

State of Arizona  
COMMISSION ON JUDICIAL CONDUCT

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Disposition of Complaint 13-136

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Judge:	No. 1083814297A
Complainant:	No. 1083814297B

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**ORDER**

The complainant alleged a superior court judge intentionally ignored the law by imposing an illegal sentence.

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 review, the commission found no evidence of ethical misconduct and concluded that the judge did not violate the Code in this case. The commission approved sending the judge a private advisory letter. The complaint is dismissed pursuant to Rules 16(b) and 23(a).

Dated: August 21, 2013.

FOR THE COMMISSION

/s/ Louis Frank Dominguez

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Louis Frank Dominguez  
Commission Chair

Copies of this order were mailed to the complainant and the judge on August 21, 2013.

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

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

RE: Judicial Conduct Complaint

Dear Sirs:

This letter will serve to supplement the attached complaint form. Based on my reading of your form, this letter actually serves as the complaint. In support of my complaint I have attached copies of relevant email correspondence, transcripts of the change of plea hearing and the sentencing hearing, a copy of the plea agreement, relevant minute entries and also some Arizona case law.

My complaint, in a nutshell, is as follows. [redacted] was the assigned judge in a case that I handled in my capacity as a [redacted]. That case was [redacted]. The defendant was charged with aggravated DUI as a class four felony. The case resulted in a plea agreement. As a condition of the plea agreement, the state negotiated for an illegal plea provision. That provision was that the defendant would be sentenced to the minimum mandatory term of four months DOC as a condition of probation. However, the agreement provided the defendant **shall not receive credit** for pre sentence incarceration credit (hereafter PSIC). This illegal provision was pointed out to the state and the court prior to the agreement being struck, at the time the agreement was entered into, and then again at the time of sentencing. At the time of sentencing the defense requested the court sentence the defendant in accordance with the correct law. The court refused to do this, thus intentionally disregarding the law in contravention of Canon 2 of the Code of Judicial Conduct.

Based on the circumstances of this case, the judge intentionally disregarded the law in order to favor the prosecution. In support of this judicial

conduct complaint the complainant offers the following.

First, this case involved a charge of aggravated DUI, which is a class four felony under the criminal code. See ARS 28-1383.A.1. The crime carries with it a mandatory prison sentence of not less than four months in prison. See ARS 28-1383.D.

Second, pursuant to ARS 13-712.B, the defendant must receive credit against any prison sentence for any time spent in pre sentence incarceration. In other words, if he is too poor to post bond he can't be penalized for that. Thus, he must receive credit for his PSIC time against any prison sentence. Otherwise, there would be an inequity between DUI defendants who could afford to post bond and those who could not. The poor defendants would have to do the four months DOC as well as all their pre sentence time. The better off defendants, who were not in jail, would only have to do the four months DOC. This issue has been litigated in the context of the mandatory sentence of four months DOC as a condition of probation for the felony DUI offenses, but the law is clear that ARS 13-712.B applies in the DUI context. See *State v. Mathieu*, 165 Ariz. 20 (1990), *State v. Clements*, 161 Ariz. 123 (1989) and *State v. Nihiser*, 191 Ariz. 199 (1998), all of which stand for the proposition that the defendant must receive credit for PSIC as to any prison as a condition of his probation in the felony DUI case. ). All of the foregoing was pointed out to the trial judge at the time the change of plea was entered into, as well as at the time of sentencing.

Third, the state offered a plea agreement that provided the defendant shall not receive credit for PSIC against the 4-month prison term. The defense was unable to convince the state to alter their proposed plea, even though the defense pointed out the above noted statutory provisions and case law to the state. ). At the time of the change of plea the defense explained all this to the court in an effort to convince the court that what the state was offering was an incorrect statement of the law.

Fourth, the defendant did enter into the proposed plea agreement with the incorrect sentence provision. The defendant did so, not out of ignorance, but rather because he was unable to convince the state to alter the agreement, he did not want to spend an additional six months or so in jail waiting for his trial, and the longer he waited to enter into the plea agreement the more time he would be "losing" in pretrial incarceration.

Fifth, at the time of judgement and sentencing the defense pointed out again to the court that the sentencing provision of the plea requiring no credit for time served was an illegal provision. The defense asked the court not to follow it and cited to *State v. Schneider*, 207 Ariz. 325 (2004). stands for a couple of propositions relevant to this situation. First, it is fundamental error to impose an illegal sentence. In this case, by intentionally not giving the defendant credit for his PSIC, the court was handing down an illegal sentence. Second, the state is presumed to know the law in existence at the time it negotiated the plea agreement. Therefore, if the court had refused to honor the illegal provision of the plea agreement, as it should have, that would have just been tough luck for the state. It would not be as if the defense was taking advantage of an unknowing adversary. Third, if

the court had taken the proper course of action, the state could not have withdrawn from the plea agreement since it had already been accepted. Further, the state cannot withdraw from a plea relying on a mistake of law that they have created.

Sixth, the court refused to modify the provision of the plea, as the defense requested, at time of sentencing. Instead, the court imposed an additional 103 days of jail on the defendant, but gave him credit for 103 days of PSIC. This also violated the stipulation of the plea agreement which provided for "no further jail."

. Thus, it appears the judge not only intentionally ignored black letter law by imposing an illegal sentence, but he also intentionally tacked on additional jail time in contravention of the written plea agreement.

In summary, the trial judge intentionally ignored statutes and case law which mandated the defendant shall receive credit for PSIC as to any prison sentence. The judge was on notice of this law prior to the time of the change of plea, as well as prior to the imposition of the sentence. At the time of sentencing, the judge was also apprised of case law indicating he was about to impose an illegal sentence. He was further advised that the imposition of an illegal sentence was fundamental error. Fundamental prejudicial error is error which affects fundamental constitutional rights and which prejudices the defendant. Clearly, this illegal sentence prejudiced the defendant. Nevertheless, the judge intentionally chose to impose an illegal sentence. He further compounded the problem by imposing additional jail time on the defendant. This violated the plea stipulation for no additional jail time.

Rule 2.2 of the Code of Judicial Conduct states that "A Judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." The comment to that rule states that: "A good faith error of fact or law does not violate this rule. However, a pattern of legal error or an intentional disregard of the law may constitute misconduct." The complainant realizes that a good faith error of law would militate against a finding of intentional disregard of the law. However, it seems clear to the complainant that the judge in this case was on actual notice as to what constituted the correct law.

In this case the judge was orally advised several times in open court, as well as provided with case law, which clearly indicated the proposed plea agreement was illegal. He chose to go forward. At the time of sentencing, the judge was again presented with additional case law indicating he was about to impose an illegal sentence. Yet he still went forward and imposed the stipulations authored by the state. Since he had prior notice on at least three occasions that what he was about to do was improper, his actions appear to constitute an intentional disregard of the law.