

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: : MISCELLANEOUS
: :
ROBERT B. SURRICK : NO. 00-086

Dalzell, J., Dissenting

June 11, 2001

I respectfully dissent from the Majority's unsought disapproval of our panel's February 7, 2001 Report and Recommendation and from the harsh discipline it has now imposed. I do so for two fundamental reasons.

First, the imposition of any discipline is unwarranted because the state court proceedings deprived Surrick of procedural due process within the meaning of our Rule of Disciplinary Enforcement II.D.1. Second, as suggested in my concurring opinion, the imposition of discipline by this Court would result in grave injustice, within the meaning of our Rule of Disciplinary Enforcement II.D.3., because of (a) the unprecedented severity of the state discipline, and (b) the profound First Amendment interests that are violated by the imposition of such discipline.

I.

There is no point in rehearsing what Judge Pollak set forth in such detail and with such persuasiveness in his opinion for our panel on the subject of the procedural due process of which Surrick was so palpably deprived at the hands of the Commonwealth's highest tribunal. Even if our Disciplinary Rule II.D.1. did not exist, two controlling United States Supreme

Court precedents would compel the conclusion we reached in our panel opinion. See In re Ruffalo, 390 U.S. 544 (1968) and Theard v. United States, 354 U.S. 278 (1957).

Though a narrow majority of this Court thinks otherwise, the deprivation of procedural due process is therefore obvious and requires the result our panel recommended.

II.

As suggested in my concurring opinion, the imposition of the same discipline would result in grave injustice within the meaning of Rule of Disciplinary Enforcement II.D.3. Although the First Amendment interests are, of course, transcendent, there are in fact two reasons to apply the "grave injustice" standard here.

A.

It remains undisputed and indisputable that the discipline imposed in Surrick's case is uniquely and unprecedentedly harsh. In colloquy with me at the September 20, 2000 oral argument, the Office of Disciplinary Panel's able advocate acknowledged that he could cite no other case in Pennsylvania disciplinary jurisprudence which suspended for any such time any Pennsylvania lawyer for filing a recusal motion.¹ This may by itself explain why, even after the Pennsylvania Supreme Court's remand regarding Anonymous Attorney A, the Disciplinary Board nevertheless only recommended a public censure for Surrick's August 11, 1992 filing in the Pennsylvania Superior

1. At the May 22, 2001 hearing before the second panel, disciplinary counsel reiterated this concession.

Court. The five-year suspension came, quite literally, unbidden and out of the blue.

In imposing a five-year suspension, the filing of a motion for recusal in an appellate court was thus given the equivalence of a conviction of a felony, as recently witnessed by the five-year suspension imposed on former Pennsylvania Attorney General Ernest Preate, who pled guilty to federal mail fraud and received a fourteen month prison sentence for it. See The Legal Intelligencer, March 22, 2001, p. 1. By contrast, all Surrick did was, at worst, ruffle some judicial feathers in his written criticism of four public figures. Such discipline is far beyond the pale and utterly out of proportion to what Surrick did on August 11, 1992. In short, this Draconian discipline constitutes "grave injustice" and this Court should be the last institution to perpetuate any aspect of that injustice -- much less thirty months of it -- under our own Rules.

B.

As suggested in my concurring opinion, there are also profound First Amendment interests in play in this case.

At the outset, and as the concurring opinion stated, there is no question that a courtroom is not a free speech zone on the order of a public square or the Internet. To the contrary, the law and the judges who administer that law must keep very tight control of what occurs in the courtroom in areas ranging from, in our courts, the application of the Federal Rules

of Evidence² to courtroom civility and decorum. It is crucial, however, to recall that none of those interests is threatened by the written motion Surrick filed in the Pennsylvania Superior Court on August 11, 1992.

In filing his anticipatory motion for recusal, Surrick challenged the integrity of four elected judges in the Commonwealth of Pennsylvania, and did so with some strong language. A look at one of those four judges will illuminate the core First Amendment interests at stake here.

