The Supreme Court of Ohio

CASE ANNOUNCEMENTS

July 17, 2012

[Cite as *07/17/2012 Case Announcements*, 2012-Ohio-3223.]

MISCELLANEOUS ORDERS

BEFORE THE COMMISSION OF THIRTEEN JUDGES APPOINTED BY THE CHIEF JUSTICE OF THE COURTS OF APPEALS ASSOCIATION

In Re:	:	Supreme Court Case No. 2012-0418
	:	
Judicial Campaign Grievance Against	:	On Appeal from a Decision of the
	:	Commission of Five Judges
William M. O'Neill (0024031)	:	Appointed by the Chief Justice of the
	:	Courts of Appeals Association
Respondent	:	
	:	Commission Case No. SCC 12-001
Carlos M. Crawford	:	
	:	
Complainant	:	O P I N I O N

Pursuant to Rule II, Section 6(D)(2) of the Rules for the Government of the Judiciary, the Chief Justice of the Courts of Appeals convened an adjudicatory panel after the filing of a notice of appeal from the sanction imposed by the five-judge commission. Respondent filed a brief on April 23, 2012, and complainant did not file a brief. Respondent was heard at oral argument before the adjudicatory panel on May 21, 2012 and complainant did not appear.

Respondent advanced the following two propositions of law:

I

"THERE IS NOT CLEAR AND CONVINCING EVIDENCE TO SUPPORT THE CLAIM THAT THE RESPONDENT VIOLATED JUD. CONDUCT R. 4.3(C) BY DISTRIBUTING THE CAMPAIGN LITERATURE AT ISSUE."

II

"RULE 4.3(C) OF THE OHIO CODE OF JUDICIAL CONDUCT IS UNCONSTITUTIONAL UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THAT IT IS OVERBROAD BOTH ON ITS FACE AND AS APPLIED TO THE FACTS OF THIS CASE, AND IN THAT IT IS UNCONSTITUTIONALLY VAGUE AS WELL."

II

We will discuss Proposition of Law II as we find it to be dispositive of this case.

Respondent claims Canon 4.3(C) of the Ohio Code of Judicial Conduct is unconstitutional as the rule is an unlawful restraint of judicial campaign speech and therefore violates the First and Fourteenth Amendments to the United States Constitution. Respondent claims the rule is overbroad, both on its face and as applied to his case, and is vague. Said rule states the following:

"During the course of any campaign for nomination or election to judicial office, a *judicial candidate*, by means of campaign materials, including sample ballots, advertisements on radio or television or in a newspaper or periodical, electronic communications, a public speech, press release, or otherwise, shall not *knowingly* or with reckless disregard do any of the following:

"(C) Use the title of an office not currently held by a *judicial candidate* in a manner that implies that the *judicial candidate* does currently hold that office."

As recently as June 28, 2012, the United States Supreme Court reaffirmed the philosophy that "content-based restrictions on free speech are presumed invalid":

" '[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002) (internal quotation marks omitted). As a result, the Constitution 'demands that content-based restrictions on speech be presumed invalid ... and that the Government bear the burden of showing their constitutionality.' *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004)." *United States v. Alvarez*, ____ S.Ct. ____, 2012 WL 2427808, at *6.

The *Alvarez* court at *11 recognized that not only must the restriction meet the "compelling interest test," but the restriction must be "actually necessary" to achieve its interest:

"The First Amendment requires that the Government's chosen restriction on the speech at issue be 'actually necessary' to achieve its interest. *Entertainment Merchants Assn.*, 564 U.S., at ——, 131 S.Ct., at 2738. There must be a direct causal link between the restriction imposed and the injury to be prevented. See *ibid.*"

Respondent's challenge centers on whether there exists a compelling interest of the judiciary in the enactment/enforcement of its rules and whether the restriction in Canon 4.3(C) is actually necessary to achieve that interest.

The Code of Judicial Conduct enacted by the Supreme Court of Ohio sets forth in its Preamble [1] and Scope [5] the government's interest and philosophy of the code, respectively:

"An independent, fair, and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the rules contained in this code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.

"The rules of the Ohio Code of Judicial Conduct are rules of reason that should be applied consistent with constitutional requirements, statutes, other court rules, and decisional law, and with due regard for all relevant circumstances. The rules should not be interpreted to impinge upon the essential independence of judges in making judicial decisions."

Canon 4.3 in many sections prohibits making false statements which would place it within a very broad interpretation of the *Alvarez* decision. As noted in *Alvarez* at *12, the "remedy for speech that is false is speech that is true." As respondent notes, the hearing panel's decision concedes that respondent is a judge, albeit a retired judge. Respondent argues with this accepted fact, the brochure is not false, but misleading. Although we might agree the brochure is not in toto false but misleading, the challenged rule does not address misleading speech, only the use of a judicial position that the candidate currently does not have.

As stated in Preamble [1] cited supra, the purpose of Canon 4.3 is to ensure judicial independence, fairness, and impartiality, and emphasizes that the United States' legal system is based upon the "integrity" of the participants. This is a clear expression of a compelling governmental interest. Therefore, we will now

review whether the restriction of Canon 4.3(C) as applied to respondent is necessary to achieve this interest.

Undeniably, speech about qualifications for judicial office are " 'at the core of our First Amendment freedoms' " and therefore any restrictions are subject to strict scrutiny. *Republican Party of Minnesota vs. White* (2002), 536 U.S. 765, 774, quoting *Republican Party of Minnesota vs. White* (2001), 247 F.3d. 861, 863. Therefore, the burden is upon the proponents of the rules to demonstrate the restrictions of Canon 4.3(C) do not "unnecessarily circumscrib[e] protected expression." *Brown vs. Hartlage* (1982), 456 U.S. 45, 54.

