guilty or has been found guilty, he will be sentenced. At sentencing, you have the right to tell the judge what sentence you believe the defendant should receive. You may also tell the judge about the impact the defendant's actions have had on you or your family such as any injuries, mental anguish, emotional distress or economic loss. Among the terms of sentence that a court may impose are the following: jail, a fine, probation, counseling, community service hours and/or restitution.

Restitution: If you have out-of-pocket expenses that are the direct result of the defendant's criminal action, you may be entitled to restitution. Restitution can cover such items as medical expenses, loss of work because of the injury caused by the defendant, property damage, insurance deductibles, etc. Restitution does not cover damages such as pain and suffering. If you feel that you are entitled to restitution you will need to provide proof of the amount of the loss to the Prosecutor's Office on or before the defendant's sentencing date. Proof may be in the form of receipts, estimates or any other information which establishes the amount of the loss. Please be advised failure to provide this information in a timely fashion will result in you waiving your right to restitution through this criminal proceeding.

ALLETATION #1

Did I fail to seek a victim impact statement pursuant to ARS §13-4401 etc.

Initially, some background information about the process and procedure that the Buckeye Magistrate Court has in place are relevant to this inquiry.

After I was recruited by the Town of Buckeye to serve as presiding judge, one of the first things I did was to meet with the prosecutor Manny Bustamante and the court appointed counsel Stephen McClure to discuss any business process issues any of us may have with the court. I also then had meetings with Mr. Bustamante on issues that did not involve Mr. McClure's clients. One of the first issues I raised was; what business systems are in place in the Buckeye Magistrate Court that will give me satisfaction that victims' rights are being complied with. The issue of insuring victims' rights has always been very important to me. Shortly after I was appointed a judge in the Phoenix Municipal Court in 1977, Steve Twist, then Assistant Attorney General, was writing Rule 39. The Phoenix Municipal Court bench met with him to discuss how procedurally the rule would work in practice. I welcomed the rule, as I have always believed that victims should not be discounted by the criminal justice system.

Mr. Bustamante advised me that his office has drafted a letter for victims advising them of their rights in a criminal prosecution, advising them of the court processes, and attaching a misdemeanor victim rights notification and victim impact statement form. A copy is attached as exhibit A. That form is supplied to the Buckeye Police Department by the prosecutor, and standard police procedure is to give all victims of misdemeanor offenses a copy of the form.

On every court date, prior to entering the courtroom, people are first asked by staff if they are defendants. If they advise staff that they are a victim, they are told to check in with the prosecutor when they enter the courtroom. The prosecutor maintains a victim sign-in sheet and is always present for arraignments and pretrials, except for a few in-custody and out of custody arraignments set by the Maricopa County jail court judge. If those cases are victim type charges, I always enter a not guilty plea and set the case for a pretrial conference. It should also be noted that staff advises me prior to taking the bench that a victim is present, and I always advise victims that they have a right to be heard if the issue is release or modification of a release order. If it is a sentencing issue that the victim wants to discuss, I advise them of the next court date and inquire into whether or not they have the town prosecutors' information. They are also told that if it is a sentencing issue, the prosecutor will be discussing it with them prior to offering a plea agreement to the defendant. As a double check, prior to any in-custody defendant being brought into the courtroom, I ask if there are any victims present, and if so, if they want to address the court when the defendant's case is called.

As a part of the business process of the court, and to reduce interruption to plea discussions between the prosecutor and defendant, an agreement was reached that the prosecutor will advise me in every case when a victim is present, and additionally advise me that the victim does or does not want to address the court. I am comfortable with the professionalism of the prosecutor to the extent that I believe this process is always followed.

On Wednesday, November 16, 2011, in the normal flow of the pretrial conference docket, staff handed me the Steven Riddle file. I called the defendant to the bench, advised him of the terms of the plea agreement, and asked him if that was his understanding of the terms. I was not advised that a victim was present (victim was not present), or that there was a victim impact statement for my review. In fact, the victim in this case did not submit any written impact statement to the prosecutor. The pretrial conference was concluded when I accepted the defendant's plea of guilty to the plea agreement terms. Staff then processed the defendant.

