

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-JP-01505-SCT

***MISSISSIPPI COMMISSION ON JUDICIAL
PERFORMANCE***

v.

MARION McKENZIE

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| DATE OF JUDGMENT: | 09/10/2010 |
| TRIAL JUDGE: | HON. H. DAVID CLARK, II |
| COURT FROM WHICH APPEALED: | MISSISSIPPI COMMISSION ON JUDICIAL PERFORMANCE |
| ATTORNEYS FOR APPELLANT: | DARLENE D. BALLARD AYANNA BATISTE BUTLER |
| ATTORNEY FOR APPELLEE: | CONRAD MORD |
| NATURE OF THE CASE: | CIVIL - JUDICIAL PERFORMANCE |
| DISPOSITION: | SUSPENDED FROM OFFICE FOR THIRTY (30) DAYS WITHOUT PAY, PUBLIC REPRIMAND, \$500 FINE, AND ASSESSED COSTS IN THE AMOUNT OF \$100 - 06/23/2011 |
| MOTION FOR REHEARING FILED: | |
| MANDATE ISSUED: | |

EN BANC.

WALLER, CHIEF JUSTICE, FOR THE COURT:

¶1. The Mississippi Commission on Judicial Performance filed a formal complaint against Walthall County Justice Court Judge Marion McKenzie, charging that he had engaged in ticket-fixing and ex parte communications. Judge McKenzie acknowledged his wrongdoing and has joined the motion for approval of recommendation of a public reprimand, a \$500

fine, and assessment of costs in the amount of \$100. After conducting an independent inquiry and giving careful consideration to the findings of fact and recommendations of the Commission, we order a thirty-day suspension from office without pay in addition to the recommended sanctions.

AGREED FINDINGS OF FACT

¶2. During a three-year period, from January 2006 to January 2009, Judge McKenzie disposed, or attempted to dispose, of nine ticket citations for misdemeanor offenses. The offenses involved hunting over bait, failing to wear hunter orange, hunting without a license, and littering.

¶3. On three occasions, Judge McKenzie intervened, or attempted to intervene, in cases assigned to Justice Court Judge Lionell Harrell. On each of these occasions, Judge McKenzie obtained the violator's copy of the ticket, passed the copy to the justice court deputy clerk, and asked the deputy clerk to give it to the citing officer so the officer could help the defendant. Despite Judge McKenzie's efforts, Judge Harrell managed to dispose of two of the cases by holding hearings, finding the defendants guilty, and imposing fines totaling more than \$1,300. But a third case, which was returnable in November 2007, still had not been prosecuted at the time the Commission submitted its findings.

¶4. Judge McKenzie used similar tactics in one of his own assigned cases as well. In January 2009, after being assigned a certain case, Judge McKenzie obtained copies of the violator's tickets, gave those copies to the deputy clerk, and asked the deputy clerk to give them to the citing officer so the officer could help the defendant. The defendant eventually pleaded not guilty, and both charges were dismissed.

¶5. In three other instances, Judge McKenzie improperly disposed of cases before him. In one case, he revoked a judgment of guilt without any motion, reset the case for trial, and, at the second trial, dismissed the charge. The two other cases both involved the same defendant, who happened to be related to a local public official. One of those cases was remanded to the inactive files; the other never was called for prosecution.

¶6. When the Commission began its formal inquiry, Judge McKenzie, initially at least, failed to cooperate with and misled the Commission.

STANDARD OF REVIEW

¶7. In reviewing judicial misconduct cases, this Court conducts an “independent inquiry of the record,” and, in doing so, “accord[s] careful consideration [of] the findings of fact and recommendations of the Commission, or its committee, which has had an opportunity to observe the demeanor of the witnesses.” *Miss. Comm’n on Judicial Performance v. Boone*, ___ So. 3d ___, 2011 WL 1586469, **3-4 (Miss. April 28, 2011) (quoting *In re Removal of Lloyd W. Anderson, Justice Court Judge*, 412 So. 2d 743, 746 (Miss. 1982)).

