

Opinion Issued December 2, 2022



DOCKET NO. 21-0004

SPECIAL COURT OF REVIEW

**IN RE HONORABLE ROBERT D. BURNS, III
(CJC No. 20-1561)**

OPINION

The Chief Justice of the Texas Supreme Court convened this Special Court of Review¹ to conduct a trial de novo of the State Commission on Judicial Conduct’s Public Admonition issued to Respondent, the Honorable Robert Burns.² For the reasons set forth below, we conclude that the Commission did not meet its burden of proving that Judge Burns willfully violated either Canon 3(B)(4) of the Texas Code of Judicial Conduct or Article V, Section 1-a(6)(A) of the Texas Constitution.

¹ The panel for the Special Court of Review was chosen “by lot” and appointed by the Chief Justice of the Texas Supreme Court. *See* TEX. GOV’T CODE ANN. § 33.034 (providing procedure for appealing sanctions issued by State Commission on Judicial Conduct). This panel consists of Justice Peter Kelly of the First Court of Appeals, Justice April Farris of the First Court of Appeals, and Justice Jeff Alley of the Eighth Court of Appeals.

² After the events we note below, Robert Burns was elected as the Chief Justice of the Fifth Court of Appeals. Because the issue deals only with his conduct as a trial judge, we refer to him as Judge Burns.

I. BACKGROUND

A. The Conduct Underlying the Public Admonition

The Public Admonition at issue centers on comments that Judge Burns made while sentencing a defendant at the end of a 2018 criminal trial over which he was presiding as Judge of the Dallas County Criminal Court Number One. Judge Burns made his comments after the jury returned its verdict finding the defendant, Charles Wayne Phifer, guilty of capital murder in the death of his girlfriend's four-year-old daughter in March 2016.

The evidence at Phifer's trial revealed that the day before the child's death, Phifer and the child's mother had beaten the child, and that on the day of her death, Phifer had hung the child by her hands in a closet with the door shut. Because the district attorney had not sought the death penalty, Judge Burns was required to sentence Phifer to life in prison without the possibility of parole. *See* TEX. PENAL CODE ANN. §12.31(a)(2). Prior to formally announcing Phifer's sentence, while the jury was still in the courtroom, Judge Burns made the following comment to the defendant:

Mr. Phifer, in 28 years practicing criminal law and handling hundreds of murder cases, I thought I'd seen it all, and I've seen some pretty bad stuff. I think this is the worst case that I've ever seen. What you did was unfathomable, inhuman, and savage. You and Jeri [the child's mother] did monstrous things to that little girl. Life in prison seems insufficient. Hanging a little girl in a closet is savage. You should die in a locked closet just—if TDC had one, but they don't have one for you unfortunately. Life in prison doesn't seem like enough for you, but nonetheless, that's the punishment you're getting.

The media was present in the courtroom at sentencing, and a reporter recorded Judge Burns's statement, parts of which were incorporated into several news stories.

Following trial, Phifer filed a motion for new trial and a motion to either recuse or disqualify Judge Burns from hearing any further matters in the case. Judge Burns voluntarily recused himself, and another judge denied the motion for new trial. The Fifth Court of Appeals

affirmed Phifer’s conviction in an opinion that rejected multiple challenges, including a claim that Judge Burns had shown bias by making the comment at issue. *See Phifer v. State*, No. 05-18-01232-CR, 2020 WL 1149916, at *1 (Tex. App.—Dallas Mar. 10, 2020, pet ref’d) (mem. op., not designated for publication).

B. The Commission Proceedings

The Commission opened its own investigation against Judge Burns. In accordance with the procedures set forth in section 33.022 of the Texas Government Code, the Commission advised Judge Burns by letter of the Commission’s concerns about his comments, and he provided a written response. TEX. GOV’T CODE ANN. § 33.022 (setting forth procedures to be used in investigating complaints made against judges). Judge Burns then made an informal appearance before the Commission and gave testimony explaining his reasons for making the comments. After considering the evidence, the Commission issued a Public Admonition finding that Judge Burns’s comment that the Phifer “should die” was “undignified and discourteous.” The Commission found that by making the comment, Judge Burns had violated Canon 3(B)(4) of the Texas Code of Judicial Conduct, which required him to “treat Mr. Phifer with the patience, dignity and courtesy required of the judge for those with whom he deals in an official capacity.” The Commission further found that Judge Burns had engaged in “willful or persistent conduct [that] cast public discredit upon the judiciary and the administration of justice in violation of Article V, Section 1-a(6) of the Texas Constitution.”

