

State of Arizona
COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 23-412

Judge:

Complainant:

ORDER

The Complainant alleged a superior court judge issued contradictory orders to modify a sentence in a criminal case.

The role of the Commission on Judicial Conduct is to impartially determine whether a judicial officer has engaged in conduct that violates the Arizona Code of Judicial Conduct or Article 6.1 of the Arizona Constitution. There must be clear and convincing evidence of such a violation in order for the Commission to take disciplinary action against a judicial officer.

After review, the Commission found that the judge issued the rulings modifying the sentence without allowing the parties to be heard. While this was improper under Rule 2.6(A) of the Code of Judicial Conduct, the Scope Section of the Code provides that not every transgression will result in the imposition of discipline. The Commission decided, after considering all the facts and circumstances, to dismiss the Complaint pursuant to Commission Rules 16(b) and 23(a), but to issue a warning letter to the judicial officer reminding him of the duty to ensure that the parties' right to be heard is followed.

The Commission further advises that a public reprimand was seriously considered as the response provided was wholly inadequate and came off as dismissive of the Commission's concerns.

Commission members Louis Frank Dominguez and Delia R. Neal did not participate in the consideration of this matter.

Dated: September 20, 2024

FOR THE COMMISSION

/s/ Christopher P. Staring
Hon. Christopher P. Staring
Commission Chair

Copies of this order were distributed to all appropriate persons on September 20, 2024.

JUDICIAL COMPLAINT, CONTINUED.

ON _____ I ACCEPTED A PLEA OF GUILTY TO ONE(1)
 COUNT OF PROMOTING PRISON CONTRABAND IN THE _____ COUNTY
 SUPERIOR COURT. _____ CASE No. _____

JUDGE _____ IMPOSED A NON-DANGEROUS, NON-REPETITIVE,
 PRESUMPTIVE TERM OF FIVE YEARS. (ID. AT EXH. A AT 5-6)

NEARLY FOUR YEARS LATER, ON OR ABOUT _____

_____ OFFICIALS CONTACTED THE
 COURT, EX PARTE, FOR CLARIFICATION OF SENTENCE, NOTING THAT
 THE SENTENCING DOCUMENT DOES NOT CITE CONCURRENT (C/C)
 OR CONSECUTIVE (C/S) TO SENTENCES. (ID. AT EXH. A AT 6; EXH. B)

THEREAFTER, I WAS NOTIFIED BY _____ COUNSELOR _____ THAT
 MY RELEASE DATE HAS BEEN RECALCULATED TO REFLECT A
 CONSECUTIVE SENTENCE AND A PROJECTED RELEASE DATE OF

(ID. AT EXH. B)

THE FEDERAL AND ARIZONA CONSTITUTIONS GUARANTEE A
 DEFENDANT THE RIGHT TO APPEAR AND DEFEND IN PERSON IN
 ALL CRIMINAL PROCEEDINGS. U.S. CONSTITUTION, AMENDMENTS
 VI, XIV; ARIZONA CONSTITUTION, ARTICLE II § 24.

UNDER RULE 26.9, THE DEFENDANT MUST BE PRESENT AT
 SENTENCING. ARIZ. R. OF CRIM. PROC.

IN ANY EVENT, JUDGE _____ ISSUED AN EX PARTE RE-
 SENTENCING DOCUMENT, THIS TIME CONFIRMING THAT THE
 SENTENCE WAS TO BE SERVED CONCURRENTLY WITH MY PRIOR
 SENTENCE. (ID. AT EXH. A AT 6). I WAS NOT PRESENT AT THE
 RE-SENTENCING AND DID NOT WAIVE MY PRESENCE. SEE

ST. V. POWERS, 154 ARIZ. 291, 742 P.2d 792 (ARIZ. 1987) (WHERE
 THE TRIAL COURT APPARENTLY OVERLOOKED ITS STATUTORY DUTY TO
 IMPOSE A FELONY ASSESSMENT, THE PROPER METHOD OF

JUDICIAL COMPLAINT, CONTINUED.

CORRECTING AN ILLEGAL SENTENCE WAS NOT BY MINUTE ENTRY; CORRECTION OF THE SENTENCE SHOULD HAVE BEEN IN OPEN COURT WITH THE DEFENDANT PRESENT).

WHILE THE APPEAL IN CAUSE NO. WAS UNDERWAY, THE TRIAL COURT JUDGE TOOK IT UPON HIMSELF TO HOLD A SECOND RE-SENTENCING HEARING. JUDGE DID NOT NOTIFY ME OR MY APPELLATE COUNSEL, NOR DID HE SEEK AN ORDER FROM THE COURT OF APPEALS TO RE-VEST THE TRIAL COURT WITH JURISDICTION FOR PURPOSES OF RESENTENCING. (ID. AT EXH. A AT 7). ALSO IN THIS SECOND RE-SENTENCING EFFORT JUDGE REVERSED HIMSELF, IMPOSING A CONSECUTIVE SENTENCE. Id.

JUDGE FIRST ASSERTED THE SENTENCE WAS CONCURRENT, THEN ATTRIBUTED THE ERROR TO CLERICAL, TYPOS, AND THEN CHANGED THE SENTENCE WITHOUT DEFENDANT PRESENT. THIS TYPE OF CONDUCT VIOLATES THE OBLIGATIONS OF THE COURT AND RESULTED IN CONSTITUTIONAL VIOLATIONS.