On November 23, 2011 the victim filed a request for re-examination of the plea proceedings, and to provide him the opportunity to have input prior to sentencing. On that day I set his motion for hearing on December 13, 2011. Attached as Exhibit B, is an audio recording of the motion hearing. At the hearing on December 13, 2011, I made a ruling that the victims' rights were not violated, and that at most there may have been a misunderstanding between the victim and the prosecutor. However, pursuant to Rule 39 F3, I set aside the finding of guilty, and based upon the defendants request, reset the case for a non-jury trial. Pursuant to the victims' request, I recused myself and brought in a pro-tem judge for the January 10, 2012 trial date. On that date the defendant plead guilty to the court without a plea agreement, the victim was heard, and the defendant was sentenced by Pro-Tem Judge James Tinker.

Based on all of the above, I do not believe that the victims' rights were in any way violated.

ALLEGATION #2

Did I make inappropriate comments during a guilty plea proceeding.

After reviewing the audio recording of the plea proceeding, I do believe that it was certainly not one of my better pleas. I don't know if the defendant's comments regarding his "sob story" of the Chapter 13 Bankruptcy or the question regarding the surcharge (during which the defendant laughed) distracted me.

When the prosecutor waives his presence during guilty plea proceedings, I attempt to get a factual basis to accept the plea from the defendant. Mr. Riddle's factual statement was that a Jeep was following him very closely when he was on his motorcycle, the Jeep driver was honking his horn and flipping him off, and that Mr. Riddle tried to pull over to let the Jeep pass, only to have the Jeep driver continue to honk and flip him off. Then Mr. Riddle stopped and got off his motorcycle, walked back to the Jeep, and as the driver started to exit, Mr. Riddle hit him and then left.

I then made the statement that "I know I shouldn't say it, but I personally did not disagree with what you did." I know I had only heard one side of the story, but I am keenly aware of the danger cars pose to motorcycle riders, and I probably had a flashback regarding a close friend that was killed while riding his motorcycle. After the comment, I did go on to indicate that there was a factual basis for the plea, in other words, your actions did violate the law, and found the defendant guilty. My personal feelings did not interfere with the proper application of the facts to the law.

The alleged claim that an ethics violation occurred when I discussed the “justification” defense is wholly misplaced. I did tell the defendant that there could be a “partial justification” defense, which does not mean there is such a defense, or that it would prevail at a trial. By law, there must be a factual basis for accepting a change of plea, and the plea must be knowingly and voluntarily made. Most judges agree that listening to and commenting on a possible defense meets the Rule standards and also allows the defendant to better understand that, once a plea is accepted, the opportunity to raise defenses or challenge the state’s evidence is lost.

I believe that my conduct on this point was fully on track with both the rules of procedure and ensuring the defendant was not misinformed.

The defendant did ask me a question regarding whether or not this conviction may have an effect on his commercial driver’s license. I did not give the defendant any legal advice. I only told him that the disposition of this case is reported to the Department of Public Safety, and not to the Motor Vehicle Division.

The complaint as to my explanation regarding the availability of a motion to set aside per ARS 13-907 is also without merit. The supposed ethics violation due to my explaining the availability of a motion to set aside is quite confusing. This is a mandate of Arizona law and an advisory to a defendant that this procedure is provided by law is squarely within the scope of a court’s acceptance of a plea of guilty. Although the text of 907 states that the court “shall” advise the defendant at the time of discharge, the clear and overwhelming bench practice is to alert the defendant at the time of sentencing to ensure compliance with the intent of the statute.

The victims' allegation that I laughed when the defendant said "I wish I had hit him harder" is without merit. I do not laugh during any court proceeding. I did not laugh during this plea proceeding. After many reviews of the audio recording, it appears that the laugh came from the defendant.