C. Judge Burns Requests a Special Court of Review

Judge Burns then requested that the Chief Justice of the Texas Supreme Court appoint a special court of review to review the Commission’s action, as permitted by section 33.034(b) of the Texas Government Code. *See* TEX. GOV’T CODE ANN. § 33.034(b); *see also* TEX. RULES

REM'L/RET. JUDG. R. 9(a). As required by section 33.034(d), the Commission filed a charging document against Judge Burns setting forth two charges of judicial misconduct, both stemming from the same statement:

Charge I - Judge Burns' comments to Defendant, Charles Wayne Phifer, that he "should die in a locked closet," constituted a willful failure to treat Phifer with the patience, dignity, and courtesy a judge owes to all those with whom he deals in an official capacity.

Charge II - Judge Burns' comments to Defendant, Charles Wayne Phifer, that he "should die in a locked closet," constituted willful conduct that is clearly inconsistent with the proper performance of his duties, and/or that cast public discredit upon the judiciary or the administration of justice, in violation of Article V, Section 1-a(6)A of the Texas Constitution.

As the Special Court of Review that was assembled to hear Judge Burns's appeal, our role was to conduct a "trial de novo," as that term is used in the appeal of cases from justice to county court, on these two charges. *See* TEX. GOV'T CODE ANN. § 33.034(e)(2); *see also id.* § 33.034(f) (providing that trial de novo is to be "governed to the extent practicable by the rules of law, evidence, and procedure that apply to the trial of civil actions generally"). At this trial, the Commission shouldered the burden to prove each element of the charges against Judge Burns by a preponderance of the evidence. *See In re Hecht*, 213 S.W.3d 547, 560 (Tex. Spec. Ct. Rev. 2006); *In re Davis*, 82 S.W.3d 140, 142 (Tex. Spec. Ct. Rev. 2002).

Having held the trial de novo, our role now is to determine whether the Commission met that burden, and if so, we may decide the proper sanction that should be imposed. *See* TEX. RULES REM'L/RET. JUDG. R. 9(d). However, if we find that the Commission did not meet its burden of proof, we may dismiss the charges and find the respondent judge "not guilty." *See id.* We find that the Commission did not meet its burden of proof and dismiss the charges.³

³ Judge Burns also moved to dismiss the Public Admonition based on procedural errors. Because we find that the Commission did not meet its burden at trial of proving the charges against Judge Burns, we deny that motion as moot.

II. THE HEARING RECORD

Before the trial de novo, the parties entered a series of factual stipulations. These included Judge Burns’s acknowledgment that he had made the challenged statement at Phifer’s sentencing while the jury was still in the courtroom and while he still had plenary power over the case. In addition, Judge Burns stipulated that his statement received media attention. We also have before us materials from the Phifer case (relevant transcripts, appellate filings, an audio recording of Judge Burns’s comments at sentencing, and media accounts) and a transcript of Judge Burns’s testimony before the Commission during his informal appearance.

During the trial, the Commission called Judge Burns as its sole witness. On direct examination, Commission counsel focused on only two lines of questioning. First, counsel elicited testimony from Judge Burns acknowledging that he should not have made the comment that Phifer “should die in a locked closet” and that the comment “crossed the line.” Second, in response to counsel’s questions, Judge Burns expressed his opinion that trial judges throughout the state of Texas make somewhat “similar” statements when sentencing criminal defendants—a point that he later elaborated on when he testified on his own behalf. And, as explained below, Judge Burns provided extensive testimony setting forth the context in which he made his comments and his reasons for doing so.

