State of New York
Commission on Judicial Conduct

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to

Determination

ALLAN L. WINICK,

a Judge of the County Court,
Nassau County.

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
John J. Bower, Esq.
David Bromberg, Esq.
Honorable Carmen Beauchamp Ciparick
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea
John J. Sheehy, Esq.

APPEARANCES:

Gerald Stern (Robert H. Tembeckjian, Of Counsel) for the Commission

Jaspan, Ginsberg, Ehrlich, Reich & Levin (By A. Thomas Levin; Joseph Jaspan, Of Counsel) for Respondent

The respondent, Allan L. Winick, a judge of the County Court, Nassau County, was served with a Formal Written Complaint dated October 10, 1985. Respondent filed an answer dated October 21, 1985.

By order dated November 6, 1985, the Commission designated Gerald Harris, Esq., as referee to hear and report proposed findings of fact and conclusions of law.

On December 17, 1985, respondent was served with an Amended Formal Written Complaint, superceding the Formal Written Complaint of October 10, 1985. Respondent answered the Amended Formal Written Complaint on December 23, 1985.

A hearing was held on January 21 and 22, 1986, and the referee filed his report with the Commission on June 2, 1986.

By motion dated August 28, 1986, the administrator of the Commission moved to confirm in part and disaffirm in part the referee's report, to adopt additional findings and conclusions and for a determination that respondent be censured. Respondent opposed the motion by cross motion on September 15, 1986.

On November 14, 1986, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent is a judge of the Nassau County Court and has been consistently since January 1, 1984. He also served two interim terms in 1982 and 1983.

2. On Sunday, May 5, 1985, Walter Cook was arrested in Queens by Investigator Gregory Gentile of the State Police and Investigator Steven G. Hill of the Attorney General's Office.

3. Investigator Gentile was executing a felony arrest warrant issued pursuant to a sealed indictment in Monroe County. Investigator Hill was executing an order and warrant of commitment for contempt of court arising out of a civil proceeding in Cayuga County.

4. After his arrest, Mr. Cook called Marshall A. Bernstein, an attorney who had previously represented him in civil matters, and asked him to find a judge who would arraign him. Mr. Bernstein was not told of the nature of the charges or that the arrest was pursuant to an indictment.

5. Mr. Bernstein attempted without success to find a judge to arraign Mr. Cook. He then called his law partner, Richard S. Gershman, at the Woodmere Country Club.

6. Mr. Bernstein asked Mr. Gershman to locate respondent and ask him to arraign Mr. Cook.

7. Respondent and Mr. Gershman are members of the club. Mr. Bernstein was a member until 1982. Although respondent was acquainted with the two lawyers as members of the club, he had no social or business dealings with them at or outside of the club.

8. Mr. Gershman found respondent in the locker room of the club and asked him whether he would arraign someone who had been arrested in Queens.

9. Respondent said that he had no jurisdiction in Queens. Mr. Gershman asked whether respondent could handle the arraignment if the defendant were brought to Nassau County.

10. Respondent agreed to arraign the defendant at his home before 5:00 P.M.

11. At the time, there was a procedure in Nassau County by which defendants arrested at night or on weekends could be arraigned by a District Court judge on call for such matters. Respondent was aware of the procedure but did not suggest that it be employed with respect to Mr. Gershman's client. Although a District Court judge would not have had jurisdiction to arraign a defendant pursuant to a sealed indictment, respondent did not know at the time that Mr. Gershman's client had been arrested pursuant to a sealed indictment.

12. Mr. Cook was booked at State Police barracks and taken to respondent's home. Respondent, Mr. Cook, Mr. Gershman, Investigator Gentile, Investigator Hill, Mr. Cook's father and a man named Louis Morell were present for the proceeding.

13. Respondent refused to entertain the commitment order on the basis that he had no jurisdiction over an order issued by the Supreme Court.

14. Respondent conducted a proceeding on the arrest warrant which had some of the elements of an arraignment and which several of the participants, including respondent, have referred to at various times as an arraignment. Respondent now contends, however, that it was not an arraignment but a bail application hearing.

15. Respondent read Mr. Cook the charges listed on the warrant of arrest. He did not have a copy of the indictment and indicated on the back of the arrest warrant that the defendant had waived the reading of the indictment.

16. Respondent advised Mr. Cook of his right to counsel and that a predicate felon was subject to mandatory imprisonment.

17. Respondent then asked for a report on Mr. Cook's criminal history and said that he must have the views of an assistant district attorney as to bail.

18. Investigator Gentile gave respondent a criminal history which indicated a number of arrests dating to 1967 but no reported convictions.

19. Mr. Gershman reached a Nassau County assistant district attorney, Edward W. McCarty, III (now a District Court judge), and respondent spoke to him by telephone.