DISCUSSION

I. Judge McKenzie violated Canons 1, 2A, 2B, 3A, 3B(1), 3B(2), and 3B(7) of the Mississippi Code of Judicial Conduct, thus causing this matter to be actionable under Article 6, Section 177A of the Mississippi Constitution of 1890, as amended.

¶8. According to the Commission’s findings, Judge McKenzie violated Canons 1, 3A, and 3B(1)¹ when he involved himself in cases that were assigned to Judge Harrell and when he

¹Canon 1 of the Code of Judicial Conduct provides that:

An independent and honorable judiciary is indispensable to justice in our

attempted to help defendants with their tickets. He violated Canons 2A and 2B² when he obtained violators' copies of the tickets, gave those copies to a deputy clerk, and instructed the clerk to pass them along to the citing officer so the officer could help the defendants dispose of the charges. Judge McKenzie violated Canon 3B(2)³ when he failed to ensure that

society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code should be construed and applied to further that objective.

Mississippi Code of Judicial Conduct Canon 1.

Canons 3A and 3B(1) state, in pertinent part, that:

. . . The judicial duties of judges take precedence over all their other activities. The judges' judicial duties include all the duties of their office prescribed by law. In the performance of these duties, the following standards apply: . . . (1) A judge shall hear and decide all assigned matters within the judge's jurisdiction except those in which disqualification is required.

Mississippi Code of Judicial Conduct Canon 3.

²Canons 2A and 2B provide, in pertinent part, that:

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. Judges shall not allow their family, social, or other relationships to influence the judges' judicial conduct or judgment. Judges shall not lend the prestige of their offices to advance the private interests of the judges or others; nor shall judges convey or permit others to convey the impression that they are in a special position to influence the judges. . . .

Mississippi Code of Judicial Conduct Canon 2.

³Canon 3B(2) states that "A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism." Mississippi Code of Judicial Conduct Canon 3B(2).

proper notice was given to the State before conducting a hearing, and when he assisted certain defendants by dismissing or remanding their cases to the inactive files. Judge McKenzie violated Canon 3B(7)⁴ when he engaged in ex parte communications with numerous defendants and failed to afford the State a right to be heard. And finally, the Commission found that Judge McKenzie had violated Canon 3C(1)⁵ by failing initially to cooperate with the Commission’s investigation.

¶9. We agree that each of these Canons was violated, except for Canon 3C(1), which relates to Judge McKenzie’s failure to cooperate with the Commission’s investigation. Canon 3C(1) concerns “Administrative Responsibilities” and does not speak to a judge’s obligation to the Commission. *See, e.g., Miss. Comm’n on Judicial Performance v. Vess*, 692 So. 2d 80, 84 (Miss. 1997) (finding that a justice court judge had violated Canon 3C(1) by failing to disqualify himself from a case after having had improper ex parte communications). More importantly, Judge McKenzie had a federal and state constitutional

⁴Canon 3B(7) provides, in pertinent part, that:

A judge shall accord to all who are legally interested in a proceeding, or their lawyers, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding [with certain exceptions]. . .

Mississippi Code of Judicial Conduct Canon 3B(7).

⁵Canon 3C(1) states that “A judge shall diligently discharge the judge’s administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and shall cooperate with other judges and court officials in the administration of court business.” Mississippi Code of Judicial Conduct Canon 3C(1).

right against self-incrimination. U.S. Const. amend. V; Miss. Const. art. 3, § 26. His lack of cooperation, therefore, was not a violation of the Code of Judicial Conduct. Judge McKenzie did admit to “misleading” the Commission, however. This will be considered below as an aggravating factor.

¶10. In sum, we find that Judge McKenzie violated Canons 1, 2A, 2B, 3A, 3B(1), 3B(2), and 3B(7) of the Mississippi Code of Judicial Conduct and that his actions constituted willful misconduct and conduct prejudicial to the administration of justice, in violation of Article 6, Section 177A of the Mississippi Constitution of 1890, as amended.⁶

II. Judge McKenzie’s misconduct warrants a public reprimand, a thirty-day suspension from office without pay, a \$500 fine, and assessment of costs in the amount of \$100.