III. APPLICABLE LAW

The Texas Constitution provides that a judge may be disciplined for a willful violation of the Texas Code of Judicial Conduct, or for willful or persistent conduct that is clearly inconsistent with the proper performance of his or her duties or that casts public discredit upon the judiciary or administration of justice. TEX. CONST. art. V, §. 1-a(6)(A). For purposes of Article V, Section 1-a,

“willful or persistent conduct that is clearly inconsistent with the proper performance of a judge’s duties” includes a willful violation of a provision of the Code of Judicial Conduct. TEX. GOV’T CODE ANN. § 33.001(b)(2). Thus, to discipline Judge Burns for his comments, the Commission shouldered the burden of establishing by a preponderance of the evidence that his conduct was either a willful violation of Canon 3(B)(4), or a willful violation of the Texas Constitution, as charged. *See In re Davis*, 82 S.W.3d at 142 (recognizing that Commission had “burden to prove by a preponderance of the evidence that [the respondent judge] willfully committed one of the charged violations”).

Neither the Constitution nor the applicable Government Code sections defines the term “willful.” Nevertheless, courts have put varying glosses on the term. The panel in *In re Thoma*, after surveying how other jurisdictions applied similar willfulness terms, concluded that:

[T]he term “willful,” as applied in [Article V, Section 1-a(6)(A)], requires a showing, but not necessarily a finding, of bad faith. Moreover, we specifically hold that the term “willful,” as applied in [Article V, Section 1-a(6)(A)] is the improper or wrongful use of the power of his office by a judge acting intentionally, or with gross indifference to his conduct. It involves more than an error of judgment or a mere lack of diligence. Necessarily, the term would encompass conduct involving moral turpitude, dishonesty, corruption, misuse of office, or bad faith generally, whatever the motive. A specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority may in and of itself constitute bad faith.

In re Thoma, 873 S.W.2d 477, 489–90 (Tex. Rev. Trib. 1994, no appeal) (internal citations omitted). More recent panels have shortened the definition, concluding that

[w]illful conduct requires a showing of intentional or grossly indifferent misuse of judicial office, involving more than an error of judgment or lack of diligence. A judge need not have specifically intended to violate the Code of Judicial Conduct; a willful violation occurs if the judge intended to engage in the conduct for which he or she is disciplined.

In re Sharp, 480 S.W.3d 829, 833 (Tex. Spec. Ct. Rev. 2013) (internal citations omitted); *see also*

In re Slaughter, 480 S.W.3d 842, 848 (Tex. Spec. Ct. Rev. 2015). Recently, another panel

distinguished between how the term “willful” applies in a case based on charges for a judge’s “legal errors” such as interpreting a statute and charges for non-legal errors like statements from the bench. *See In re Ginsberg*, 630 S.W.3d 1, 7–8 (Tex. Spec. Ct. Rev. 2018).

Ultimately, the nuance of the definition does not determine the outcome here, because, as explained below, under any iteration of the definition, we conclude that the Commission has failed to meet its burden to demonstrate a willful violation of either the Code of Judicial Conduct or the Texas Constitution.

IV. ANALYSIS

A. Charge I: The Alleged Violation of Canon 3(B)(4)

Canon 3(B)(4) provides that “[a] judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials and others subject to the judge’s direction and control.” TEX. CODE JUD. CONDUCT, Canon 3(B)(4), *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. B. Here, the Commission charged Judge Burns with willfully violating Canon 3(B)(4) by making a comment to the defendant at sentencing that he “should die in a locked closet.” Although we do not condone the phrase that the judge used, we do not find that the comment—when viewed in the context of the entire trial proceedings—constituted a willful violation of the Canon.

