

FILED

OCT 13 1999

STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

Commission on
Judicial Performance

Inquiry Concerning Judge Fred L. Heene, Jr.

No. 153

DECISION AND ORDER IMPOSING
PUBLIC CENSURE

This is a disciplinary matter concerning Judge Fred L. Heene, Jr., of the San Bernardino County Superior Court. Formal proceedings having been instituted, this matter is before the Commission on Judicial Performance pursuant to rule 127 of the Rules of the Commission on Judicial Performance (discipline by consent).

APPEARANCES

Trial Counsel for the Commission on Judicial Performance are Jack Coyle and William Smith. Counsel for Judge Heene is James E. Friedhofer of Lewis, D'Amato, Brisbois & Bisgaard.

PROCEDURAL HISTORY

Formal proceedings were instituted in this matter by a Notice of Formal Proceedings dated February 26, 1999. The Notice set forth nine counts of misconduct pursuant to article VI, section 18 of the California Constitution. On April 29, 1999, Judge Heene filed a response to the Notice of Formal Proceedings. As provided for by rule 121(b) of the Rules of the Commission on Judicial Performance, the Supreme Court appointed three special masters to conduct an evidentiary hearing and to prepare a written report.¹

CONSENT AGREEMENT

Following the holding of a prehearing conference by the special masters and the scheduling of an evidentiary hearing,² Judge Heene submitted a proposed disposition by consent. The "Proposed Disposition" recites the following factual stipulations.

¹ The special masters are Justice Marcel Poché of the Court of Appeal, First Appellate District, Division Four (presiding), Judge Barbara A. Lane of the Superior Court of Ventura County and Judge Jerry E. Johnson of the Municipal Court of Los Angeles County.

² In light of the commission's disposition of the matter, the hearing scheduled to commence November 1, 1999 is cancelled.

COUNT ONE*People v. Fullerton*

On the morning of July 30, 1996, Judge Heene presided over the preliminary hearing in the rape case of *People v. Fullerton*. The alleged victim (referred to as Ms. Doe) testified inconsistently with what she had told police. Ms. Doe testified that she had given the police information that was not true. At the conclusion of her testimony, Judge Heene ordered that she be taken into custody, stating:

Okay, ma'am, you are not allowed to leave. The bailiff is ordered to take her into custody and I am going to set bail in the amount of \$25,000 and ask that charges be filed ... She has admitted to this Court a crime.

Deputy District Attorney Friedman, who was prosecuting the preliminary hearing, asked that Judge Heene take a recess before taking the witness into custody; Judge Heene refused. When Friedman noted that there were no charges pending against Ms. Doe, the judge stated that she had admitted a crime in court and again ordered her remanded. Shortly thereafter, Deputy District Attorney Hansen, Friedman's supervisor, appeared in court and expressed concern that the witness had been taken into custody under such circumstances. The judge again stated that the witness had admitted a crime. When Hansen noted that the district attorney's office had not made a determination as to whether a crime had been committed, the judge responded that Ms. Doe had admitted on cross-examination that she had filed a false police report.

Shortly thereafter, Judge Heene released Ms. Doe from the custody of the bailiff to her attorney upon the condition that she was not free to leave the courthouse. Ms. Doe had been in the custody of the bailiff for approximately 10 minutes. The preliminary hearing was thereafter concluded. After the lunch recess, Judge Heene had Ms. Doe brought into the courtroom, and told her that he was ordering a transcript to be prepared for the district attorney's office to review to possibly file criminal charges. Judge Heene stated that he was going to order a day for Ms. Doe to return to court, then withdrew that order at Friedman's request. He then told Ms. Doe that she was free to leave.

COUNT TWO*People v. Reis*

On February 10, 1997, Judge Heene presided over the court trial on a speeding ticket in the case of *People v. Reis*. After the police officer testified, Judge Heene asked defendant Reis, who was representing himself, to tell his side of the story. The following then occurred:

MR. REIS: Do I get to cross-examine the officer?

THE COURT: No, sir. You tell me your side of the case.

MR. REIS: Oh. I thought – I misunderstood. I thought we got to cross-examine the officer also.

THE COURT: Sir, it is early on Monday morning.

MR. REIS: I don't want to offend you.

THE COURT: Okay. All right. I asked you to tell me your side of the case.

THE COURT: Okay.

THE COURT: Now, for the third time, would you please tell me you side of the case?

