COMMONWEALTH OF PENNSYLVANIA
COURT OF JUDICIAL DISCIPLINE

IN RE:

Ann H. Lokuta
Judge of the Court of Common Pleas
Eleventh Judicial District
Luzerne County

: No. 3 JD 06

BEFORE: Honorable Stewart L. Kurtz, P.J.
Honorable John L. Musmanno, P.J.E.
Honorable Richard A. Sprague, P.J.E.
Honorable William H. Lamb, P.J.E.
Honorable Lawrence J. O'Toole
Honorable Kelley T.D. Streib
Honorable William D. Bucci

OPINION AND ORDER

OPINION BY JUDGE SPRAGUE FILED: January 4, 2010

I. INTRODUCTION

On October 30, 2008, after a lengthy trial, this Court filed an Opinion finding that Judge Ann H. Lokuta[1] was subject to discipline under Section 18(d)(1) of the Pennsylvania Constitution. That finding was based on findings that Petitioner's conduct described at the trial by 30 witnesses constituted thirteen violations of the Constitution as conduct which brought the judicial office into disrepute or prejudiced the proper administration of justice, or both, and also constituted thirteen violations of various provisions of the Code of Judicial Conduct.[2] We held that these violations had been

[1] In our Opinion we referred to Judge Lokuta as "the Respondent." Since then she has filed a Petition with the Supreme Court and is referred to as "the Petitioner" by the Supreme Court in its Remand Order. We will refer to her as "the Petitioner."

[2] Four violations of Canon 3(A)(3) (failure to be patient, dignified and courteous); one violation of Canon 3A(5) (failure to dispose promptly of the business of the court); four violations of Canon 3(B)(1) (failure to facilitate the performance of the administrative responsibility of other judges and court officials); two violations of Canon 3(C)(1)(a) (failure to disqualify); and two violations of Canon 2A (failure to conduct herself in a manner that promotes public confidence in the integrity and impartiality of the judiciary).

established by "clear and convincing evidence." These findings of the Court were unanimous with the exception that Judges Streib and O'Toole did not join in the Court's findings that Petitioner violated Canons 3(C)(1)(a) and 2(A).

On December 9, 2008, this Court entered an Order of Sanction removing Petitioner from her judicial office and prohibiting her from holding any judicial office in the future.[3] From this Order, on January 6, 2009, Petitioner filed a timely appeal with the Supreme Court.

On January 26, 2009, the United States Attorney for the Middle District of Pennsylvania filed an Information against Michael Conahan and Mark Ciavarella, former judges of the Luzerne County Court of Common Pleas, charging them with violations of 18 U.S.C. §§1343, 1346 and 2 which he styled – "Honest Services Wire Fraud" (Count 1), and with violations of 18 U.S.C. §371 styled "Conspiracy to Defraud the United States" (for filing "materially false [income] tax returns") (Count 2).[4]

On February 3, 2009, the United States Attorney filed an Information against William T. Sharkey, former Court Administrator of Luzerne County, charging him with embezzling funds belonging to Luzerne County. Sharkey pled guilty to the charges on February 17, 2009.[5]

---

[3] Judge O'Toole dissented from the Sanction Order and would have imposed a sanction of suspension for one year without pay followed by probation for three years.

[4] Conahan and Ciavarella entered Plea Agreements to the charges on January 26, 2009 but, on July 30, 2009 Judge Kosik of the United States District Court for the Middle District of Pennsylvania withdrew approval of the Plea Agreements and Conahan and Ciavarella entered pleas of not guilty. Later, on September 9, 2009, the Grand Jury returned an Indictment alleging the same conduct, but charging Conahan and Ciavarella with a variety of additional crimes arising from that conduct. These include Racketeering, Corrupt Receipt of Bribe/Reward for Official Action Concerning Programs Receiving Federal Funds, Money Laundering, and Extortion Under Color of Official Right, consisting of a total of 48 Counts. Conahan and Ciavarella have pleaded not guilty to these charges.

[5] Sharkey's conduct described in the Information is unrelated to the conduct which provided the basis for the charges against Conahan and Ciavarella.

On February 23, 2009, Jill Moran, former Prothonotary of Luzerne County, entered into a Stipulation of Compromise with the United States of America whereunder she agreed to cooperate with the United States by providing all information of criminal activity of which she has knowledge and to resign as Prothonotary of Luzerne County.

