

State of Arizona
COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 07-261

Complainant: No. 1266910262A

Judge: No. 1266910262B

ORDER

The issue raised in this complaint involves an interpretation of A.R.S. §13-703.04(A) which provides that when the Arizona Supreme Court reviews a capital case, it “shall independently review the trial court’s findings of aggravation and mitigation and the propriety of the death sentence.” The commission determined that the question of whether the judge in this case exceeded the scope of this statute is a legal question outside the commission’s jurisdiction. Additionally, the commission did not find clear and convincing evidence that the judge exhibited bias against the state in issuing the minute entry, and found no merit in the contention that the judge lacked knowledge of the capital sentencing law. Accordingly, the complaint is dismissed pursuant to Rules 16(a) and 23(a).

Dated: May 30, 2008.

FOR THE COMMISSION

/s/ Hon. John C. Gemmill
Vice Chair

Copies of this order were mailed
to the complainant and the judge
on May 30, 2008.

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

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October 2, 2007

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

Re: [REDACTED]

It has been brought to my attention that Judge [REDACTED] has engaged in conduct warranting a referral to the Commission on Judicial Conduct. This letter is written after a review and recommendation by [REDACTED] as well as a review by myself. It is our belief that [REDACTED] conduct in this matter may have violated the Code of Judicial Conduct and should be investigated by the Commission.

Factual Background

Four defendants, including [REDACTED], were charged in connection with the kidnapping and murder of [REDACTED] in 2002. [REDACTED], a jury found that [REDACTED] should be sentenced to death for the murder. The jury also found [REDACTED] guilty of kidnapping, and Judge [REDACTED] imposed a concurrent sentence of 12 years on [REDACTED]. In court and in his minute entry of that date, Judge [REDACTED] stated:

This Court must determine whether the sentence for Count 2 shall run concurrent or consecutive to the sentence imposed by the jury for Count 1. Because of that fact, and because the Supreme Court has independent jurisdiction to reconsider a death penalty sentence, this Court will make some findings that may assist the Supreme Court.

When this case was originally filed, there were four defendants. When this case was originally filed, the State filed a notice of death penalty against each of the four defendants alleging cruelty, heinous and depravity. That decision, as the law mandates, was a decision unilaterally made by the County Attorney.

As the law allows, the County Attorney made unilateral decisions to plead out [REDACTED], the man who, under the State's theory of the case, [REDACTED] the victim to death or to near death. In doing so, the County Attorney, as he is authorized to do, unilaterally withdrew the notice of death penalty as to [REDACTED].

As the law allows, the County Attorney made a unilateral decision to plead out [REDACTED], the co-defendant who procured the murder. But for her conduct, even under the State's theory of the case, there would be no murder. In doing so, the County Attorney, as he is authorized to do, unilaterally withdrew the notice of death penalty as to [REDACTED].

The County Attorney, as the law allows, made a unilateral decision not to withdraw the death notice for [REDACTED] a defendant who, even under the State's theory of the case, did not cause the physical death of [REDACTED]. Under the State's theory of the case, [REDACTED] acted only as support for [REDACTED] as he [REDACTED] to death or to near death, and helped drag [REDACTED] to a car trunk and the desert. Under the State's theory, [REDACTED] act of [REDACTED] while cruel and heinous, was not a cause of the death.

The County Attorney may argue that the decision for the death penalty was the jury's decision, but in this instance, that was not true. [REDACTED] made a decision not to present any mitigation. So this jury, like this Court, was bound to follow the law, which in effect was a directed verdict for a death penalty sentence.

The Court believes that [REDACTED] was correctly prosecuted and convicted for the felony murder.

The Court believes that the jurors' verdict for Count 1 was based upon the facts presented and the law given to them.

This Court, nonetheless, finds that [REDACTED] death penalty sentence for Count 1 was not justified in the context of the relative responsibility of the co-defendants whom the County Attorney chose to withdraw the notices of death and reduce their sentencing range.

It is the County Attorney's motto that "let justice be done." This, of course, coincides with a prosecutor's unique ethical responsibility. This Court finds that justice was not done for [REDACTED] in Count 1.

This Court leaves to the Supreme Court the ramifications of these findings.

The case against [redacted] is proceeding before Judge [redacted] and trial is set for [redacted]. Upon learning of Judge [redacted]'s inappropriate "findings" in the [redacted] case, the State filed a notice of change of judge for cause under Rule 10.1, Ariz.R.Crim.P., in the [redacted] case. Judge [redacted] denied the State's request in a minute entry dated [redacted]. The court found that the State failed to "overcome the presumption of impartiality" set forth in applicable case law. In addition, the court stated:

In making these findings the Court also relies on the holding in *State v. Ellison*, 213 Ariz. 116, 140 P.3d 899, (2006), certiorari denied 127 S.Ct. 506 that judicial rulings alone almost never constitute a valid basis for a bias or partiality motion, without showing either an extrajudicial source of bias or any deep-seated favoritism.

The Court considered the affidavit submitted by the State in support of the State's motion and has found that the affidavit recites the State's allegation that Judge [redacted] is biased due to a ruling issued in *State v. Bearup*. The findings in that minute entry were made pursuant to A.R.S. § 13-703.04 which requires a trial court to make findings regarding the propriety of a death sentence therefore the Court finds no evidence of bias in Judge [redacted] minute entry.