20. Mr. McCarty suggested that Mr. Cook be detained at the Nassau County Jail until he could be transported to Monroe County "where the judge who knows more of the facts could set the appropriate bail." Respondent said that he would consider it.

21. Mr. McCarty told respondent that the Monroe County authorities considered the matter serious, that Mr. Cook had "no definitive roots" in Nassau County, that he had been a fugitive for a long period and that he had a record of arrests.

22. Mr. McCarty recommended bail of $50,000.

23. Respondent said that he would consider Mr. McCarty's position and ended the conversation.

24. Respondent then heard Mr. Gershman, who argued that Mr. Cook was a businessman who had lived in Nassau County for 15 years.

25. Respondent set bail at $5,000 bond or $500 cash and ordered Mr. Cook to appear in Monroe County on May 8, 1985.

26. Respondent then called a Supreme Court justice and asked her to handle the commitment order, and the parties left his home.

27. Respondent had never before conducted an arraignment or a bail hearing at his home.

28. On May 8, 1985, respondent called Mr. McCarty to his chambers. Respondent asked whether Mr. McCarty had heard what happened with the case in Monroe County. Respondent indicated that he hoped that Mr. Cook had appeared as scheduled because respondent had extended "a favor to a friend" at his club.

29. Mr. Cook did not appear in Monroe County on May 8, 1985, and remained at large until November 1985.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1 and 100.2 of the Rules Governing Judicial Conduct and Canons 1 and 2 of the Code of Judicial Conduct. The charge in the Amended Formal Written Complaint is sustained, and respondent's misconduct is established. Respondent's cross motion is denied.

A judge must be sensitive to the appearance of impropriety that may be conveyed by his or her conduct, as well as to the commission of actual improprieties. Section 100.2 of the Rules Governing Judicial Conduct. The appearance of favoritism is no less to be condemned than actual favoritism. Matter of Spector v. State Commission on Judicial Conduct, 47 NY2d 465, 466 (1979).

Taken as a whole, respondent's handling of the Cook matter conveyed the appearance of favoritism.

Respondent, a county court judge with limited geographic jurisdiction, agreed to conduct a bail hearing for a defendant wanted in another county and arrested in a third. The request to do so came outside of court from a lawyer respondent knew only as a country club acquaintance. Respondent ignored standard procedures for off-hours proceedings and conducted the hearing not in a courtroom or a police station but at his home on a Sunday afternoon.

This unusual hearing raised serious procedural questions. Mr. Cook's arrest was pursuant to a warrant that demanded his appearance before the Monroe County Court, not respondent's court, and pursuant to a statute that calls for a defendant's "arraignment." Section 210.15 of the Criminal Procedure Law. Respondent contends that he did not conduct an arraignment but a bail application hearing. This he had no power to do since the statute allows for bail or release only "[u]pon the arraignment...." CPL §210.15(6). Having assumed to hold a "bail application hearing," respondent set a low bail considering the defendant's fugitive status, the felony nature of the charges and the prosecutor's recommendation of a considerably higher bail.

It is not our function to review bail decisions or erroneous assumptions of jurisdiction. These are legal issues

subject only to a judge's discretion and appellate review. We examine these factors as part of a picture that, with the other circumstances of the case, depicts the appearance of favoritism. Matter of Mullen, unreported (Com. on Jud. Conduct, May 22, 1986); Matter of Latremore, unreported (Com. on Jud. Conduct, May 30, 1986). Respondent further contributed to the appearance of impropriety by describing his handling of the matter as a "favor to a friend."

> The appearance from which favored treatment can be deduced, even without real foundation, can be very harmful to the administration of justice. Likewise is providing the opportunity from which an implication of impropriety could be drawn. No matter how innocent respondent's conduct may have been, it unnecessarily and unwisely put a burden of explanation and justification not only on himself but on the judiciary of which he is an officer.
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> Matter of Suglia, 36 AD2d 326, 327-28 (1st Dept. 1971).

Because respondent's actions in this matter conveyed an appearance of favoritism, public sanction is appropriate, not to punish him but to maintain public confidence in the judiciary. Matter of Waltemade, 36 NY2d (a), (nn), (lll)(Ct. on the Judiciary 1975).

By reason of the foregoing, the Commission determines that the appropriate sanction is admonition.

Mrs. Robb, Mr. Bower, Mrs. DelBello, Mr. Kovner, Judge Ostrowski, Judge Shea and Mr. Sheehy concur.

Judge Ciparick and Mr. Cleary dissent and vote that the Formal Written Complaint be dismissed.

Mr. Bromberg did not participate.

Judge Rubin was not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct, containing the findings of fact and conclusions of law required by Section 44, subdivision 7, of the Judiciary Law.

Dated: January 29, 1987

Lillemor T. Robb, Chairwoman
New York State
Commission on Judicial Conduct