ON THE COURT OF APPEALS ISSUED ITS MANDATE, VACATING BOTH SUPERIOR COURT'S ORDERS AS VOID.

JUDGE ERRED IN SENTENCING WITHOUT HIS PRESENCE AND ATTEMPTED TO CIRCUMVENT THE CRIMINAL RULES AND PROCEDURES BY STATING IT WAS CLERICAL ERROR OR MISTAKES.

AS A RESULT OF JUDGE INDEPENDENT DECISION TO RESENTENCE WITHOUT HIS PRESENCE, JUDGE VIOLATED RULE 1.1

[COMPLIANCE WITH THE LAW], 1.2 [PROMOTING CONFIDENCE IN THE JUDICIARY], 2.1 [GIVING PRECEDENCE TO JUDICIAL DUTIES], 2.5 [COMPETENCE, DILIGENCE, AND COOPERATION], 2.6(A) [ENSURING THE RIGHT TO BE HEARD], 2.12(A) [SUPERVISORY DUTIES].

JUDICIAL COMPLAINT, CONTINUED.

THE [COMMENTARY] TO RULE 1.2 STATES, CONDUCT THAT APPEARS TO COMPROMISE THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF A JUDGE UNDERMINES PUBLIC CONFIDENCE IN THE JUDICIARY. ACTUAL IMPROPRIETIES INCLUDE VIOLATIONS OF LAW, COURT RULES, OR PROVISIONS OF THIS CODE. [CMT. 3, 5]

JUDGE MULTIPLE ATTEMPTS TO RE-SENTENCE, SHOWS A PATTERN OF LEGAL ERROR, AND IS A DEPARTURE FROM THE ARIZONA RULES OF CRIMINAL PROCEDURE AND UNLAWFUL.

DUE TO A PATTERN OF LEGAL ERROR OF UNLAWFUL SENTENCING, JUDGE VIOLATED RULE 1.1 [COMPLIANCE WITH THE LAW], 1.2 [PROMOTING CONFIDENCE IN THE JUDICIARY], 2.2 [IMPARTIALITY AND FAIRNESS], 2.5 [COMPETENCE, DILIGENCE, AND COOPERATION], 2.6(A) [ENSURING THE RIGHT TO BE HEARD].

THE [COMMENTARY] TO RULE 2.2 STATES, A PATTERN OF LEGAL ERROR OR AN INTENTIONAL DISREGARD OF THE LAW MAY CONSTITUTE MISCONDUCT. [CMT. 3]

THE [COMMENTARY] TO RULE 2.5 STATES, COMPETENCE IN THE PERFORMANCE IN JUDICIAL DUTIES REQUIRES THE LEGAL KNOWLEDGE, SKILL, THOROUGHNESS, AND PREPARATION REASONABLY NECESSARY TO PERFORM A JUDGE'S RESPONSIBILITIES OF JUDICIAL OFFICE. [CMT. 1]

BY HAVING EX PARTE COMMUNICATION WITH OFFICIALS WITHOUT NOTICE TO JUDGE VIOLATED RULE 1.1 [COMPLIANCE WITH THE LAW], 2.4(A), (C) [EXTERNAL INFLUENCES ON JUDICIAL CONDUCT], 2.9(A), (B), (C), (D) [EX PARTE COMMUNICATION].

THE [COMMENTARY] TO RULE 2.4 STATES, CONFIDENCE IN THE JUDICIARY IS ERODED IF JUDICIAL DECISION MAKING IS PERCEIVED TO BE SUBJECT TO INAPPROPRIATE OUTSIDE INFLUENCES.

EXHIBIT

A

ISSUE PRESENTED FOR REVIEW

The central question in this appeal is whether Appellant _____ is entitled to a concurrent sentence of imprisonment, as was contemplated by this plea agreement, as was recommended by the Presentence Report, and was intended by the court at the time of his original sentencing. Years later, this question became somewhat muddled when the trial court twice re-sentenced _____ giving rise to these consolidated appeals. In the first re-sentencing effort the trial court explicitly provided that _____ sentence was to be served concurrently with a prior sentences imposed by _____ County. In the second, the trial court reversed himself and purported to impose a consecutive sentence. As the second re-sentencing occurred while the appeal in cause number _____ was underway and jurisdiction was with the Court of Appeals, the second resentencing effort gives rise to a procedural sub-issue of whether the Trial Court lacked jurisdiction to enter the second sentencing order.

I. STATEMENT OF THE CASE AND FACTS.

In _____ the _____ secured a three-count indictment against Appellant _____ in which he was charged with promoting prison contraband, possession of a narcotic drug and possession of paraphernalia. (ROA-1). Each of the counts referenced the generic sentencing statute, A.R.S, 13-701, and the generic

**THE COMMISSION'S POLICY IS
TO POST ONLY THE FIRST FIVE
PAGES OF ANY DISMISSED
COMPLAINT ON ITS WEBSITE.**

**FOR ACCESS TO THE
REMAINDER OF THE
COMPLAINT IN THIS MATTER,
PLEASE MAKE YOUR REQUEST
IN WRITING TO THE
COMMISSION ON JUDICIAL
CONDUCT AND REFERENCE
THE COMMISSION CASE
NUMBER IN YOUR REQUEST.**