

State of Arizona
COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 14-406

Judge:

Complainant:

ORDER

The complainant alleged a justice of the peace failed to perform her duties competently.

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.

The judge retired effective January 1, 2015. The alleged acts of incompetence occurred in 2012 and have been addressed by a higher court on appeal. The commission determined that no further action was warranted under the circumstances and directed the file in this matter be closed.

Dated: January 14, 2015

FOR THE COMMISSION

/s/ George A. Riemer

George A. Riemer

Executive Director

Copies of this order were mailed to the complainant and the judge on January 14, 2015.

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

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

COMPLAINT AGAINST A JUDGE

Name:

Judge's Name:

Instructions: Use this form or plain paper of the same size to file a complaint. Describe in your own words what you believe the judge did that constitutes judicial misconduct. Be specific and list all of the names, dates, times, and places that will help the commission understand your concerns. Additional pages may be attached along with copies (not originals) of relevant court documents. Please complete one side of the paper only, and keep a copy of the complaint for your records.

Rule 81, Rules of Arizona Supreme Court is entitled, "Arizona Code of Judicial Conduct." It includes Canon 2 entitled, "A Judge Shall Perform the Duties Judicial Office Impartially, Competently and Diligently." Canon 2 includes 16 rules. Rule 2.1 entitled "Giving Precedence to Judicial Duties" states, "The judicial duties of a judge shall take precedence over all of a judges activities."

Rule 2.5 entitled, "Competence, Diligence, and Cooperation" states in part:

"(A) A judge shall perform judicial and administrative duties competently, diligently and promptly." [Emphasis supplied]

The Comment states in part,

"1. Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office.

This complaint against Judge _____ is based on her multiple instances of incompetency while presiding over two cases in _____ Court in which Complainant was defense counsel and over which he has first-hand knowledge. These cases are *State v. J. Michael* TR2011163114, and *State v. Benjamin* TR2011165609.

This complaint incorporates by reference all matters in the Commission's _____ which involved a complaint against Judge _____ filed by _____ of the _____ County Attorney's Office (concerning his demeanor during the oral argument on the _____ except an unrelated matter, which has been omitted, in *State of Arizona v. Ho* in the _____ Court (case _____) on pages 6-7, 9,10. Judge _____ response was written prior to his rulings on _____ dated _____ and _____ which are attached hereto as Exhibits 1 and 2.

The following are specifically incorporated by reference in this complaint: Judge

response; Exhibit A, a transcript of _____ in _____ before Judge _____ in which she accepted the defendant's submission on the record; Exhibit B of _____ before Judge _____ of _____ sentence; Exhibit E, Judge _____ ruling in _____ Exhibit F, transcript of _____ submission as well as sentencing before Judge _____ in _____

Rule 17.2, Ariz.R.Crim.P. entitled, "Duty of court to advise of defendant's rights and of the consequences of pleading guilty or no contest, or of admitting guilt, or of submitting on the record." [Emphasis supplied] (amended 6/8/2004, effective 12/1/2004), states:

Before accepting a plea of guilty or no contest, the court shall address the defendant personally in open court, informing him or her of and determining that he or she understands the following:

- a. The nature of the charge to which the plea is offered;
- b. The nature and range of possible sentence for the offense to which the plea is offered, including any special conditions regarding sentence, parole, or commutation imposed by statute;
- c. The constitutional rights which the defendant foregoes by pleading guilty or no contest, including his or her right to counsel if she or she is not represented by counsel;
- d. The right to plead not guilty;
- e. That by pleading guilty or no contest in a noncapital case the defendant will waive the right to have the appellate courts review the proceedings by way of direct appeal, and may seek review only by filing a petition for post-conviction relief pursuant to Rule 32 and, if denied, a petition for review; and
- f. That if she or she is not a citizen of the United States, the plea may have immigration consequences. Specifically, the court shall state, "If you are not a citizen of the United States, pleading guilty or no contest to a crime may affect your immigration status. Admitting guilt may result in deportation even if the charge is later dismissed. Your plea or admission of guilt could result in your deportation or removal, could prevent you from ever being able to get legal status in the United States, or could prevent you from becoming a United States citizen." The court shall also give the advisement in this section prior to any admission of facts sufficient to warrant finding of guilty, or prior to any submission on the record. The defendant shall not be required to disclose his or her legal status in the United States to the court.

Application. Applicable to all criminal cases in which a guilty plea of [sic][plea of] no contest admission of guilt or submission on the record occurs on or after [Emphasis supplied]

Judge _____ response in the Commission’s file _____ cites Respondent’s failure to conduct a *State v. Avila*, 127 Ariz. 21, 617 P.2d 1137 (1980) colloquy prior to her acceptance of the waiver of trial by jury and submission in both _____ and _____ to her for a determination of guilt or innocence based on the police reports and other documentary evidence of alcohol concentration or drug content. The _____ requirement is a judicially imposed requirement that parallels the requirements of Rule 17.2.

