

IN THE ALABAMA COURT OF THE JUDICIARY

FILED

MAY 14 2021

IN THE MATTER OF:

TRACIE TODD
CIRCUIT JUDGE,
BIRMINGHAM DIVISION
CRIMINAL DIVISION
JEFFERSON COUNTY, AL

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CASE NO. 58

COURT OF THE JUDICIARY
Rebecca C. Oates
Secretary

THE JUDICIAL INQUIRY COMMISSION'S RESPONSE TO
JUDGE TODD'S BRIEF ON HER MOTION TO DISMISS

Introduction

This case concern's Judge Todd's repeated failure to acknowledge the authority of the appellate Courts over her as a trial court judge; her repeated interference with the authority of the district attorney to carry out his duties; her abuse of her judicial authority; and her repeated failure to disqualify herself in matters in which her impartiality might reasonably be questioned. In doing so she violated the Alabama Canons of Judicial Ethics.¹

The original verified complaint to the Judicial Inquiry Commission (hereinafter "the Commission") was filed by Michael Anderton, District Attorney, 10th Judicial Circuit and dated December 17, 2017. The

¹ Paragraph 2 of the Complaint

complaint alleged a series of actions comprising unethical conduct by Judge Todd from 2014 through 2017. At the time of the filing of the complaint, there were approximately 17 mandamus petitions pending against Judge Todd in the Court of Criminal Appeals. Some of these petitions involve instances in which Judge Todd failed to follow directives of the Court of Criminal Appeals to her. While Mr. Anderton's complaint was pending before the Commission, Judge Todd again failed to follow an Order of the Court of Criminal Appeals on September 12, 2018. Although she had been instructed by the Court of Criminal Appeals that she was disqualified from hearing a certain matter, she set that matter, along with others that had been stayed while pending on mandamus, for a status conference before her with explicit instructions to come prepared to discuss preparation for trial. Michael Anderton, in his personal capacity, immediately filed a supplemental complaint adopting his previous complaint and making new allegations concerning her action for matters on which she was disqualified or which had been stayed pending decision on mandamus.² None of the actions complained of were accepted

² The acts complained of occurred beginning 2014 and continuing through 2017.

by the District Attorney serving at the time they occurred. Mr. Anderton served as either a deputy district attorney or district attorney during this entire period.

The Complaint before this Court was filed in this Court a little over 2 and a half years after Mr. Anderton filed his supplemental complaint with the Commission.

I. THE MATTERS HERE COMPLAINED FAR EXCEED ABOVE BEING CLASSIFIED AS “MERE LEGAL RULINGS” AND EASILY REACH THE THRESHOLD OF UNETHICAL CONDUCT

The mere fact that a judge’s action is a “legal ruling” or that an order or other ruling is involved does not isolate the action from consideration as unethical conduct. Charles Gardner Geyh, James J. Alfani, Steven Lubert, & Jeffery M. Shaman, Judicial Conduct and Ethics § 2.2 (5th ed. 2013); *See also Matter of Sheffield*, 465 S.d 350, 357 (Ala. 1984) (“*Absent bad faith . . .* a judge may not be disciplined under Canons 2A and 2 of the Alabama Canons of Judicial Ethics for erroneous legal rulings.”). The Court in *Sheffield*, however, recognized there are other instances in which legal rulings may be scrutinized under the Canons for violations without threatening the independence of the judiciary, i.e., establishing a pattern of erroneous ruling.

Here, the legal errors are repetitive in nature, forming a pattern of gross negligence in failing to maintain competency in criminal law and procedure, usurping the authority of the District Attorney's Office, and using independent research to inform decisions. Not one of these was a single occurrence. Moreover, a significant number of her rulings were made after an appellate court had directed her otherwise or she had been advised of the law.

A few examples include her Order of March 3, 2016, in which Judge Todd based her finding of fact on 17 sources that were not made a part of the record and were not even argued by the parties. She also used extraneous sources as evidence to declare that the Alabama appellate courts, judges, and lawyers had failed to do their duty in death-penalty cases. In *Kemp*, she also based her decision on her unscientific analysis of extra-judicial facts not received in evidence.