Surrick feared that there were ex parte communications involving Supreme Court Justice Rolf Larsen in an earlier case, and that Delaware County Common Pleas judges were in league with Justice Larsen, to the disadvantage of Surrick and his clients. As Judge Greenberg of our Court of Appeals later rehearsed the sordid history, Larsen, besides being in 1994 impeached and removed from office in the Pennsylvania General Assembly, was the subject of an investigation by the Pennsylvania Judicial Inquiry Review Board ("JIRB"). See Larsen v. Senate of the Commonwealth of Pennsylvania, 154 F.3d 82, 85 (3d Cir. 1998). As Judge Greenberg reported in Larsen, the JIRB, "following an investigation into allegations of misconduct, reported to the Pennsylvania Supreme Court that Larsen had created an appearance of impropriety by engaging in ex parte communications with a trial judge in a pending case." Interestingly, Justice Larsen's

2. See, e.g., Fed. R. Evid. 611(a).

(unsuccessful) defense to this charge was that at least three other Justices "had engaged in various forms of misconduct involving ex parte communications, kickbacks, partiality toward litigants and interference in pending cases." Id.

Our Court of Appeals's decision in Larsen was not the only reason for my comment in footnote 2 of the concurring opinion that it is well past the time in Pennsylvania when one could reflexively attribute claims of such improper communications to lawyers' hyperactive imaginations. As Judge Greenberg did in Larsen, id. at note 1, I cited Yohn v. Love, 887 F.Supp. 773 (E.D.Pa. 1995), aff'd in relevant part 76 F.3d 508 (3d Cir. 1996), a case in which Judge Newcomer found, and our Court of Appeals affirmed, an ex parte communication between the former Chief Justice of Pennsylvania and an Assistant District Attorney during a criminal case. This ex parte communication led to that Chief Justice's direction to the trial judge to reverse an earlier, important evidentiary ruling in the middle of a criminal trial.

In both Larsen and Yohn, it is very hard to see how the ex parte misconduct could have been brought to light unless a lawyer had the courage to do so. Indeed, as pointed out in footnote 2 of the concurring opinion, in less than twenty years no fewer than 266 judges in state courts around the country have been removed from office as a result of disciplinary proceedings, including many because of ex parte communications. See 22 Judicial Conduct Reporter 4, 6-7 (Summer, 2000). The conduct of

which Surrick complained in his written motion, therefore, is scarcely unknown either in Pennsylvania or in the other state courts, and involves the heart of the judicial branch of government.

Experience in the federal courts, while much happier in this regard than that just canvassed in the state systems, is nevertheless instructive as to why written motions like Surrick's must be accorded Times-Button "breathing space".³ In 1990, Congress created the National Commission on Judicial Discipline and Removal ("NCJDR"), see Judicial Improvement Act of 1990, Pub. L. No. 101-650, tit. IV, § 410, 104 Stat. 5089, 5124. The counsel to the NCJDR and a researcher from the Federal Judicial Center who worked with him published their exhaustive research on judicial misconduct complaints under 28 U.S.C. § 372(c), Jeffrey N. Barr & Thomas E. Willging, Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980, 142 U. Pa. L. Rev. 25 (1993). Although Barr and Willging found that the great majority of the 2,405 § 372(c) filings they studied were without merit, they did find forty-four cases where corrective action was taken, including three where Article III judges were ultimately

3. See NAACP v. Button, 371 U.S. 415, 433, 83 S.Ct. 328, 338 (1963)("First Amendment freedoms need breathing space to survive"); New York Times v. Sullivan, 376 U.S. 254, 279, 84 S.Ct. 710, 725 (1964)("would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.").