Rule 26.10, Ariz.R.Crim.P., entitled “Pronouncement of Judgment and Sentence,” states,

a. **Pronouncement of Judgment.** In pronouncing judgment on non-capital counts, the court shall set forth the defendant’s plea, the offense of which the defendant was convicted or found guilty, and the determination of whether the offense falls in the categories of dangerous, nondangerous, and repetitive or non-repetitive.

b. **Pronouncement of Sentence.** The Court shall:

- (1) Give the defendant an opportunity to speak on his or her own behalf;
- (2) State that it has considered the time the defendant has spend in custody on the present charge;
- (3) Explain to the defendant the terms of the sentence or probation;
- (4) Specify the commencement date for the term of imprisonment and a computation of time to be credited against the sentence as required by law; and
- (5) For any felony offense or a violation of §§13-1802, 12-1805, 28-1381, or 28-1382, permanently affix the defendant’s right index fingerprint to the sentencing document or order.
- (6) Direct the Clerk of Court to send to the Department of Corrections, along with the sentencing order, copies of all pre-sentence reports, probation violation reports, medical and mental health reports prepared as to or relating to the defendant sentenced.

Rule 26.11, Ariz.R.Crim.P., entitled, “Duty of court after pronouncing sentence,” states:

After trial, the court shall, in pronouncing judgment and sentence:

a. Inform the defendant of his or her right to appeal from the judgment, sentence or both and advise the defendant that failure to file a timely appeal with result in the loss of the right to appeal.

b. If he or she is entitled thereto, advise the defendant that:

- (1) If the defendant is indigent, as defined in Rule 6.4(a), the court will appoint counsel to represent him or her on appeal; and
- (2) If the defendant is unable to pay for a certified copy of the record on appeal and the certified transcript, they will be provided by the county.

C. Hand the defendant a written notice of these rights and the procedures the defendant must follow to exercise them, receipt of which shall be shown affirmatively in the record.

On pages 5 and 8 of Judge _____ response, he specifically described the lack of competency of Respondent during the trial court proceedings in _____ and _____ stating:

...The clerk reminded Judge _____ she needed to address the civil traffic charge, and she said she would suspend the fine for the A.R.S. §28-701(A) charge. ... Judge _____ did not say anything else about a sentence, but the Judgment and Sentence Order signed by Judge _____ ordered the following:

A.R.S. §28-701(a): Fine and sentence suspended.
A.R.S. §28-1381(A)(1): Fine = -0-
A.R.S. §28-1381(A)(3):
DUI (Prison Constr. Fund) = _____
DUI (Addl. Assessment) = _____
Confined in _____ County Jail = _____
_____ in jail _____ suspended upon completion of certain programs.
Participate in _____ Victim Impact Panel.
Defendant's driving privileges suspended for _____
Ignition interlock for _____

* * *

The Arizona Court of Appeals has held the failure of a trial court to advise a defendant of the constitutional rights waived in a submission on the record, as is required by _____ is fundamental error. *State v. Bunting*, 226 Ariz. 572, 250 P.2d 1201, ¶¶ 1, 11 (Ct. App. 2011). Thus in both _____ and _____ Judge _____ committed fundamental error by not following the procedure required by _____ In both _____ and _____ Judge _____ failed to pronounce sentence orally in open court, and thus failed to comply with Rule 26.10(b) of the Arizona Rules of Criminal Procedure. In _____ Judge _____ failed to impose the mandatory statutory fines and assessments, and thus failed to comply with those statutes. In _____ Judge _____ attempted to correct her failure to impose those fines and assessments by entering a *nunc pro tunc* minute entry _____ after the sentencing. In _____ Judge _____ signed the Judgment and Sentence Order after the clerk had filled in the fines, assessments and sentence provisions Judge _____ had failed to pronounce orally in open court.

The _____ and _____ transcripts reflect that during Judge _____ acceptance of the defendants' waiver of jury trial and trial by submission, as well as her entry of judgments of guilt and sentences, she failed to comply with the mandatory requirements for such proceedings provided in Rules 17.2, 26.10, 26.11. Although a judicial officer's isolated mistake in complying with lawful requirements in a proceeding does not constitute "incompetence", Respondent's utter failure to comply—to any extent—with the previously described rules constitutes a violation to such a degree that it supports a finding of incompetence and a violation of her judicial ethical duty.

Complainant is informed and believes that Respondent's term of office as the elected
of the Court will end on Complainant is further
informed and believes that for the last of her term of office, Respondent has been on
medical leave approved by Court. Notwithstanding
these facts, the Commission should render a public disposition of this complaint with a minimum
sanction of a reprimand.