IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1995 Term

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No. 22248

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IN THE MATTER OF: HONORABLE LARRY STARCHER,
JUDGE, CIRCUIT COURT OF MONONGALIA COUNTY

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DISCIPLINARY PROCEEDING

REPRIMAND

_____

Submitted: January 10, 1995
Filed: March 30, 1995

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This Opinion was delivered PER CURIAM.

Justice Brotherton did not participate.

Justices Cleckley and Fox, deeming themselves disqualified, did not participate.

Judges Ranson and Berger sitting by temporary assignment.

Chief Justice Neely dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings." Syl. pt. 1, West Virginia Judicial Inquiry Commission v. Dostert, 165 W. Va. 233, 271 S.E.2d 427 (1980).

2. "The initiation of ex parte communications by a judge is strictly prohibited by Canon 3A(4) of the Judicial Code of Ethics, 'except as authorized by law.'" Syl. pt. 2, In the Matter of Kaufman, 187 W. Va. 166, 416 S.E.2d 480 (1992).

3. "When the language of a canon under the Judicial Code of Ethics is clear and unambiguous, the plain meaning of the canon is to be accepted and followed without resorting to interpretation or construction." Syl. pt. 1, In the Matter of: Karr, 182 W. Va. 221, 387 S.E.2d 126 (1989).

Per Curiam:

This case is before this Court upon the recommendation of the West Virginia Judicial Hearing Board that Judge Larry Starcher of the Circuit Court of Monongalia County be admonished for a violation of the West Virginia Code of Judicial Conduct. The violation concerns an ex parte communication initiated by Judge Starcher with an assistant prosecuting attorney concerning an on-going criminal trial in Monongalia County. Judge Starcher, pursuant to Rule 4.9 of the West Virginia Rules of Judicial Disciplinary Procedure, filed a consent to the recommendation. However, for the reasons expressed below, this Court concludes that a reprimand, rather than the lesser sanction of admonishment, is warranted.

I

The facts are not substantially in dispute. On December 16, 1993, Ms. Linda Gutsell, an associate of the law firm Spilman, Thomas & Battle, was sitting in a room adjoining Judge Starcher's chambers when she became aware of a telephone conversation taking place between Judge Starcher, who had initiated the call, and an assistant prosecuting attorney of Monongalia County. The telephone conversation concerned the on-going criminal trial of State v. Hawkins, in which the defendant was accused of sexually assaulting several West Virginia University co-eds.

Judge Starcher admitted that the conversation occurred and that it related to the State's upcoming closing argument in the Hawkins trial. Specifically, Judge Starcher stated that during the conversation he advised the assistant prosecuting attorney that: (1) the State should have some supporters present in the courtroom during closing argument, e.g., the victims, a police officer and some female attorneys, (2) the term "serial rapist" might be used frequently, and (3) the assistant prosecuting attorney should be more emotional before the jury.

By way of explanation, Judge Starcher described the Hawkins trial as long and difficult and a trial during which he became concerned that the defense was "taking over" the courtroom. Moreover, during his testimony before the Judicial Hearing Board, Judge Starcher indicated that his sympathy for the victims "no doubt allowed [his] personal feelings to become injected into the trial."

Ms. Gutsell reported the conversation to her law firm, and the following day, December 17, 1993, Linda Gutsell and Paul Edward Parker, III, of Spilman, Thomas & Battle, went to Judge Starcher's chambers and informed him that the conversation with the assistant prosecuting attorney had been overheard. The complaint of the Judicial Investigation Commission suggests that Judge Starcher expressed displeasure toward Ms. Gutsell, Mr. Parker and the law firm concerning the pursuit of the matter. Judge Starcher,

however, denied that he threatened Ms. Gutsell, Mr. Parker, or the law firm in any way.

In May, 1994, a complaint was filed against Judge Starcher by the Judicial Investigation Commission with regard to the telephone conversation between Judge Starcher and the assistant prosecuting attorney. Although several Canons of the Code of Judicial Conduct are cited, the gravamen of the complaint, as well as the provision relied upon by the Judicial Hearing Board for its recommendation, is Canon 3B(7), which provides, in part:

> A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:
>
> (a) Where circumstances require, ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
>
> (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
>
> (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(emphasis added).

The complaint further suggests that Judge Starcher violated the Code of Judicial Conduct by allegedly threatening to take retaliatory action against Ms. Gutsell, Mr. Parker and their law firm for pursuing the matter concerning the overheard conversation.

