State of Arizona Supreme Court

COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 13-046

Judge:	1350710429A
Complainant:	1350710429B

ORDER

The complainant alleged a superior court judge engaged in a pattern of legal error.

The responsibility of the Commission on Judicial Conduct is to impartially determine if the judge engaged in conduct that violated the provisions of Article 6.1 of the Arizona Constitution or the Code of Judicial Conduct and, if so, to take appropriate disciplinary action. The purpose and authority of the commission is limited to this mission.

After reviewing all of the information provided by the complainant, applicable appellate court rulings, and other relevant documents, the commission found no evidence of ethical misconduct and concluded that the judge did not violate the Code in this case. Accordingly, the complaint is dismissed in its entirety pursuant to Rules 16(a) and 23.

Dated: April 10, 2013.

FOR THE COMMISSION

/s/ George Riemer

George A. Riemer
Executive Director

Copies of this order were mailed
to the complainant and the judges
on April 10, 2013.

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

This is a complaint of judicial misconduct against now-retired Judge , formerly the Presiding (and only) judge in the County Superior Court. Presumably Judge remains a judge available for assignment. Hence, the need for review by the Commission.

SYNOPSIS

The primary allegation here, based on a series of reversals by the Arizona Court of Appeals, is that Judge has violated Rule 2.2 (*Impartiality & Fairness*), per comment 3. (That a "**pattern of legal error or an intentional disregard of the law** may constitute misconduct.") And by extension, Judge also violated Rule 1.1 (*Compliance with the Law.*)

As also will be shown, Judge violated Canon 2 (*A judge shall perform the duties of judicial office impartially, competently and diligently*) and Rules 2.1 & 2.5 *(Giving Precedent to Judicial Duties & Competence, Diligence, and Cooperation*, respectively) since, according to his own words, he refused to give precedence to his judicial duties in at least two cases.

Given that the series of reversals cited in this Complaint all involved the of , Arizona, and that Judge consistently ruled wrongly in favor of the , a third allegation is that Judge was biased toward the Town. This would be another violation of Rule 2.2 and also violations of Rules 1.2 & 2.4. (*Promoting Confidence in the Judiciary & External Influences on Judicial Conduct*, respectively.)

FACTS

This Complaint focuses of four recent Court of Appeals reversals which prove the primary allegation here of legal error and/or intentional disregard of the law. In chronological order of their publication dates, they are: (Exhibit 1), (Exhibit 2), *State v. Roth* (Exhibit 3) and (Exhibit 4).[1]

Case 1,

In *Felton*, a civil action, Mr. took the to Judge in a Special Action. The action was limited to matters of law. (I. e, Summary judgment.)

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[1] There may be more than these cases where the COA reversed Judge for fundamental failures of law. Complainant has limited resources, and suggests the Commission should search the record for addition violations.

Per the COA, Judge made several fundamental errors of law.

First, at ¶ 13, "Contrary to [Judge] ruling, however, the issue is not whether the matrix or A.R.S. § 9-462.01(C)(1) governs the issuance of conditional use permits . . . Here, however, the Zoning Ordinance controls." And, "Nothing in A.R.S. 9-462.01(C)(1) gives the Town specific authority to issue conditional use permits for RV hookups in SR43." (Judge cited the statute to issue conditional use permits.)

Thus, Judge arbitrarily and capriciously disregarded law in favor of the .

Then, in FN 10 of , the COA notes that "The court determined a literal reading of the matrix is inconsistent with the general character of the Town . . . As Felon points out, however, **statement is not directly supported by the evidence presented.**"

Thus, Judge is making stuff up. In favor of the

Case 2

was a criminal matter of no ordinary consequence. At the end of his first jury trial, Judge sentenced Mr. to 122 years in prison.

Mr. appealed.

At issue in the appeal was Judge numerous violations of the Arizona Rules of Evidence. At ¶ 13, "accordingly, allowing the tapes to be played in their entirety was **improper**, and [ ] abused [his] discretion in doing so." At ¶ 14, "the court's decision to admit S.W.'s consistent statements was **also in error** . . . "

At ¶ 19, "Unlike , the court in the instant case [i.e., Judge] allowed the State to not only introduce portions providing context or explaining the statements utilized by Appellant, for impeachment purposes, but admitted the interviews in their entirety, which included many statements that bore little or no relation to the statements utilized by Appellant. **Further, the interviews contained passages that were highly prejudicial to Appellant** . . . "

Of note is the COA's conclusion that "Many of the statements made throughout the entirety of the interviews simply did not qualify, explain, or place into context previously admitted portions fo the interviews, and therefore, **should not have been admitted under Rule 106.**"

Judge admitted he "had not reviewed any of the interviews or transcripts before

making [his] conditional ruling allowing them to be played in their entirety. We hold that, to the extent [ ] relied on Rule 106 and the rule of completion, [he] abused [his] discretion when [he] ruled **without first determining** whether the interviews qualified, explained, or provided context for the statements Appellant sought to use for impeachment." (¶ 20.)