Judge Todd repeatedly failed to recognize her disqualification in death-penalty cases, even though she was provided with the applicable law. She banned a deputy district attorney from practicing before her and interfered with the district attorney's authority to assign his deputies to specific cases. After the Court of Criminal Appeals declared

she was disqualified from hearing a case, she failed to follow the law of disqualification plainly laid out for her by the Court of Criminal Appeals.

This brief does not attempt to lay out all the instances of Judge Todd's unethical conduct arising from her legal rulings. Suffice it say with these few, no mere legal error exists in these matters. These are instances in which rulings were either informed or affected by other matters and taken as a whole rise far above "mere legal error." The matters alleged in this Complaint do not infringe on a judge's independence in making decisions on matters before him or her, but address matters beyond the scope of appeal or mandamus to finally resolve. It is especially noted that appeal is ineffective if the trial court will not follow the appellate court's orders.

II. THE COMMISSION MAY RECEIVE AND ACT ON ANY VERIFIED COMPLAINT

Rule 6A Rules of Procedure, Ala. Jud. Inq'y Comm'n provides for the institution of proceedings before the Commission, as follows: "Proceedings may be instituted by the commission only upon a verified complaint filed either by a member of the public or by a member of the commission or the commission's staff."

In this context, a member of the public is anyone not associated with the Commission. No one is excluded. This makes judicial discipline open to everyone. As noted in the brief of the respondent, the district attorney has a limited role in impeachment proceedings, but the Commission is not a part of the impeachment process. He has no constitutional or statutory role with the Commission in Judicial Discipline.³ He does not “prosecute” cases before the Commission.⁴ Indeed, district attorneys stand in the same relationship to the Commission as any other member of the general public. That office gives the district attorney no special standing. Thus, the complaint, as supplemented, filed with the Commission in this instance has the same status as any other complaint.

III. THE COMPLAINT TO THE COMMISSION WAS SUFFICIENTLY VERIFIED AND DOES NOT RAISE JURISDICTIONAL ISSUES

³ Under Rule 15, the Attorney General may prosecute for the Commission in the *Court of the Judiciary* except where there is a conflict.

⁴ Cases are not prosecuted before the Commission; they are investigated. Only the Commission can bring charges in this Court. Section _____ Constitution of Alabama.

The complaint filed with the Commission in this case is the form used by the Commission for many years. The verification on this form states:

The allegations and statements of fact set forth above and in any additional attached pages are true and correct to the best of my knowledge, information and belief, and I understand that a copy of this complaint and all supporting materials will be provided by the Commission to the judge against whom the complaint is made.

Judge Todd would have the Complaint before the Court dismissed due to the use of this form in the filing of the complaint with the commission. She argues the verification is improper and that this is a jurisdictional defect.

First, a district attorney has official and administrative authority to file a complaint with the Commission based upon the representations, information, and knowledge of the assistant district attorneys under his direct supervision and control. A district attorney, as the top administrator of the office and final decision maker, can surely file on behalf of the collected experience of those in his office, particularly when that experience involves a judge's pattern and practice against that very office, e.g., here Judge Todd's repeated interference in the discretion of the office of the district attorney.

Moreover, the verification form provided by the Commission and used by the complainant in this case is sufficient, especially because the complaint is not intended as evidence. Rather, from the facts alleged and from studying court records, i.e., in this case, transcripts of court proceedings, Alacourt records, and numerous appellate opinions – upon which much of Mr. Anderton’s complaint was based, the Commission can determine if there is sufficient cause to open an investigation.

This application is supported by the very words of Rule 6. A complaint can be filed by a commission member or a member of the staff. These are people who ordinarily will not have personal knowledge of the facts alleged but are informed and believe with such certainty they are willing to file a complaint.