The Judicial Hearing Board conducted an evidentiary hearing and, on September 20, 1994, filed its Findings of Fact, Conclusions of Law and Proposed Disposition. Citing Canon 3B(7), the Board concluded that Judge Starcher violated the Code of Judicial Conduct by initiating an ex parte communication with the assistant prosecuting attorney and advising the assistant prosecuting attorney concerning the State's closing argument in the Hawkins trial.

The Judicial Hearing Board recommends that Judge Starcher be admonished with regard to the ex parte communication. Furthermore, the Board recommends that the complaint be dismissed with regard to Judge Starcher's alleged conduct toward Ms. Gutsell, Mr. Parker and their law firm. Judge Starcher, pursuant to Rule 4.9 of the West Virginia Rules of Judicial Disciplinary Procedure, filed a consent to the Board's recommendations. The Judicial Investigation Commission, however, filed a general objection to the recommendations.

II

As indicated in the brief of the Judicial Investigation Commission, this case was conducted under the West Virginia Rules of Judicial Disciplinary Procedure, which became effective on July 1, 1994. Unchanged, however, is the standard of proof that allegations of a complaint in a judicial disciplinary proceeding "must be proved by clear and convincing evidence." Syl. pt. 1, In the Matter of: John Hey, Judge, No. 21676, ___ W. Va. ___, ___ S.E.2d ___ (Nov. 18, 1994); syl. pt. 4, In re Pauley, 173 W. Va. 228, 314 S.E.2d 391 (1983). Rule 4.5 of the current Rules states that "[i]n order to recommend the imposition of discipline on any judge, the allegations of the formal charge must be proved by clear and convincing evidence."

Moreover, we recognized recently in In the Matter of: June Browning, Magistrate, No. 21863, ___ W. Va. ___, ___ S.E.2d ___ (Nov. 18, 1994), that "it is this Court's responsibility to review the record in [such cases] de novo and determine if there is clear and convincing evidence to prove the allegations in the complaint." As this Court held in syllabus point 1 of West Virginia Judicial Inquiry Commission v. Dostert, 165 W. Va. 233, 271 S.E.2d 427 (1980): "The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings." See also syl. pt. 1, In re Pauley, supra. The findings of the Judicial Hearing Board are "not binding

on this Court." In the Matter of: June Browning, Magistrate, supra n. 4.

The circumstances before this Court are somewhat similar to those in In the Matter of: Kaufman, 187 W. Va. 166, 416 S.E.2d 480 (1992). In Kaufman, a circuit judge initiated a telephone conversation with the president of Charleston Area Medical Center, Inc., which corporation was a party to a civil action pending before the judge. The circuit judge, in Kaufman, stated that he placed the call in order to ensure that CAMC's president would appear at the next scheduled court hearing. In addition, CAMC indicated that the judge left the impression, through the telephone conversation, that he was "unhappy" with CAMC's course of action in the litigation.

In the Kaufman case, this Court adopted the recommendation of the Judicial Hearing Board that the circuit judge should be admonished. Specifically, this Court concluded that the initiation of the telephone conversation by the judge constituted an improper ex parte communication. Syllabus point 2 of Kaufman states: "The initiation of ex parte communications by a judge is strictly prohibited by Canon 3A(4) of the Judicial Code of Ethics, 'except as authorized by law.'" It was recognized in Kaufman that "[i]n order to promote public confidence in the judiciary, courts have imposed sanctions varying from reprimand to removal, against judges held to have engaged in ex parte communications." 187 W. Va. at

169-70, 416 S.E.2d at 483-84. It should be noted, however, that, under the circumstances in Kaufman, two justices dissented, indicating that no sanction against the circuit judge should be imposed.

In the case before us, we recognize, as in Kaufman, that a distinction exists between the fact that an ex parte communication occurred, and the content of that communication. As Kaufman states: "The very act of talking to one party without the presence of the other creates an ex parte situation." 187 W. Va. at 171, 416 S.E.2d at 485. Nevertheless, this Court would be remiss in not considering the content of the communication between Judge Starcher and the assistant prosecuting attorney. The communication herein was more egregious than in Kaufman. It was less ambiguous than the conversation between Judge Kaufman and the president of CAMC. Here, Judge Starcher admittedly initiated the telephone conversation in order to advise the State upon the manner in which its closing argument should be conducted in the Hawkins trial.

