

THE COURT: All right. So it's your decision you are not going to testify?

DEFENDANT: Yes, sir.

THE COURT: You understand you have the right to testify?

DEFENDANT: Yes, sir.

THE COURT: You can disregard what your lawyer said; right?

DEFENDANT: Yes, sir.

THE COURT: You can testify, say what you want to say; you understand that, don't you?

DEFENDANT: Yes, sir.

THE COURT: He'll help you. He'll ask questions and allow you to put the questions to you; do you understand that? He'll put the questions to you so you can testify.

DEFENDANT: Uh-huh.

THE COURT: You understand that?

DEFENDANT: Yes, sir.

THE COURT: All right. And knowing what your rights are, it's your decision that you don't want to testify; is that right?

DEFENDANT: Um, yes, sir.

(Jan. 23, 2009 Tr. 7-8).

After a Rule 29 motion and charge conference, complainant's attorney informed the court that the complainant had changed his mind and now wished to testify. The judge confirmed with the complainant that he wanted to testify and informed complainant

that he would testify after lunch. After the lunch break, the complainant's attorney and the prosecutor asked to approach the bench, and complainant's attorney informed the judge as follows:

ATTORNEY: I spoke to my client. I spoke with my client again about his rights regarding testifying. He decided not to testify, so I will not be calling him as a witness.

THE COURT: Okay. I'm just going to proceed in that fashion then.

(Jan. 23, 2009 Tr. 13-14).

At his sentencing, complainant asserted that his attorney had threatened to let complainant handle his case himself if he chose to testify. (May 28, 2009 Tr. 6). Counsel denied making such a statement, (May 28, 2009 Tr. 14-15), and the judge found that counsel had not made such a threat. (May 28, 2009 Tr. 14-15).

After complainant's conviction was affirmed on appeal, he filed a motion to vacate his conviction and sentence under 28 U.S.C. § 2255 raising, among other challenges, a claim that his attorney improperly influenced his decision on whether to testify. The district judge again rejected this claim, finding that the record clearly established that complainant had ample opportunity to testify and ultimately chose not to testify.

Complainant now alleges in his judicial complaint that the district judge violated complainant's right to testify and the

judge's obligation to afford every person the right to be heard, Canon 3(A)(4) of the Code of Conduct, by accepting trial counsel's representation, in a side-bar discussion, that complainant no longer wished to testify. Complainant alleges that it was a bad decision on the part of the judge to permit counsel to waive complainant's rights without affording complainant a chance to contest his attorney's representations.

The Judicial Conduct and Disability Act establishes an administrative remedy for judicial misconduct or disability. The procedure "is not designed as a substitute for, or supplement to, appeals or motions for reconsideration," In re Memorandum of Decision, 517 F.3d 558, 561 (U.S. Jud. Conf. 2008), and allegations that are "[d]irectly related to the merits of a decision or procedural ruling" are subject to dismissal under the Act. 28 U.S.C. § 352(b)(1)(A)(ii). If, however, the complainant demonstrates "clear and convincing evidence of a judge's arbitrary and intentional departure from prevailing law based on his or her disagreement with, or willful indifference to, that law," 517 F.3d at 562, or evidence that the judge's ruling was the result of a bribe, ex parte contact, racial bias, or other improper motive, Rule 3(h)(3)(A), Rules for Judicial-Conduct and Judicial-Disability Proceedings, a claim may be brought under the Act.

The complainant must present "sufficient evidence to raise an inference that misconduct has occurred." 28 U.S.C. § 352(b)(1)(A)(iii). If "the only support for the allegation of bad acts or motive is the merits of the judge's ruling," the complaint must be dismissed. In re Doe, 640 F.3d 869, 873 (8th Cir. 2011).

Complainant's allegation that the judge improperly accepted counsel's representation, outside complainant's presence, that complainant did not wish to testify is directly related to the merits of the judge's decision. There is no evidence that the judge was deliberately indifferent to the law or acting out of ill motive in permitting counsel to rest his case without again questioning complainant regarding his decision not to testify.

Accordingly, this complaint is dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) as related to the merits of the judge's rulings and pursuant to 28 U.S.C. § 352(b)(1)(A)(iii) as lacking in factual support.

IT IS SO ORDERED.



William B. Traxler, Jr.
Chief Judge