(Thus, a fundamental lack of due diligence by .)

And again at ¶ 22, " . . . we conclude that [ ] abused [his] discretion in admitting the interviews into evidence and requiring that they be played in full to the jury . . . "

Upon remand and a new jury trial, was found not guilty of all charges. That's quite a difference from 122 years in prison. The Commission should take the gravity of this into effect as an Aggravating Factor.

Case 3

This was another criminal matter. was an outspoken critique of corruption in the . He was exercising his First Amendment right to Free Speech, criticizing the Chief of Police at a public Town meeting. Whereupon, the Chief of Police arrested

At a jury trial under Judge , Mr. was found guilty of two counts of "disorderly" conduct. Like Case 2 above, the COA vacated Mr. convictions and sentences. Unlike Case 2, the COA saw absolutely no need to remand for a new trial.

To start, the COA quoted Judge instructing the jury (wrongly) about the First Amendment right to free speech. Specifically that "if the speech or expression is basically incompatible with the normal activity of a particular place at a particular time, then it is not protected under the Constitution." (See ¶ 9.) While the COA did not rule on the First Amendment issue, it chose to educated Judge on the First Amendment in ¶¶ 13-15. (Not quoted here.)[2]

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[2] As it goes to Aggravating Factors, complainant offers that the whole purpose of our right to free speech is to protect unpopular speech. (Popular speech not needing protection.) A "function of free speech under our system is to invite dispute. **It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.**") And "The First Amendment reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited,

The COA went out of its way to write a few footnotes to correct Judge .

At FN5, "The judge instructed the jury that 'seriously disruptive' means conduct 'that causes considerable distress, anxiety, and inconvenience.'"

At FN6, "[ ] overrulec objection to the prosecutor's question that elicited this legal conclusion from ."

The COA vacated Mr. two criminal convictions, essentially laughing it out of court.

Case 4

The case of was an urgent (civil) election contest, needing to be settled before ballots were to be printed. The case concerned some of the contentious politics in , which were well known to Judge . (Fast forward to Supplement #1, where Judge invoked Rule 122 to prohibit recording in his courtroom, opining about "the acrimony that's been almost constantly present in .")

Paraphrasing the COA's *FACTS*, Mr. alleged that played a shell game with his election contest, changing his primary election into a special election to prevent him from ever winning. (¶ 21) But the merits of that allegation never got to trial.

Instead, sought to dismiss the matter based on the doctrine of laches. Judge granted. The COA vacated.

Of note for this complaint is the COA's first statement that "a finding of laches is within the trial court's sound discretion, and 'absent erroneous interpretation of the law or clearly erroneous factual underpinnings, the trial court's determination can be overturned **only if its decision represents an unreasonable judgment** in weighing relevant factors.'" (¶ 12)

Specifically, to prevail in laches, it must be proved that a plaintiff acted unreasonably. "Here, the [Judge] erroneously granted dismissal based on laches because [he] did not find that had acted unreasonably." (¶ 14)

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robust, and wide open."
"Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."
(1988) (citation omitted). A judge who swore to uphold the Constitution should know these fundamental principles.

"Laches requires a finding that the plaintiff acted unreasonably in causing the delay, and although the court believed that had aired in filing this petition in County, [Judge] did not find his conduct unreasonable." (*Id.*)

"The **record is therefore clear** that [Judge] found laches based solely on prejudice. Because [Judge] did not find that Prutch had acted unreasonably, and we cannot infer such a finding from this record, we vacate the dismissal based on laches and remand for further proceedings." (¶ 15)

In the end, the COA found Judge 's decision an "unreasonable judgment." Judge simply disregarded the law.

Missing from the COA ruling, but present in the trial audio, is Judge telling statement that for him to rule on this case in a timely fashion (for the ballot printing), he would have to stay up til midnight. That would have been Monday night/Tuesday morning.[3]

But Judge wasn't about to stay up late because, as it turns out, he had to catch an airline flight early Wednesday morning to start a vacation! (Complainant sought the audio CD for this matter on that Wednesday and was told the clerk) Judge e may even have left town Tuesday to catch a flight out of early Wednesday. (The Commission should ask him.)

And, of course, one of the parties did disagree with Judge and appealed his decision anyway. Judge could have — and should have — heard the merits of the case and stayed up until midnight to rule in a timely fash the matter, Judge B as an Aggravating Factor.