In his direct testimony, Judge Burns explained that he made the unplanned and spontaneous comment after a week-long trial, which he acknowledged took an emotional toll on him given the horrendous details of how the child-victim had died. In fact, Judge Burns recounted that he found the *Phifer* case to be the most emotionally impactful case of his entire career, which included 16 years practicing criminal law as both a defense attorney and prosecutor, 12 years as a criminal trial

judge, and further included many “high profile” cases. Among other things, the judge recalled that the paramedic EMT—called to the home by the child’s mother and the first to attempt to aid the little girl—lost his composure while testifying, which required a break in the trial. He recalled that the child’s treating physician at the hospital and a long-serving medical examiner both struggled to testify about what they had observed. Judge Burns also recalled that he needed to take two breaks during the trial when jurors were sobbing while hearing the evidence and in particular while viewing the horrific autopsy photographs.

Judge Burns credibly testified that he did not intend to make any comments to Phifer at sentencing, explaining that his usual practice is to only make comments to defendants who are youthful or are receiving probation to guide them in the future. Judge Burns recalled, however, that after the jury delivered its verdict and was polled, half of the jurors were sobbing and the other half were sullen. He testified that he then made his unplanned comments to the jurors—rather than to Phifer—to explain to them why Phifer was only receiving a life sentence in an attempt to “make the jury feel a little bit better[.]” His statement therefore would not have been premeditated or planned. Next, upon uttering the phrase, “You should die in a locked closet,” Judge Burns immediately recognized his error. Judge Burns testified that he attempted to “modify” or “correct” the statement by adding that the Texas Department of Corrections would not actually treat Phifer that way, as it had no such “locked closet.”

In addition, the record demonstrates that the judge made his comments in a calm and even tone of voice. He did not raise his voice to Phifer or speak to him in an angry or aggressive manner. The audio clip of his comments that he introduced at the trial de novo confirmed that his tone was subdued throughout the sentencing.

Finally, we find it significant that Judge Burns provided uncontradicted testimony that he was courteous and respectful to Phifer throughout two years of proceedings, including the trial and multiple pretrial hearings. The Commission failed to point to any evidence that Judge Burns treated Phifer in a disrespectful or discourteous manner at any other time during the trial or during the two years that Phifer appeared in the judge's court before trial. In the appeal from his conviction, Phifer claimed that Judge Burns exhibited a bias against him based solely on the comment that he made at sentencing. Phifer did not allege that the judge made any other inappropriate comments to him or treated him improperly at any other point during the trial or during any of the pretrial hearings. *See Phifer*, 2020 WL 1149916, at *10–11. The Fifth Court of Appeals concluded that the judge's comments did not reveal a disqualifying bias that affected the proceedings so as to require reversal of Phifer's conviction. *Id.* at *11.

Although we recognize that Judge Burns's comment was intemperate and regrettable, we find that it was an isolated and unplanned statement that was not intended to degrade the defendant. At best, the comment reflected a momentary "error of judgment" rather than gross indifference, intentionality, or moral turpitude that would rise to the level of a sanctionable Canon 3(B)(4) violation. *See In re Slaughter*, 480 S.W.3d at 848 (reciting "more than an error of judgment" standard for willfulness); *see also In re Thoma*, 873 S.W.2d at 489–90 (reciting moral turpitude standard for willfulness); *In re Barr*, 13 S.W.3d 525, 534 (Tex. Rev. Trib. 1998, no appeal) (reciting intentionality or gross indifference standard for willfulness). We thus conclude that the Commission did not meet its burden of proving by a preponderance of the evidence that Judge Burns willfully violated Canon 3(B)(4) of the Code of Judicial Conduct, as alleged in Charge I of the charging document.

B. Charge II: The Alleged Violation of Texas Constitution Article V, Section 1-a(6)(A)

For similar reasons, we find that the Commission failed to meet its burden of proving by a preponderance of the evidence that Judge Burns violated Article V, Section 1-a(6)(A) of the Texas Constitution, as alleged in Charge II. The Commission alleged in this charge that Judge Burns’s comment that Phifer “should die in a locked closet” constituted “willful conduct that is clearly inconsistent with the proper performance of his duties, and/or that cast public discredit upon the judiciary or the administration of justice, in violation of Article V, Section 1-a(6)A of the Texas Constitution.” The Commission was required to establish that Judge Burns acted willfully in making the challenged comment, and we have already concluded that the Commission did not meet this burden.