On March 3, 2009, Petitioner filed an Application for Supersedeas, Stay, and Extraordinary Relief with the Supreme Court. In the Application, Petitioner made reference to the above-mentioned Informations and the guilty pleas of Conahan, Ciavarella and Sharkey and the Stipulation of Compromise filed by Moran and requested various relief including a stay of the Order of this Court removing her from judicial office.[6]

On March 25, 2009, the Supreme Court of Pennsylvania consolidated Petitioner's Application for Extraordinary Relief with her appeal and remanded the case to this Court in an Order which stated:

> The consolidated matter is REMANDED to the Court of Judicial Discipline for the limited purpose of that court considering Petitioner's claims in the nature of after-discovered evidence, arising from the recent revelations of corruption in Luzerne County. The Court of Judicial Discipline is to determine whether the new evidence requires a further hearing and/or whether it affects the existing determination of the Court of Judicial Discipline to remove Petitioner from judicial office.

[6] Petitioner also requested that the Supreme Court direct the Secretary of the Commonwealth to refrain from placing Petitioner's judicial seat on the May 2009 ballot.

> Furthermore, the December 9, 2008 order of the Court of Judicial Discipline is STAYED pending remand and a final determination of this matter . . . .[7]

From this Order, then, we take instruction for our work on remand.

II. DISCUSSION

A. Proceedings in This Court

Pursuant to the Supreme Court's Remand Order, this Court proceeded as follows:

On March 27, 2009 we ordered the Judicial Conduct Board (Board) and Petitioner to file briefs treating the questions:

1. whether the matters referred to by Petitioner in her Application to the Supreme Court . . . require this Court to revoke or modify the sanction order removing Petitioner from her judicial office, and

2. whether a further evidentiary hearing is required to make such determination.

Briefs were filed in April and argument on the questions was held on May 13, 2009. During that argument, this Court made the following ruling:

> It is the Opinion of this Court -- the unanimous Opinion of this Court that the Remand Order by the Supreme Court of Pennsylvania where they use the language arising from the – reading it in its entirety – for us, this Court "for the limited purpose of considering Petitioner's claims in the nature of after discovered evidence arising from the recent revelations of corruption in Luzerne County," that that means we are not obviously told to look at newspaper accounts. We are not told to guess as to what in the world is meant by something that may be public, of something that may become public.

[7] The Supreme Court's Order continued with instructions to the Secretary of the Commonwealth as follows:

> [A]nd the Secretary of the Commonwealth is directed to refrain from placing Petitioner's judicial seat on the Court of Common Pleas of Luzerne County on the May 2009 primary ballot. This stay is entered solely for the purpose of ensuring that Petitioner's seat on the Court of Common Pleas of Luzerne County is not placed on the ballot until final resolution of this judicial disciplinary matter, and is not to be construed as this Court taking any position on the merits of Petitioner's appeal or her after-discovered evidence claim.

> What the Supreme Court meant in the Opinion of this Court is that those filings that have been on the public record in Luzerne County, meaning the pleas of guilty by Judge Ciavarella, Judge Conahan, Mr. Sharkey, and even including the agreement involving Moran, but it is the position of this Court that all arguments are to be from those matters. That is what is meant by corruption.
>
> It is our position that argument that we will hear, and if there is to be testimony, will be on the issue of the connection of that area of corruption and the trial of Judge Lokuta to see if there is anything that occurred in those areas that would cause this Court to reconsider its disposition of this case or the necessity of taking further testimony. (N.T. 45-46, May 13, 2009).

At the conclusion of the proceedings on May 13, 2009, this Court entered the following Order:

> It is the ruling of this Court that no discovery will be allowed, which does not mean however that Judge Lokuta may not engage in whatever investigation they want to do and obtain whatever interviews and any other material they want to obtain.
>
> The Court will grant Judge Lokuta a period of 90 days to engage in whatever discovery they believe appropriate understanding the ruling of this Court, and it is expected it will be complied with. (N.T. 95-96, May 13, 2009).

Thereafter, on August 7, 2009, Petitioner filed four documents. These were the affidavits of:

> Patricia E. Benzi
> Joseph S. Novak
> Carolee Medico Olenginski and
> Sandra M. Brulo

On September 10, 2009 Petitioner filed a "Supplemental Statement" which was a letter from Judge Norman A. Krumenacker, III, Court of Common Pleas of Cambria County.

On October 7, 2009 Petitioner filed a "Supplemental Submission" which reports on two newspaper articles which appeared in the Wilkes-Barre papers on September 25,

2009 and October 2, 2009, and statements made by John Kennedy, a Luzerne County lawyer, on a Wilkes-Barre radio station on October 2, 2009. The newspaper articles were attached as exhibits. In its Response to this Submission the Board filed a transcript of Kennedy's radio interview.