impeached. Of telling First Amendment significance to Surrick's case, however, was the authors' report of interviews "from the Public Integrity Section of the Department of Justice [who] expressed misgivings about filing complaints" against federal judges. Quoting a research paper of Professor Todd Peterson about those interviews, the authors reported that

the attorneys were incredulous at the suggestion that a Department attorney would risk souring relations between the Department and a federal judge by making a complaint under the 1980 Act. The absence of complaints from federal attorneys coincided with reports from the same interviewees that federal judges sometimes exhibit signs of an 'arrogant and arbitrary exercise of authority' that includes 'sexism and racism in the treatment of attorneys.' Given the power and influence of the Department of Justice, one can imagine that the average practitioner would be at least as timid in risking their personal reputation or that of their law firm.

Id. at 149 (citations to Professor Peterson's research paper omitted).⁴

Even before Surrick's case, it was apparent that any lawyer had to swallow hard before he or she risked filing a motion to recuse, given the fears Barr and Willging cited. But because, as I mentioned in my concurring opinion, lawyers are effectively sentries for the public when they detect judges' ethical breaches, they must have Times-Button "breathing space"

4. It is certainly true that lawyers who do not often appear in this district, especially out of district lawyers, do not have the institutional constraint Department of Justice lawyers do. But this limited circumstance does not apply to lawyers like Surrick who regularly have practiced in our district.

in this heartland of the administration of justice if they are to take that grave risk.⁵

The Pennsylvania Supreme Court and now the narrowest majority of this Court have made a lawyer's filing of a motion to recuse a professionally suicidal act. Surely the First Amendment

5. We are not the first to notice this First Amendment dimension. See, e.g., Judge Kozinski's opinion for the Court in Standing Comm. on Discipline of the U.S. Dist. Court v. Yagman, 55 F.3d 1430, 1437-38 (9th Cir. 1995) (Times constrains district court attorney disciplinary standards) and 1441 (lawyer has First Amendment right to refer to a federal judge as, e.g., "dishonest," "ignorant," "a buffoon," "a bully," and "a right wing fanatic"). The pertinent epithets were made in the lawyer's letter to the publisher of the Almanac of the Federal Judiciary, in response to the subject judge's request for an amendment to his profile therein. The offending letter is worth quoting so it may be compared with the content of Surrick's motion:

It is outrageous that the Judge wants his profile redone because he thinks it to be inaccurately harsh in portraying him in a poor light. It is an understatement to characterize the Judge as "the worst judge in the central district [of California]." It would be fairer to say that he is ignorant, dishonest, ill-tempered, and a bully, and probably is one of the worst judges in the United States. If television cameras ever were permitted in his courtroom, the other federal judges in the Country would be so embarrassed by this buffoon that they would run for cover. One might believe that some of the reason for this sub-standard human is the recent acrimonious divorce through which he recently went: but talking to attorneys who knew him years ago indicates that, if anything, he has mellowed. One other comment: his girlfriend . . . , like the Judge, is a right-wing fanatic.

Id. at 1434 n.4.

The lawyer in question also told a reporter that the judge was "drunk on the bench" and given to "anti-semitism," id. at 1434.

exists to prevent such self-immolation on the part of those citizens in the best position to detect judicial misconduct and bring it to public light.

III.

There is also a certain surreality to the imposition of discipline in this Court given that no one has asked for it. The Office of Disciplinary Counsel, no wilting flower in these cases, interposed no objection to either the Report and Recommendation or the concurring opinion. While this silence does not foreclose this Court's right to examine Surrick's case de novo, to expend such energy for so long in such a procedural context seems a peculiar expenditure of precious judicial time.

While not an advisory act under U.S. Const. Art. III, § 2, the Court's unsought action to reach such an unwarranted result is odd and disquieting. Indeed, those who believe, as I do, that the First Amendment protects values at the core of our polity will share my particular disquiet that Article III judges could be so unnerved by the possible application of those values in this extreme case that they have acted as they have where there is really no case and only controversy of their own making.

Stewart Dalzell, J.