¶11. This Court considers six factors in determining proper sanctions for judicial misconduct: (1) the length and character of the judge’s public service; (2) whether there is any prior caselaw on point; (3) the magnitude of the offense and the harm suffered; (4) whether the misconduct is an isolated incident or evidences a pattern of misconduct; (5) whether moral turpitude was involved; and (6) the presence or absence of mitigating or aggravating circumstances. *Miss. Comm’n on Judicial Performance v. Gibson*, 883 So. 2d

⁶Section 177A of the Mississippi Constitution states, in pertinent part, that:

On recommendation of the commission on judicial performance, the supreme court may remove from office, suspend, fine or publicly censure or reprimand any justice or judge of this state for: . . . (b) willful misconduct in office; . . . (e) conduct prejudicial to the administration of justice which brings the judicial office into disrepute

Miss. Const. art. 6, § 177A.

1155, 1158 (Miss. 2004), *overruled in part on other grounds by Boone*, 2011 WL 1586469 at *1.

A. Length and Character of Judge McKenzie's Public Service

¶12. Judge McKenzie has been a justice court judge for fifteen years. Prior to that, he served as a deputy sheriff for twelve years. The record is silent regarding the character of his public service.

B. Prior Caselaw

¶13. The Commission cites *Mississippi Commission on Judicial Performance v. Boykin*, 763 So. 2d 872 (Miss. 2000), and *Mississippi Commission on Judicial Performance v. Warren*, 791 So. 2d 194 (Miss. 2001), as comparable cases. In *Boykin*, this Court imposed a public reprimand and a fine for a justice court judge who improperly had dismissed eleven tickets based upon ex parte communications. *Boykin*, 763 So. 2d at 874, 876. In *Warren*, this Court ordered a public reprimand and a fine on a justice court judge who had engaged in ex parte communications and had dismissed approximately ten speeding tickets without notice to the citing officer or a hearing. *Warren*, 791 So. 2d at 196-99.

¶14. The Commission also cites *Mississippi Commission on Judicial Performance v. Sanford*, 941 So. 2d 209 (Miss. 2006), and *Mississippi Commission on Judicial Performance v. Gordon*, 955 So. 2d 300 (Miss. 2007), but it finds that Judge McKenzie's actions were not as egregious as the misconduct in those cases.

¶15. In *Sanford*, *Gordon*, and, more recently, in *Mississippi Commission on Judicial Performance v. Bradford*, 18 So. 3d 251 (Miss. 2009), this Court imposed suspensions for egregious misconduct that involved moral turpitude arising out of what is referred to as

“ticket-fixing.” *Sanford*, 941 So. 2d at 216-18; *Gordon*, 955 So. 2d at 305-06; *Bradford*, 18 So. 3d at 256-57.

¶16. In *Sanford*, a justice court judge arranged for the arresting officer in a driving-under-the-influence case not to appear at trial so the judge could dismiss the case for failure to prosecute. *Sanford*, 941 So. 2d at 210, 218. The Commission recommended a public reprimand and assessment of costs. *Id.* at 215. This Court, however, believed that a harsher sanction was warranted. *Id.* at 218. Thus, a thirty-day suspension was added. *Id.*

¶17. In *Gordon*, a municipal court judge approached an officer and told him that several local residents were upset about a number of speeding tickets that the officer had issued. *Gordon*, 955 So. 2d at 302. The judge then informed the officer that he intended to pass those tickets to the files. *Id.* Despite the officer’s objections, fourteen defendants were advised not to appear in court because their tickets had been “passed” to the files. *Id.* The Commission recommended that the judge be publicly reprimanded and assessed all costs. *Id.* at 304. But this Court, citing *Sanford* as support, found that the judge’s conduct was egregious and, therefore, a thirty-day suspension was appropriate as well. *Id.* at 306. We noted that we had not always required a suspension for such conduct. *Id.* Yet *Sanford*, we stated, had marked a shift. *Id.* (citing *Sanford*, 941 So. 2d at 209). As a result, conduct akin to that in *Gordon* warranted a more severe penalty, including a suspension. *Gordon*, 955 So. 2d at 306.