Canon 2 requires "a judge shall perform the duties of judicial officer . . . diligently." Rule

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[3] At the hearing, Judge said, "Although I think that the case should be heard on the merits, I think under the circumstances and the timeliness that we're here today on April 16th and the early ballots have to go out on April 19th, even if I heard the case, the earliest I could get a decision out, it'd have ... unintelligible the court ... up to the midnight hours tonight and nobody would get them until the morning and then, which would be the 17th and then the 18th is the day the early ballots have to go out of there just wouldn't be enough time for the parties if they didn't agree with my decision to, to appeal this case . . ." (CD, court audio of , at 17:20.)

2.1 requires a judge gives "precedence to judicial duties." Specifically, "the judicial duties of a judge take precedence over ALL of a judge's other activities."

This would include sleeping and vacationing in time-critical election contests.

Since Judge knew he was leaving on vacation in two days and would not have time to deal with a virtual emergency matter, he should have sua sponte assigned the matter to another judge the minute it came to him. (Friday, April 13, 2012.) He did not.[4]

So then, in addition to a violation of Canon 2 and Rule 2.1, Judge also violated Rule 2.5 here.

CONCLUSION #1

While any one reversal alone might not rise to the level that would warrant discipline, these reversals are not alone. There are four reversals which are consistent in that they find the same pattern of error by Judge — a total disregard for the law.

Specifically, Judge Burke has consistently demonstrated his lack of concern for basic law, from the Rules of Evidence to Arizona Sautes. It appears he makes stuff up as he goes along.

Furthermore, by not taking the time to review evidence before allowing it or refusing to sacrifice his time in urgent election contests (*ch*, respectively), even if it meant putting off his vacation, he has demonstrated his lack of diligence as a judge in at least two cases.

CONCLUSION #2 — APPEARANCE OF IMPROPRIETY

One other troubling aspect of these four cases, buttressed by the case in Supplement # 1, is that all four involved) was simply a resident of Quartzsite who had been arrested by the police. Whether there is a political connection — ex-wife a friend of police chief or an enemy? — complainant does not know.) But see Supplement #1 for a contentious case that did involve directly, where

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[4] It turns out that had filed a Rule 42 Notice for a change of judge anyway. But at trial, Judge said it would take a few days to arrange for another judge to sit. (Trial audio at 0:48.) Even so, at the hearing Judge said he was fully briefed and ready to go. If he had fully briefed for trial over the weekend, why hadn't he prearranged for new judge?

Judge acted as counsel for the Town!

In all four of these cases, Judge wrongly ruled in favor of

While it could be that Judge is incompetent across the board, the pattern of consistently ruling wrongly in favor of the Town raises the specter of partiality.

Specifically, that Judge is biased or prejudice toward . From Supplement #1, during the time of some of these trials), Judge was aware of "the acrimony that's been almost constantly present in Quartzsite."

In the case of , working on the assumption that Judge knows what the First Amendment guarantees, it appears he went out of his way to mis-instruct the jury as to the First Amendment so as to convict Mr. . And that he went out of his way to let Quartzsite police chief opine about the law so at to convict Mr. (Both issues raised by the COA.) So blatant was the injustice in this case, the COA didn't even order a remand.

In the case of it appears Judge simply deep-sixed an election to keep the challenger out and an incumbent in.

Supplement #1

This Supplement focuses on the civil case of , an election contest brought by YouTube sensation Jennifer Jones.[1]

There are several allegations here: Judge was biased in favor of the Judge acted as counsel for the Town; Judge "modified" (i.e, critically changed) his verbal Order when he wrote his written Order; Judge was swayed by public clamor or fear of criticism; Judge colluded with the attorney and/or engaged in ex parte communication with the .

FACTS

Per Exhibit A, *Findings and Judgment*, had won a recent recall election against sitting , contested the election.

did not file an answer to ' Complaint, nor did he appear at the hearing.

Per Judge *Order striking Pleading* (Exhibit B), the Town of filed an application to intervene but the Town Attorney did not appear for the hearing.

Violation of Canon 2, Rule 2.2 - Impartiality

Rule 7.1(b) of the Rules of Civil Procedure says ". . . if the opposing party does not serve and file the required answering memorandum, or if counsel for any moving or opposing party fails to appear at the time and place assigned for oral argument, such non-compliance may be deemed a consent to the denial or granting of the motion, and the court may dispose of the motion summarily."

Instead of disposing of the matter summarily because the opposing party was a no-show, Judge Burke went to the opposite extreme and acted as counsel for the .)

Judge staunchly defended the Town as if he had prepped arguments. Or, as if he HAD been prepped. (of ex parte communication, below.)