The Court also notes that the State's assertion that Judge [redacted] has previously accused the [redacted] of racial and economic bias is without merit particularly in light of the fact that the State failed to submit a copy of the letter mentioned in the State's motion.

Applicable Canons

Canon 1. A Judge Shall Uphold the Integrity and Independence of the Judiciary

A. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this code are to be construed and applied to further that objective.

Canon 2. A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 3. A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently

B. Adjudicative Responsibilities.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

Analysis

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Judge [redacted] statements in the [redacted] case unfairly criticize [redacted] and indicate a lack of knowledge of the capital sentencing law. Although Judge [redacted] did not mention A.R.S. § 13-703.04 in his [redacted] minute entry, he apparently was proceeding under that statute. He stated that "the Supreme Court has independent jurisdiction to reconsider a death penalty sentence." Judge [redacted] stated in her [redacted] minute entry that the findings in Judge [redacted] minute entry "were made pursuant to A.R.S. § 13-703.04 which requires a trial court to make findings regarding the propriety of a death sentence." However, these interpretations of the statute are incorrect.

A.R.S. § 13-703.04(A) states: "The supreme court shall review all death sentences. On review, the supreme court shall independently review the trial court's findings of aggravation and mitigation and the propriety of the death sentence." That language is currently interpreted to mean that the supreme court shall independently review the findings of the trier of fact. "This court independently reviews the jury's findings of whether a death sentence is warranted. A.R.S. § 13-703.04.A." *State v. Carreon*, 210 Ariz. 54, 65, 107 P.3d 900, 911 (2005); *accord*, *State v. Anderson*, 210 Ariz. 237, 356, 111 P.3d 369, 398 (2005).

In the [redacted] case, the jury determined the existence of aggravating factors (it found three), found no mitigation sufficiently substantial to warrant leniency, and imposed the death penalty. Upon review by the supreme court, only the jury's findings will be considered. Judge [redacted] findings on the appropriateness of the death sentence are irrelevant and show a lack of understanding of the law.

In addition, Judge [redacted] appeared to be advocating "proportionality review," which the supreme court no longer conducts. He stated in his minute entry that the court found "[redacted] death penalty sentence for Count 1 was not justified in the context of the relative responsibility of the co-defendants whom the County Attorney chose to withdraw the notices of death and reduce their sentencing range." In *State v. Roque*, 213 Ariz. 193, 219, 141 P.3d 368, 394 (2006), the court stated:

Roque claims that this murder was not so beyond the norm of first degree murders as to deserve the death penalty, and he asks this court to overturn his death sentence because his crime is no worse than the crimes of other defendants who have received life sentences. Although this court did at one time engage in proportionality reviews, we no longer do so. *State v. Salazar*, 173 Ariz. 399, 417, 844 P.2d 566, 584 (1992). We instead independently review the aggravating and mitigating factors to assess the propriety of the death sentence. A.R.S. § 13-703.04. . . .

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Even when the Supreme Court engaged in proportionality review, trial courts were not to do so:

Defendant contends that the trial court should have performed a proportionality review, thereby considering similarly situated defendants who have received life sentences. This court, and not the trial court, reviews every death penalty case in Arizona. . . . The trial court's consideration of other similarly situated defendants is inapposite to *this* defendant's "character or record", and does not show any of the circumstances surrounding *this* defendant's "offense" that would call for a sentence less than death. Therefore, only this court will conduct a proportionality review, considering both the defendant and the crime.

State v. Greenway, 170 Ariz. 155, 171, 823 P.2d 22, 38 (1991) (emphasis in original). Therefore, Judge [redacted] acted contrary to the law by comparing the sentences of codefendants and suggesting that the supreme court do the same.

In addition, Judge [redacted] comments also unfairly and inappropriately criticized the [redacted] charging decisions. Although the minute entry stated that [redacted] had a legal right to make the decisions, Judge [redacted] clearly was expressing his disagreement. He also made the gratuitous comment about the [redacted] motto before concluding that justice was not done in this case. By criticizing [redacted] created the appearance of impropriety and showed a lack of integrity and impartiality. The comments were inappropriate from an ethical standpoint, despite the fact that Judge [redacted] found the conduct legally insufficient to remove Judge [redacted] for cause from the [redacted] case.

This is not the first instance where Judge [redacted] made unfounded allegations against [redacted]. In *State v. Ivey* (CR2004-128573), he also expressed disagreement with charging decisions and made comments such as, "The Court finds that the state's exercise of discretion was to protect the rich and white and to prosecute the poor and black." [redacted] filed a complaint with the Commission on [redacted] regarding that conduct. Although the complaint was dismissed, the Commission advised Judge [redacted] to act more prudently in the future. He has failed to do so.

Judge [redacted] conduct in the [redacted] case appears to violate Canons 1(A), 2(A) and 3(B)(2). Therefore, I respectfully request that the Commission investigate this incident and take whatever action it deems appropriate. Please feel free to contact me at [redacted] if you have any questions or need additional information.

Sincerely,

[redacted]