¶18. The justice court judge in *Bradford* committed numerous violations: two counts of ex parte communications, five counts of improperly dismissing or disposing of charges, two counts of violating Rule 2.06 of the Uniform Rules of Procedure for Justice Court, and

improperly ordering the issuance of two contempt warrants. *Bradford*, 18 So. 3d at 254. And, similar to the case before us, the justice court judge in *Bradford* tried to interfere with two traffic citations that had been assigned to another justice court judge. *Id.* at 253. The Commission recommended a public reprimand, thirty-day suspension without pay, and assessment of costs. *Id.* at 254. We adopted its recommendation. *Id.* at 258. Notably, we discussed harsher sanctions, but found “no case in which a judge making a first appearance before the Commission and this Court, for whom the Commission recommended a suspension from office, in which this Court imposed a longer suspension from office and a fine greater than that resulting from the direct costs of the judge’s misbehavior.” *Id.* at 257-58. Two justices, however, would have imposed an even harsher sanction. *Id.* at 259-63 (Randolph, J., concurring in part and dissenting in part).

C. The Magnitude of the Offense and the Harm Suffered

¶19. Judge McKenzie violated multiple canons and the Mississippi Constitution. That alone indicates the seriousness of his misconduct. *Id.* at 305. Judge McKenzie’s actions interfered with the administration of justice and brought the judicial office into disrepute. By involving himself in another judge’s cases and attempting to assist defendants with their tickets, Judge McKenzie compromised the integrity and independence of the judiciary. These actions created an impression that certain defendants were in a special position to influence him. *Id.* His actions also deprived the State of a fair opportunity to exercise its legitimate interest in punishing offenders of its laws. *Id.*

¶20. We have noted in the past that it is particularly important for justice court judges to “regard scrupulously the nature of their office.” *Sanford*, 941 So. 2d at 215 (quoting *In*

re Bailey, 541 So. 2d 1036, 1039 (Miss. 1989)). “Our citizenry’s overall perception of the entire judicial system in this state is quite often a result of contact with our justice courts, since the vast majority of our citizens will have little or no contact with our state trial or appellate courts, other than for jury service.” *Id.* at 218 (citing *In re Bailey*, 541 So. 2d at 1039).

D. Isolated Incident or Pattern of Conduct

¶21. The Commission states that Judge McKenzie has been the subject of one informal action. The Commission offers no further details, other than to say that the conduct in the informal action was unrelated to this case.

¶22. Though Judge McKenzie does not have a disciplinary history with the Commission, this Court has found that a pattern of misconduct exists where a single disciplinary action comprises multiple offenses. *Bradford*, 18 So. 3d at 256. As few as three incidents of misconduct constitute a pattern of behavior. *Id.* (citing *Miss. Comm’n on Judicial Performance v. Cowart*, 936 So. 2d 343, 350 (Miss. 2006)). The nine incidents here thus constitute a pattern of conduct.

E. Moral Turpitude

¶23. The Commission and Judge McKenzie agree that his actions involved moral turpitude. Moral turpitude includes “actions which involve interference with the administration of justice, misrepresentation, fraud, deceit, bribery, extortion, or other such actions which bring the judiciary into disrepute.” *Gordon*, 955 So. 2d at 305 (quoting *Gibson*, 883 So. 2d at 1158 n.2). Ticket-fixing willfully subverts justice. *Gordon*, 955 So. 2d at 305. Therefore, we agree that Judge McKenzie’s conduct crossed the line of moral turpitude.