The Court of Criminal Appeals of Oklahoma, in Jones v. State, 668 P.2d 1170 (Okla. 1983), awarded post-conviction relief to a defendant in a felony case, where the trial judge had actively attempted to help the district attorney develop trial strategy. Citing a similar provision to our Canon 3B(7), the Court, in Jones, stated: "When a trial judge initiates ex parte communication

suggesting various procedures to the prosecution, . . . the accused's right to a hearing before an impartial judge is nullified. A trial judge should never involve his personal views in the hearing of a matter[.]" 668 P.2d at 1171-72. See also State v. Finley, 704 S.W.2d 681, 684 (Mo. App. 1986) ("It was improper for the trial judge to assume the prosecutor's role as an advocate for the state[.]"); Justice Bernard Botein, Trial Judge p. 97 (Da Capo Press 1974) ("Problems arise when the judge ventures across the line marking the traditional division of labor between lawyer and judge."); Phoebe Carter, Annotation, Disciplinary Action Against Judge for Engaging in Ex Parte Communication With Attorney, Party or Witness, 82 A.L.R.4th 567 (1990).

As indicated above, Judge Starcher initiated an ex parte communication in order to advise the State upon the manner in which its closing argument should be conducted. The occurrence of the ex parte communication and its content have not been disputed. The provisions of Canon 3B(7) prohibiting such communication are also undisputed. As we held in syllabus point 1 of In the Matter of: Karr, 182 W. Va. 221, 387 S.E.2d 126 (1989): "When the language of a canon under the Judicial Code of Ethics is clear and unambiguous, the plain meaning of the canon is to be accepted and followed without resorting to interpretation or construction."

This Court is aware that the Hawkins trial was, in fact, long and difficult and that the ordeal of the victims had an impact upon Judge Starcher. In the course of a criminal trial, "evidence as to a defendant's activities may incite natural disgust, but it could hardly be thought that a judge would be disqualified because he reacted as would anyone else." 46 Am. Jur. 2d Judges 170 (1969). "We could not, if we would, get rid of emotions in the administration of justice. The best we can hope for is that the emotions of the trial judge will be sensitive, nicely balanced, subject to his own scrutiny." Jerome Frank, "Justice and Emotions," in Handbook for Judges p. 53 (American Judicature Society 1984). Nevertheless, this Court in Louk v. Haynes, 159 W. Va. 482, 500, 223 S.E.2d 780, 791 (1976), emphasized that where there is temptation "not to hold the balance nice, clear and true between the State and the accused, a judge should recuse himself."

Rule 4.12 of the Rules of Judicial Disciplinary Procedure provide that the Supreme Court of Appeals "may impose any one or more of the following sanctions for a violation of the Code of Judicial Conduct: (1) admonishment; (2) reprimand; (3) censure; (4) suspension without pay for up to one year; (5) a fine of up to $5,000[.]" Specifically, Rule 4.12 states that a reprimand "constitutes a severe reproof to a judge who has engaged in conduct which violated the Code of Judicial Conduct."

With regard to Judge Starcher's alleged conduct toward Ms. Gutsell, Mr. Parker and their law firm on December 17, 1993, no evidence of any threat appears in the record. Nor does the record contain evidence that Judge Starcher before or after the meeting with Ms. Gutsell and Mr. Parker exhibited bias toward those attorneys or the law firm. The testimony indicates frustration by Judge Starcher with himself when he realized the import of the previous day's conversation with the assistant prosecuting attorney. The members of the Judicial Hearing Board were "much closer to the pulse of the hearing" concerning that issue, and we adopt the Board's recommendation to dismiss that aspect of the complaint with regard to Judge Starcher's conduct on December 17, 1993. In the Matter of June Browning, supra n. 4.

As discussed above, however, the December 16, 1993, ex parte communication of Judge Starcher with the assistant prosecuting attorney was more egregious than the communication in the Kaufman case. Upon all of the circumstances herein, this Court concludes that a reprimand, rather than the lesser sanction of admonishment, is warranted.

As a final note of importance, we wish to emphasize that this matter, although quite serious, is but a single episode in Judge Starcher's long and distinguished judicial career. The Morgantown area constitutes one of the busiest and most difficult circuits in

West Virginia, and Judge Starcher has been a hard working judge in that circuit for more than seventeen years. His comments before the Judicial Hearing Board, that he works long hours and tackles complicated problems, were well spoken. It is commendable that Judge Starcher made a public admission and apology concerning the incident in question.

Upon all of the above, Judge Starcher is hereby reprimanded with regard to the ex parte communication of December 16, 1993.

Reprimand.