

North Country Gazette



Florida Judge Reprimanded For Criticizing Fellow Judge

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So you believe that free speech is alive and well in America?

Hardly.

Not if you dare to criticize a judge and ESPECIALLY if you're a judge who dares to criticize another jurist.

In an unprecedented move that egregiously rapes the First Amendment and effectively serves to stifle dissent within the judiciary to the public detriment, the Florida Supreme Court has voted to discipline Judge Michael Allen of the First District Court of Appeals for criticizing a fellow judge in a written opinion and in essence, calling him corrupt.

In its 5-0 decision, the court upheld a determination by the Florida Judicial Qualifications Commission to publicly reprimand Allen because he had criticized a another judge in a concurring opinion which was related to an appeal of the bribery conviction for former Florida Senate President W.D. Childers.

"Like the JQC, we conclude that Judge Allen violated Canon 1 by using his opinion-writing power not only to personally attack another appellate judge of the same court, but also to accuse that judge of judicial corruption based on unverified facts that were outside of the record", the court wrote.

"Although this type of conduct is one of first impression for this Court, we have imposed public reprimands for judges who have criticized or made improper statements towards other judges, attorneys, and other persons who came before the court.

"Generally, appellate judges are free to write almost anything in their opinions regarding the decision of the case or the facts and law involved in the case. However, the discussion must be germane to the case at bar and the facts

that are within the record of the case. In the instant proceeding, Judge Allen did not confine his opinion to the facts that were within the record of the Childers case; instead he used extra record materials to personally attack Judge Charles Kahn's decision to not recuse himself from the case and to accuse Judge Kahn of corruption.

"In addition, he failed to include vital facts that could have put doubt on Judge Allen's assumption that Judge Kahn had cast a corrupt vote. This type of action in a judicial opinion cannot be condoned, nor can it be protected by judicial independence. An appellate judge cannot use his opinion-writing power to inappropriately personally attack another appellate judge by accusing him of a crime", court decided.

Allen and the appellate court had upheld Childers' conviction and 3 1/2-year prison term. The charge stemmed from a land deal while Childers, a Pensacola Republican, was an Escambia County commissioner after leaving the Senate due to term limits.

In the notice of formal charges, the JQC accused Judge Allen of being motivated by ill will in writing his concurring opinion and personally attacking First District Court of Appeal Judge Charles Kahn in that opinion.

"Judge Allen expressed a strong dislike for Judge Kahn that predated the Childers case", the court wrote in its decision. "Judge Allen generally never had anything nice to say about Judge Kahn. In fact, when Judge Allen spoke about Judge Kahn with other judges, it was usually in a derogatory manner. Judge Allen also did not respect Judge Kahn and believed that Judge Kahn was not what a judge should be, was corrupt, and did not have the character traits to be chief judge. When it was Judge Kahn's turn to be chief judge in 2004, Judge Allen solicited several judges to run against Judge Kahn for the chief judge position.

"W.D. Childers, a former state legislator, was convicted of bribery and unlawful compensation or reward for official behavior, and appealed his conviction to the First District. This case was blindly assigned to a three-judge panel, consisting of Chief Judge Kahn, Judge Ervin, and Judge Van Nortwick. After hearing oral arguments, the three-judge panel voted unanimously to reverse Childers' conviction, and Judge Kahn, as the primary judge on the case, was assigned the responsibility of authoring the opinion. After the proposed unanimous opinion was circulated to all the judges, Judge Allen sought out another judge to talk to Judge Kahn about recusing himself from the case. Judge Kahn told that judge that he saw no reason to recuse himself. However, after further discussion within the Court, a revised two-to-one Childers opinion was circulated to all the judges.

"Before the new two-to-one opinion was released, one of the judges prepared an extensive memorandum, urging en banc review, which was circulated to all judges. Subsequently, on Feb. 2, 2006, the First District issued an en banc decision, affirming Childers' conviction by a 10-4 vote.

"This decision consisted of nine different opinions, which was the result of a legal dispute among the judges over the district court's decision to proceed en banc. One of the dissenting opinions was authored by Judge Kahn, an opinion in which he expressed his view that the court should not have granted en banc review.