F. Mitigating or Aggravating Factors

¶24. The fact that Judge McKenzie acknowledged the inappropriateness of his conduct and agreed with the Commission’s findings mitigates his actions. *E.g.*, **Gibson**, 883 So. 2d at 1158. Though the Commission cites no aggravating factors, we noted above that Judge McKenzie’s “misleading” the Commission is an aggravating factor.

¶25. After an independent review of the record, and after carefully considering the findings of fact and recommendations of the Commission, we are unable to agree with the Commission’s recommendation. In light of the egregiousness and moral turpitude of Judge McKenzie’s conduct, a harsher sanction is required. We noted in **Gordon** that, in the past, this Court has imposed a public reprimand and assessment of costs for ex parte communications and ticket-fixing. **Gordon**, 955 So. 2d at 306 (citations omitted). But in **Gordon** and in **Sanford**, we held that, where the misconduct is egregious, the proper sanction is not only a reprimand, but a suspension as well. *Id.* And, in **Bradford**, we found that **Gordon** and **Sanford** had established that a suspension is an appropriate sanction for misconduct that involves moral turpitude. *See Bradford*, 18 So. 3d at 256-57 (citations omitted). Engaging in ex parte communications and “passing” fourteen tickets to the file has been deemed to warrant a suspension. **Gordon**, 955 So. 3d at 306. Here, Judge McKenzie fixed, or attempted to fix, nine tickets for six defendants. Three cases were dismissed in open court without a hearing and without agreement from the State; one case was remanded to the inactive files; and two cases were never called for prosecution. On several occasions, he contacted and attempted to influence the citing officer through a third person. Yet, what

makes Judge McKenzie's conduct especially egregious is the fact that he intervened, or attempted to intervene, in cases that had been assigned to another judge.

¶26. Given that Judge McKenzie engaged in various forms of ticket-fixing, which included several instances of ex parte communications, and went so far as to intervene in another judge's cases, we find that a thirty-day suspension without pay is warranted in addition to the sanctions recommended by the Commission.

CONCLUSION

¶27. We find that Judge McKenzie violated Canons 1, 2A, 2B, 3A, 3B(1), 3B(2), and 3B(7) of the Mississippi Code of Judicial Conduct, and that his egregious actions constituted willful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute under Section 177A of the Mississippi Constitution of 1890, as amended. After conducting an independent review of the record, and after giving careful consideration to the findings of fact and recommendations of the Commission, we order that Judge McKenzie be suspended for thirty days from office without pay following the issuance of this Court's mandate, publicly reprimanded, fined \$500, and assessed \$100 in court costs.

¶28. WALTHALL COUNTY JUSTICE COURT JUDGE MARION MCKENZIE SHALL BE SUSPENDED FROM OFFICE FOR A PERIOD THIRTY OF (30) DAYS WITHOUT PAY EFFECTIVE ON THE DATE OF ISSUANCE OF THIS COURT'S MANDATE; PUBLICLY REPRIMANDED; FINED \$500.00; AND ASSESSED COSTS IN THE AMOUNT OF \$100.00. THE PUBLIC REPRIMAND SHALL BE READ IN OPEN COURT BY THE PRESIDING JUDGE OF THE WALTHALL COUNTY CIRCUIT COURT ON THE FIRST DAY OF THE NEXT TERM OF THAT COURT IN WHICH A JURY VENIRE IS PRESENT FOLLOWING THE ISSUANCE OF THE MANDATE OF THIS COURT, WITH JUDGE MCKENZIE IN ATTENDANCE.

CARLSON, P.J., RANDOLPH, LAMAR, PIERCE AND KING, JJ., CONCUR. KITCHENS, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY DICKINSON, P.J., AND CHANDLER, J.

KITCHENS, JUSTICE, CONCURRING IN PART AND DISSENTING IN PART:

¶29. Because I would adopt the Commission’s recommended sanctions, and the majority significantly departs from them, I respectfully concur in part and dissent in part.