We also conclude that the Commission failed to prove that Judge Burns’s comment was “inconsistent with the judge’s proper performance of his duties.” The comment came *after* the jury had returned its verdict of guilty on the charge of capital murder, and at a time when nothing remained but for the judge to impose a mandatory life sentence on Phifer as required by the Penal Code. *See* TEX. PENAL CODE ANN. § 12.31(a)(2). In addition, we disagree with the Commission’s position that the judge’s comments interfered with his ability to properly perform his duties as a judge, as they allegedly “broadcast” his belief that the mandatory sentence prescribed by the Legislature for capital murder was insufficient. In context, Judge Burns’s comments were not a criticism of the Legislature’s choice of punishments, but a response to an emotionally charged situation.⁴

⁴ In a post-trial submission, the Commission argued that Judge Burns’s emotional reaction to the evidence admitted at Phifer’s trial amounted to an admission that he had developed a “bias” against Phifer, and that he could not serve as a “neutral and detached” judge. That claim, however, was not part of the charging document filed before the hearing, and we are unaware of any provision that would allow the Commission to add entirely new charges at this late stage in the proceedings. *See* TEX. RULES REM’L/RET. JUDG. R. 9(b) (requiring Commission to file its charging document within 15 days after appointment of Special Court of Review). Moreover, the Fifth Court of Appeals has considered the question of whether Judge Burns exhibited

We recognize, however, that making any such statement *before* the jury’s return of its verdict would have been improper, as it would have reflected the judge’s opinion of the case and could have influenced the jury’s verdict. *See* TEX. CODE CRIM. PROC. ANN. art. 38.05 (prohibiting judge from making any remark that conveys to jury judge’s opinion of case “at any stage of the proceeding previous to the return of the verdict”). Here, the comment came after the jury had returned its verdict.

Finally, the Commission also argues that Judge Burns’s comments brought public discredit to the judiciary, primarily due to the negative media attention his comments received. We recognize, however, as the Commission itself has in the past, that judges have little control over what the media reports or the manner in which the media reports on court activity. *See In re Hecht*, 213 S.W.3d at 567. Here, Judge Burns argued that the media took his comments out of context. For example, a *Dallas Morning News* article contained the headline: “‘You should die in a locked closet,’ judge tells man convicted in savage beating death of 4-year-old.” The photo used in the article makes it appear that Judge Burns looked sternly at Phifer while making the “die in locked closet” statement. Judge Burns testified at the trial de novo—without contradiction—that the photo was actually taken when Judge Burns was speaking to the gallery directing them to refrain from making outbursts when verdict was read. Judge Burns testified that he was looking away from Phifer when made the complained of statement. We therefore agree with Judge Burns that the media accounts, over which Judge Burns had no control, made his comments appear worse than they were.⁵

a disqualifying bias against Phifer during his trial and concluded that he had not. *See Phifer v. State*, No. 05-18-01232-CR, 2020 WL 1149916, at *1, *10–11 (Tex. App.—Dallas Mar. 10, 2020, pet. ref’d) (mem. op., not designated for publication).

⁵ In its post-submission brief, the Commission directed attention to a social media post that the judge made about an October 2017 mass shooting in Las Vegas that included a negative comment directed to a gun accessory manufacturer. The Commission, however, mentions that post only in the context of arguing about what level of sanction we should impose on the judge—a task that we do not reach.

We thus find that the Commission has failed to carry its burden of proving by a preponderance of the evidence that the judge's comments were willful so as to constitute a violation of Article V, Section 1-a(6)(A) of the Texas Constitution.

V. CONCLUSION

We find that the Commission failed to carry its burden of establishing by a preponderance of evidence that Judge Burns engaged in any willful or persistent conduct in violation of either Canon 3(B)(4) or the Texas Constitution. We therefore find Judge Burns not guilty of both charges and dismiss the Commission's Public Admonition.

PER CURIAM

Special Court of Review Panel consists of Justices Kelly, Farris, and Alley.