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As one observer quipped, "The didn't send an attorney to represent it. It didn't need to. It had the judge acting as its attorney." (Exhibit C, first comment by Anonymous, screen printout from newspaper blog, September 22, 2011.)

At the end of the hearing, it came down to a matter of an insurance bond. Per the Court's), at trial Judge ruled "The court finds that pursuant to the Town's ordinances, if a bond was filed **prior** to taking office, he would be mayor. If no bond was filed, then not be mayor and the office is vacant."

However, in his written ruling (Exhibit A), changed that to say ". . . it is the judgment of the Court that qualified to hold the office of if either he posted the required bond or if the town has a blanket bond that covers all of its officers. If the required bond is not posted, then he is not qualified to hold the office of of the town of ."

The subtle difference between the two rulings is whether the bond was filed prior to Mr. taking office. (An issue at trial was Section 2-1-7 of the which says. "**Prior to taking office**, every Council Member shall execute and file an official bond, enforceable against the principle and his sureties . . . ")

In addition to a violation of Impartiality, sneaking in a change to a ruling is arguably a violation of Rule 1.1 and 2.2, Disregard of the Law.

Violation of Rule 2.4 - External Influences on Judicial Conduct

At the beginning of the hearing, Judge prohibited recordings in the courtroom, which is within his discretion. However, the reason he cited implicated Rule 2.4.

Specifically, Judge said, "and ummm, before we get started, for those of you that didn't read the notice on the courthouse door concerning electronic and photographic coverage, cameras, recording devices, etc. they are prohibited in the courtroom. And I'm following Arizona Supreme Court Rule 122, primarily 122(b)(4) that type of coverage would distract participants or would detract from the dignity of the proceedings. And I think in the acrimony that's been almost constantly present in and the fact that many of these videos are posted on YouTube with various comments etc. they would detract from the dignity of the proceedings... " (CD audio at 0:30)

This is specious. Judge had just polled the participants. The only "participant" there that day was Jennifer Jones. Since she had been made famous by being on YouTube

before, it's difficult to understand why she would object to being recorded in court. Or if it would distract her. Nor did Judge ask.

As for the dignity of the proceedings, the observer from Exhibit C said it best and reflects the public's view (although Judge Burke might call it "acrimonious"): "HEY, JUDGE There is only ONE person who can maintain the dignity of the court. And that's YOU! Acting as a shill for the was totally undignified and YOU single-handedly reduced the court to nothing more than a joke. You should be ashamed, and I suspect you knew you would be if you made it on YouTube."

Again, it's Judge discretion if he wants to censor Americans. The central issue here is Judge stated reason for his censorship. He acknowledged in court that external influences (his concern about being posted (and presumably ridiculed) on YouTube) affected his decision about video recordings, a violation of Rule 2.4.

As a side issue is Judge statement about the "constant acrimony" in Quartzsite. That's prejudicial on its face, a violation of Rule 2.3(B), *Bias, Prejudice, and Harassment*, since he manifested prejudice by words indicating his disapproval (implied) of comments posted on Quartzsite YouTube videos by the watching public.

Rules 2.2 and 2.9 - Impartiality and Ex parte Communications

Last is the appearance of collusion/ex parte communication with the

Even though he didn't show up for the hearing, filed an untimely "Memorandum" with the Court one day before Judge Burke's written order was due. (See Exhibit B, Judge Order Striking Pleading.)

Judge correctly struck the pleading as untimely and stated that "this Court will not consider any of the arguments presented in the memorandum and will not consider **the proposed form** of the decision order." Ignoring the careful parsing of the last phrase, it's troubling that while Judge correctly said he would not consider any of the arguments presented in the memorandum, he accurately describes in his Order what it is in the memorandum. Thus, he must have looked at it. (The memorandum is included here for completeness as Exhibit E.)

Moreover, some of what wrote is in Judge Order.

For example, text from s section Section 2.-1-3 on p. 2 of his proposed Order (Exhibit F), citing A.R.S. § 19-216, appears in Judge Final

Order.

As does ; section titled " Code Section 2-1-7. (Compare top of p. 4 of Judge's Order with bottom of p. 2 of Town's proposed Order.)

As does cite of . And the mention of the Arizona Constitution in Brannan's section titled "Contestant's Request for Relief." (Compare with paragraph 2 on page 4 of Judge *Judgment*, Exhibit A.)

While perhaps the saying that "great minds think alike" can explain the similarities, for the sake of the public's confidence in the judiciary, the Commission should make a thorough investigation as to whether Mr. and Judge colluded. (As of this writing, Mr. is under investigation by the Bar for numerous alleged Ethics Violations involving his activities for Quartzsite.)