¶30. “Often the sanction for ‘fixing’ tickets is a public reprimand, fine and assessment of the costs.” *Miss. Comm’n on Judicial Performance v. Bradford*, 18 So. 3d 251, 255 (Miss. 2009) (citing *Miss. Comm’n on Judicial Performance v. Warren*, 791 So. 2d 194 (Miss. 2001); *Miss. Comm’n on Judicial Performance v. Boykin*, 763 So. 2d 872, 872 (Miss. 2000)). The Commission cites *Warren*, 791 So. 2d at 198, and *Boykin*, 763 So. 2d at 876, as comparable cases. In both instances, the offending judges were publicly reprimanded, fined, and assessed costs for dismissing traffic tickets without hearings and without notifying the State. *Warren*, 791 So. 2d at 198; *Boykin*, 763 So. 2d at 876. In those cases, this Court noted that there was no evidence that either judge had profited financially from his or her misconduct. *Warren*, 791 So. 2d at 196; *Boykin*, 763 So. 2d at 876. Likewise, in the present case, there is no evidence that Judge McKenzie received any monetary benefit for his actions.

¶31. Moreover, the Commission effectively distinguishes the cases that the majority cites to support its ordering a thirty-day suspension. In *Mississippi Commission on Judicial Performance v. Sanford*, 941 So. 2d 209, 210 (Miss. 2006), the justice court judge directed the sheriff to give orders to the arresting officer not to attend a hearing on a driving-under-the-influence charge. In *Mississippi Commission on Judicial Performance v. Gordon*, 955

So. 2d 300 (Miss. 2007), the judge spoke directly with the officer who had issued a number of speeding tickets and then, over the officer's objections, told the defendants they did not need to appear in court. As the Commission correctly notes in its brief, "at no time did [Judge McKenzie] talk to the issuing officers' superior, personally ask the issuing officers not to appear in court, or advise any of the defendants not to appear in court." Thus, *Gordon* and *Sanford* are distinguishable.

¶32. The most recent case cited by the majority is *Bradford*, 18 So. 3d 251, but that decision, with which I concurred, does not support suspending a judge who has admitted fixing tickets, including those assigned to another judge. As the majority correctly notes, the justice court judge in *Bradford* engaged in misconduct that went far beyond ticket fixing. Maj. Op. ¶ 18. The more egregious instances of Bradford's misconduct included "engaging in *ex parte* communications in a rental-dispute case and subsequently ruling in favor of the party with whom he had the *ex parte* communications" and "ordering contempt warrants issued against individuals in the absence of pending charges against those individuals and in the absence of notice or a hearing for such individuals." *Bradford*, 18 So. 3d at 253. Moreover, Judge Bradford attempted to interfere with charges of driving under the influence and failure to abide by a protective order, while Judge McKenzie's ticket fixing involved charges of hunting game over bait, failure to wear hunter orange, hunting without a license, and littering. Judge McKenzie's misconduct simply does not rise to the level of egregious misconduct found in *Bradford*, and the Commission correctly concluded that Judge McKenzie is not deserving of the same severe sanction.

¶33. *Bradford* reinforces my position that we should adopt the recommendation of the Commission. The majority in *Bradford* reasoned that “[t]his Court’s willingness to impose harsher penalties than those recommended by the Commission usually stems from the number of times the judge has appeared before the Commission (and subsequently this Court), rather than the number of complaints listed in each appearance.” *Id.* at 258. Like *Bradford*, Judge McKenzie does not have a disciplinary history with either the Commission or this Court. The difference is that Judge Bradford’s admitted misconduct significantly surpassed that of Judge McKenzie.

¶34. As in *Bradford*, we ought to adopt the Commission’s recommendation. Eight paragraphs of the joint findings of fact comprise the only “record” we have of Judge McKenzie’s conduct, and nothing in that brief recitation of facts is so egregious as to warrant harsher sanctions than those suggested by the Commission. Accordingly, I respectfully disagree with the imposition of a thirty-day suspension and would order a public reprimand, \$500 fine, and assessment of costs.

DICKINSON, P.J., AND CHANDLER, J., JOIN THIS OPINION.