IV. RESPONDENT HAS SHOWN NO GROUND FOR ASSERTING THE DEFENSE OF LACHES

Judge Todd asserts the defense of laches but totally fails to support that defense. We first note that “[t]he applicability of the doctrine of laches is ‘dependent upon the particular facts and circumstances of each case,’ and that “[t]he applicability of the doctrine is ‘committed to the sound discretion of the trial court.’” *Horton v. Kimbrell*, 819 So. 2d 601, 606 (Ala. 2001) (quoting *Dear v. Peek*, 261 Ala. 137, 141, 73 So. 2d 358,

361 (1954), and *Wallace v. Hardee's of Oxford, Inc.*, 874 F. Supp. 374, 377 (M.D. Ala. 1995)).

“[T]he person asserting the defense of laches [must] show
(1) that the claimant delayed in asserting his or her right,
(2) that the delay was inexcusable, and
(3) that the delay caused the person asserting the defense
undue prejudice.” *Mills v. Dailey*, 38 So. 3d 731, 735 (Ala.
Civ. App. 2008)

“ ‘ ‘ ‘*Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities, and other causes; but, when a court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief.*’ Stiness, J., in *Chase v. Chase*, 20 R.I. 202, 37 A. 804 [(1897)].” 5 Pom. Eq. Jur., § 21.

“ ‘ ‘ ‘*Laches, as has been well said, does not, like limitation, grow out of the mere passage of time, but it is founded upon the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relation of the property, or the parties.—Galliher v. Cadwell*, 145 U.S. 368 [12 S.Ct. 873, 36 L.Ed. 738 (1892)].” *First Nat. Bank [Waller] v. Nelson*, 106 Ala. 535, 18 So. 154 [(1895)]. See, also. .]; *Meeks v. Meeks*, 251 Ala. 435, 437, 37 So.2d 914 [(1948)]; *Fanning v. Fanning*, 210 Ala. 575, 576, 98 So. 804 [(1924)].’ *Sykes v. Sykes*, 262 Ala. 277, 281–82, 78 So.2d 273, 277 (1954) (quoting *Hauser v.*

Foley & Co., 190 Ala. 437, 440–41, 67 So. 252, 253 (1914) (emphasis added)).

Whitfield v. Whitfield, et al. 150 So. 3rd 171, 181-82 (Ala. 2014).

Applying these tests to the matter at hand, Judge Todd has not shown that any delay was unreasonable. She has shown only the mere passage of time, which is insufficient to support her claim. In addition, she has failed to show prejudice that is known to the Commission. The complaint filed with the Commission did include the names of two lawyers who allegedly had complaints against Judge Todd, but the Commission did not charge those claims. A third lawyer, Mr. Salvagio, has also died, but those claims rely entirely on the records that have already been produced. Judge Todd has not shown how the death of any of these people affects her defense.

V. THE DOCTRINE OF CONDONATION IS NOT APPLICABLE TO JUDICIAL DISCIPLINE CASES

For many years, impeachment and concurrent removal from office were the only means for judicial discipline. However, with the adoption of §§ 156 and 157 of Art. VI of the Alabama Constitution, those old avenues were replaced with the Commission and this Court.. Judges are no longer protected from disciplinary sanction by finishing a term or

starting a new term, i.e., condonation does not apply. Cf. *Steenland v. Ala. Judicial Inquiry Comm’n.*, 87 So. 3d 535 (Ala. 2012) (the jurisdiction of the Commission continues even if the judge resigns or retires). As in this, she point blanc disobeyed an order of the Court of Criminal Appeals about two months her election to a new term. “Most Courts take the position that misconduct committed in a prior term causes just as much discredit to the Judiciary as if it had been committed in the present term.⁵ Charles Gardner Geyh, James J. Alfani, Steven Lubert, & Jeffery M. Shaman, Judicial Conduct and Ethics § 2.2 (5th ed. 2013).

Sections 156 and 157 do not confine the Commission’s investigation and prosecution and this Court’s adjudication to the same term as the alleged violations of the judge.