After consideration of the conduct of Conahan and Ciavarella and Sharkey set out in the Informations filed against them[8] and of the six items submitted by the Petitioner set out above, this Court entered an Order on October 27, 2009 which provided:

1. the new evidence claim of Ann H. Lokuta, Petitioner, does not require a further hearing on the merits of this Court's Findings of Fact and Conclusions of Law contained in its Opinion of October 30, 2008;[9]

2. the Court, however, will permit Petitioner and the Judicial Conduct Board to present argument at a hearing as to whether the new evidence that has been presented to this Court affects the existing determination of this Court to remove Petitioner from judicial office.[10]

Argument on the question was held on November 17, 2009 and the Court now unanimously affirms paragraph 1. of its Order of October 27, 2009 that the new evidence claim of Ann H. Lokuta, Petitioner, does not require a further hearing on the merits of this Court's Findings of Fact and Conclusions of Law contained in its Opinion of October 30, 2008; and further holds that said new evidence does not affect the existing determination of this Court removing Petitioner from judicial office and prohibiting her from holding any judicial office in the future.

---

[8] Moran's Stipulation of Compromise describes no conduct. It refers to "criminal activity" and provides that if she has knowledge of any, she will share it with the United States.

[9] This finding was unanimous.

[10] Judges O'Toole and Streib would have allowed an evidentiary hearing on the question of whether the new evidence affects the existing determination to remove Petitioner from judicial office.

B. Scope of Remand

1. "New Evidence" and "After-Discovered Evidence."

The Petitioner has raised some questions about just what it is that the Supreme Court has instructed this Court to consider in making the determinations we were instructed to make in the Remand Order.

The answer to this seems very clear to us. The Supreme Court's Remand Order states that any determinations by this Court that a further hearing should be held or our sanction order changed are to be made only if "the new evidence requires [it]." We likewise believe that the Supreme Court has made it quite clear exactly what is this "new evidence" which it instructs us to consider. The Court tells us that it is "in the nature of after-discovered evidence, arising from the recent revelations of corruption in Luzerne County." We believe that the Supreme Court's choosing of the modifier "after-discovered" was made with thought and purposefully, first, because of the importance that there be an end to cases,[11] and because everybody knows what "after-discovered evidence" is, it having been defined over and over by the courts of the Commonwealth.

The Supreme Court has defined it, in Commonwealth v. Dennis, 552 Pa. 331, 355, 715 A.2d 404, 415 (1998), as follows:

---

[11] This has long been a jurisprudential staple in this Commonwealth and was announced with some noticeable emphasis by our Supreme Court in Reilly by Reilly v. SEPTA, 507 Pa. 204, 489 A.2d 1291 (1985). There the Supreme Court said:

> Charges of prejudice or unfairness made after trial expose the trial bench to ridicule and litigants to the uncertain collateral attack of adjudications upon which they have placed their reliance. One of the strengths of our system of justice is that once decisions are made by our tribunals, they are left undisturbed. Litigants are given their opportunity to present their cause and once that opportunity has passed, we are loathe to reopen the controversy for another airing, save for the greatest of need. This must be so for the security of the bench and the successful administration of justice. Accordingly, rules have developed for the overturning of verdicts and judgments for after-acquired evidence.

Reilly at 1301.

To warrant relief after-discovered evidence must meet a four-prong test:

(1) the evidence could not have been obtained before the conclusion of the trial by reasonable diligence;

(2) the evidence is not merely corroborative or cumulative;

(3) the evidence will not be used solely for purposes of impeachment;

(4) the evidence is of such a nature and character that a different outcome is likely.

See, also, Weir v. Ciao, 364 Pa.Super. 490, 496, 528 A.2d 616, 619 (1987) aff'd, 521 Pa. 491, 556 A.2d 819 (1989); Ebner v. Ewick, 335 Pa.Super. 372, 484 A.2d 180 (1984); Gamma Swim Club, Inc. v. Commonwealth Department of Transportation, 95 Pa.Cmwlth. 167, 505 A.2d 342 (1986).

After-discovered evidence not only is defined in judicial decisions, there is legislation defining it. The Post-Conviction Relief Act (PCRA) provides:

§9543. Eligibility for Relief

(a) GENERAL RULE. To be eligible for relief [vacation of existing Order and grant of new trial], under this subsection the petitioner must plead and prove by a preponderance of the evidence all of the following:

* * * *

(2) That the conviction or sentence resulted from one or more of the following:

* * * *

(vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.

Pa.C.S. §9543.