Canon 4.3(C), as it applies to respondent, places the burden upon respondent of declaring himself to be "a former Court of Appeals Judge" each and every time he uses the title "judge" during his campaign. In the brochure in question, respondent identifies himself as a "former" judge only once and states that he has served by invitation on the Supreme Court of Ohio. Both statements are true and do not violate Canon 4.3(C). Seven other times in the same brochure, respondent identifies himself as "Judge O'Neill."

Although it is arguable that respondent's brochure may mislead an observer, we find a "doctrine against misleading" is even a greater threat to free speech.

Undisputedly, in common conversation, a retired former judge is called "Judge." Furthermore, as a voluntarily retired judge not engaged in the practice of law, respondent remains eligible for assignment to active duty as a judge. Ohio Constitution, Article IV, Section 6(C). To prohibit respondent from speech wherein the disclaimer of "former judge" is prominent in the advertisement has a chilling effect on his First Amendment privileges and rights.

We conclude Canon 4.3(C) as it applies to respondent under the facts in this case is unconstitutional.

Proposition of Law II is granted as to "as applied" to the facts of this case and not "on its face." Proposition of Law I is moot.

The finding and order of the five-judge commission is reversed.

s/ Sheila G. Farmer
Hon. Sheila G. Farmer
Chief Justice of the Courts of Appeals

Judge Thomas J. Grady
Second District Court of Appeals

Judge Arlene Singer
Sixth District Court of Appeals

Judge Cheryl L. Waite
Seventh District Court of Appeals

Judge Patricia A. Blackmon
Eighth District Court of Appeals

Judge Susan Brown
Tenth District Court of Appeals

Judge Timothy P. Cannon
Eleventh District Court of Appeals

Powell, Abele, Preston, Delaney, Fischer, and Whitmore, JJ., dissenting,

We respectfully dissent from the majority's opinion that Canon 4.3(C) is unconstitutional as applied to respondent. Based upon the following facts, we would find respondent has not perfected his right to challenge the constitutionality of the canon in this thirteenth hour.

Upon reviewing the transcript from the hearing panel, we do not find a challenge to the constitutionality of Canon 4.3(C). There appears to have been a passing reference to the nature of the potential sanction, but when specifically questioned by Judge Elwood, respondent's counsel declined to argue the constitutionality of the canon:

"JUDGE ELLWOOD: You are not arguing or alleging that rule 4.3(C) is unconstitutional, are you?

"MR. QUINN: I'm alleging that it could well be as applied in this case. That's the -

"JUDGE ELLWOOD: All right.

"MR. QUINN: That's the issue. And I don't want to dwell on this point a great deal, but I do think it's an important point that - -" February 22, 2012 T. at 54-55.

The possibility that a cease and desist order may be the sanction is referenced in Gov.Jud.R. II(6)(C)(2) as follows in pertinent part:

"If the commission concludes the record supports the hearing panel's finding that a violation of Canon 4 has occurred and there has been no abuse of discretion by the hearing panel, the commission may enter an order that includes one or more of the sanctions set forth in Section 5(D)(1) of this rule."

Gov.Jud.R. II(5)(D)(1)(b) specifically states the five-judge commission may enter an order "enforceable by contempt of court that the respondent cease and desist from engaging in the conduct that was found to be in violation of Canon 4."

The five-judge commission concluded there was no need for a hearing, and respondent made no attempt to challenge the constitutionality of any possible sanction.

In its determination and final order on review, the five-judge commission noted the following:

"Under Rule II Section 6(C)(2) of the Ohio Rules for Government of the Judiciary, this Commission 'may make its determination from the report of the

hearing panel, permit or require the filing of briefs, conduct oral argument, or order the hearing panel to take additional evidence.' There are no factual disputes in this matter, and the Commission, in its discretion, has determined that it will make its decision from the report of the Hearing Panel and the record of the hearing that took place before that panel."

The five-judge commission did not address the constitutionality of the Gov.Jud.R. II(5)(D)(1)(b) sanction or the recommendation of the hearing panel.

Respondent failed to challenge the constitutionality of the statute to the hearing panel and the five-judge commission. As stated by the Supreme Court of Ohio in *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus:

" 'Failure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal.' "

Based upon these facts, we would find a constitutional challenge has not been perfected.

Gov.Jud.R. II(6) provides for a three-tiered examination regarding an alleged violation of the Code of Judicial Conduct (probable cause panel, hearing panel, and commission panel).

In its determination and final order on review, the five-judge commission noted the scope of its review as follows:

"Rule II section 6(C)(2) provides for this Commission to apply a two-part standard of review to the determination and recommendation of the Hearing Panel. First, it is to determine whether the Hearing Panel's finding of a violation is supported by the record, and, second, it is to determine whether the Hearing Panel abused its discretion."

Given the nature of the review before the five-judge commission and the language of Gov.Jud.R. II(6)(D), we would conclude our review is limited to the appropriateness of the sanction.

We note a cease and desist order was the minimum that could have been imposed. It is the only sanction that could reasonably be expected to curtail subsequent violations and stop further violations of Canon 4.3. A monetary sanction would not have insured that similar statements would not have occurred again during the course of the campaign.

We therefore would find no error in the issuance of a cease and desist order as the sanction in this case.

We would deny Propositions of Law I and II and affirm the finding and order of the five-judge commission.

Judge Stephen W. Powell
Twelfth District Court of Appeals

Judge Peter B. Abele
Fourth District Court of Appeals

Judge Vernon L. Preston
Third District Court of Appeals

Judge Patricia A. Delaney
Fifth District Court of Appeals

Judge Patrick F. Fischer
First District Court of Appeals

Judge Beth Whitmore
Ninth District Court of Appeals