Section 156, the provision creating the Commission, simply provides that the Commission has “authority to conduct investigations and receive or initiate complaints concerning any judge of a court of the judicial system of this state.” Ala. Const. Art. VI, § 156(b). It further specifies that the Commission can file complaints with the Court if the Commission determines that a reasonable basis exists “to charge a judge

⁵ Id, Section 1.01

with,” among other things, “violation of any Canon of Judicial Ethics” or “misconduct in office.” *Id.* Although this language obviously contemplates that the defendant will have served as a “judge” at some point, it does not say that he or she must still be serving in the same term as when investigation or prosecution commences.

Section 157, in turn, simply ties the Court’s jurisdiction to the Commission’s -- and, correspondingly, contains no express provision limiting the Court’s jurisdiction to cases involving sitting judges. It instead says the Court may convene, without any apparent limitation, “to hear complaints filed by the Judicial Inquiry Commission.” Ala. Const. Art. VI, § 157(a). To be sure, Section 157 does say that the Court may “remove from office, suspend without pay, or censure a judge.” *Id.* But it also says that the Court may “apply such other sanction as may [be] prescribed by law.” *Id.* So again, what matters for Section 157 purposes is not whether the defendant is still serving the same term at the time of the litigation, but rather whether the charged defendant committed misconduct.

Instead, the language of Sections 156 and 157 is most sensibly read as giving the Commission and this Court jurisdiction in any case when

the charged judge was an active judge at the time of the misconduct at issue. Any other interpretation would ignore “the conditions necessitating [the] adoption” of Sections 156 and 157 -- a paramount consideration whenever this Court “ascertain[s] and effectuate[s] the intention of the people in the adoption of the constitution.” *Barber v. Cornerstone Cmty. Outreach, Inc.*, 42 So. 3d 65, 79 (Ala. 2009) (internal quotation marks omitted). Sections 156 and 157 were designed to “set up a system for policing the Alabama judiciary.” *Boggan v. Jud. Inquiry Comm’n*, 759 So. 2d 550, 558 (Ala. 1999) (Hooper, C.J., concurring specially). As the ABA explained shortly after Sections 156 and 157 became law in 1973, “the major purpose of judicial discipline is not to punish judges, but to protect the public, preserve the integrity of the judicial process, maintain public confidence in the judiciary, and create a greater awareness of proper judicial behavior on the part of judges themselves.” ABA STANDARDS RELATING TO JUDICIAL DISCIPLINE AND DISABILITY RETIREMENT 2 (Tentative Draft, 1977).

Sections 156 and 157 would not achieve these goals if they were read as depriving the Commission and the Court of jurisdiction in these

circumstances. To maintain public confidence in the judiciary, the Court must be able to sanction judges who violated the Canons during a prior term. The Commission and the Court must have authority to preserve the judicial system's integrity by reviewing acts in prior terms.

It is for these reasons that courts in many other States have held that as a blanket rule, regardless of when disciplinary proceedings begin, “[n]othing in the Constitution, the statute, or the rule limits the disciplinary power over judicial officers to those who are currently serving.” *Steady*, 641 A.2d at 118; accord *In re Thayer*, 761 A.2d 1052, 1059-61 (N.H. 2000); *In re Cox*, 658 A.2d 1056, 1058 (Me. 1995); *In re Backal*, 660 N.E.2d 1104, 1107 (N.Y. 1995); *In re Chesna*, 659 A.2d 1091, 1092 (Pa. Ct. Jud. Disc. 1995), overruled in non-pertinent part, *In re Murphy*, 10 A.3d 932, 939-40 (Pa. Ct. Jud. Disc. 2010).

This Court should adopt that same rule now, and hold that the Commission and the Court's jurisdiction extends to all matters alleging misconduct by judges that occurred while they were, regardless of term.

RESPECTFULLY submitted this 14th day of May, 2021.

/s/ Rosa H. Davis

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CERTIFICATE OF SERVICE

I hereby certify that I have, on this 14th day of May 2021, electronically filed the foregoing with the Court of the Judiciary, and that I have further served a copy upon the following by placing same in the United States Mail, postage prepaid and properly addressed and/or via email as follows:

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