"Following the release of the en banc decision, Childers' attorney moved to certify certain questions to this Court. It was in the decision denying Childers' motion for certification that Judge Allen filed his concurring opinion that is at issue in the instant proceeding. After Judge Allen circulated this proposed concurrence to the other judges, some of the judges warned Judge Allen not to release the opinion because it was unwise and it would be problematic for him.

"At the evidentiary hearing, several judges from the First District testified. One judge said he specifically told Judge Allen that releasing the opinion would affect him more than it would Judge Kahn. Although two judges believed that the opinion was a reasonable explanation of why Judge Allen voted for an en banc consideration and was not a personal attack on Judge Kahn, a majority of the judges believed that the opinion was inappropriate and that it suggested that Judge Kahn was corrupt. Two judges testified that they believed the opinion was also unnecessary because the case was, for all intents and purposes, over by the time Judge Allen wrote his concurring opinion.

"Another judge testified that he showed Judge Allen a proposed order that was a one sentence per curiam denial of Childers' motion for certification. However, Judge Allen refused to sign the proposed order and said, "It's time for them to get theirs." The judge understood "them" to mean Judge Kahn and Judge Wolf. Another judge believed that the opinion was an abuse of power and that Judge Allen wrote the opinion to "settle a score."

"Judge Allen also testified at the final hearing. He testified that if Judge Kahn had recused himself and had not written his dissent on the en banc issue (and if Judge Wolf had not written his dissent) accusing the majority of the court of ignoring the requirements of the law, he would not have published his opinion. He also said he did not believe he attacked Judge Kahn's integrity. With regards to the content of his concurring opinion, he admitted that although he quoted extensively from three newspaper articles, he had no personal knowledge of the facts contained in the articles and that Judge Kahn's name did not appear in any of the articles. He also conceded that he was not familiar with the relationship between Judge Kahn and Childers.

"Based on these factual findings, the Hearing Panel of the JQC made numerous conclusions including the following: Judge Allen's concurring opinion clearly implied that Judge Kahn cast a corrupt vote as a payoff to friends; the opinion was counter-productive and unnecessary; the opinion was a personal attack on Judge Kahn even though Judge Allen phrased the opinion in the third person; Judge Allen did not pursue proper methods of bringing claims of impropriety to the appropriate authority such as the JQC or law enforcement; Judge Allen acted from a dual motive: (1) a perceived threat to the integrity of the court by criticism, and (2) an extraordinary level of antipathy to Judge Kahn; Judge Allen knew that his opinion would harm Judge Kahn and would impede future endeavors by Judge Kahn, including other judicial opportunities; Judge Allen's opinion brought the court and the judiciary into disrepute; and the opinion did not promote public confidence in the integrity and impartiality of the judiciary. As a result, the JQC Hearing Panel found that Judge Allen was guilty of misconduct and recommended that Judge Allen be publicly reprimanded", the court wrote and concurred with the JQC.

Judge Allen had asserted that the JQC's findings of fact are not supported by clear and convincing evidence; the conclusions of law are unfounded as a matter of fact and law; and a JQC proceeding based on a judge's written opinion violates the principles of judicial independence, all argument which the Supreme Court cast aside.

While concurring with the judicial panel to publicly reprimand Allen, the court cautioned the JQC "that our opinion today should not be viewed as a license for the JQC to judge and evaluate judicial opinions". They noted judges often "use intemperate or colorful language in their evaluation of a fellow judge's opinion or reasoning."

http://www.floridasupremecourt.org/pub_info/summaries/briefs/07/07-774/Filed_12-18-2008_Opinion.pdf
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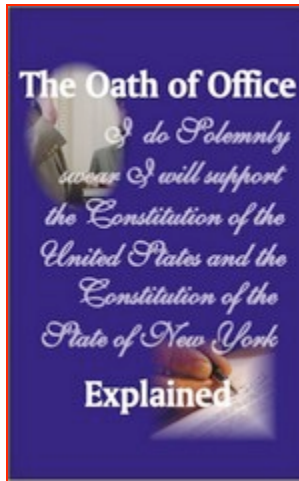


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