Judge Heene did not allow the defendant to cross-examine the officer. The defendant then explained that he was going 55 mph, not 58 as testified to by the officer, and explained why he believed that his speed was safe for the conditions at the time. Judge Heene told the defendant that the speed limit was 45, and that he was going to impose a fine. The case was then concluded. The conviction was reversed by the Appellate Department of the Superior Court, on the basis that the defendant should have been allowed to cross-examine the officer.

COUNT THREE

People v. Boykin

On December 1, 1997, Judge Heene presided over the case of *People v. Boykin*. Defendant Boykin was charged with the infraction of driving a vehicle with expired registration. Boykin had entered a not guilty plea on November 13, 1997, and the matter was set for a court trial on December 15, 1997. Boykin appeared on December 1, 1997, because he had been unable to pay the \$200 bail set on November 13. Boykin was representing himself.

Judge Heene stated as follows:

THE COURT. Okay. Tell you what. Get rid of the car, that will get you some money, and then we will get rid of the ticket, okay? Then you will solve my problem because you won't be driving. You will solve everybody else's problem because the car is gone and you will have some money; right?

THE DEFENDANT: Yes, sir.

THE COURT: Okay.

THE DEFENDANT: Hopefully I can get some money now that I am working.

THE COURT: Be back here December 11, okay, December 11th showing that the car is sold, okay.

THE DEFENDANT: Well, if I can't sell it by then, I mean, I can't make people buy it, sir. I don't –

...

THE COURT: Do you know how to determine the sale price of something?

THE DEFENDANT: No, sir.

THE COURT: You start at a nickel and you work up. And when you are down to the last person, then that's the sale price. All right? I guarantee you, offer that thing up for a hundred dollars, you are going to have some buyers, aren't you?

THE DEFENDANT: Not necessarily on the car, if you seen the car.

THE COURT: Then a tow company will buy it.

THE DEFENDANT: For 20 dollars or so.

THE COURT: Right. You be back here with that car gone on December 11th. Because one of the two of you is going to be gone on December 11th, all right? All right. We have been playing around with this since July. Make it happen. December 11th you are here, either you have a sale that's been registered with DMV showing the car is gone, or we will give you some vacation time to think about it.

THE DEFENDANT: What if I get it registered by then?

THE COURT: Did you hear me? Was I not clear? Make the car gone on December 11th or you will get some vacation time. Is that clear?

THE DEFENDANT: Yes, sir.

Defendant Boykin appeared before Judge Heene on December 11 and stated that he had sold his car. Judge Heene imposed court costs of \$10, and the case was dismissed.

COUNT FOUR*People v. Lopez*

On December 30, 1997, Judge Heene presided over the misdemeanor case of *People v. Lopez*. Defendant Lopez had been previously ordered by another judge to do community service in lieu of a fine, as part of a sentence for driving on a suspended license and two vehicle code infractions. Lopez had not completed the community service work before the due date of December 13, 1997, and came to the courthouse on December 30, 1997, to request an extension. Lopez had not been scheduled to appear in court on December 30. (No notification of failure to complete the hours had been filed with the court.) She was sent to Judge Heene's department.

She appeared without an attorney. Judge Heene inquired whether she had completed the community service or paid the fine, and she said that she had not. The following occurred:

THE COURT: Have a seat right there ma'am (pointing). All right. Ms. Lopez, stand up, please. This Court has tried 16 different – well, three different ways to try to help you get it paid. It is \$1,314, we divide that by 30, and that's 44 days in the county jail. You will be remanded into custody. Okay. Good luck to you.

MS. LOPEZ: Your Honor, can I say something?

THE COURT: Sure. What do you want to say?

MS. LOPEZ: I just had a baby. And when I was pregnant, I was on bed rest from two months on and I couldn't do my community service.

THE COURT: Did you come into court and tell them that?

MS. LOPEZ: No, I didn't, your Honor.

THE COURT: Okay. Good luck.

MS. LOPEZ: I have a seven-day old baby at home.

THE COURT: Ma'am, you should have thought about that a long time ago.

Judge Heene did not inform the defendant that he was conducting a violation of probation hearing, nor otherwise advise her of her rights in connection with a probation violation hearing.

COUNT FIVE*People v. Hillmann*

In January 1998, Judge Heene presided over a jury trial in the case of *People v. Hillmann*. The trial was completed and the jury began deliberations. On January 13, 1998, a juror was late to court. He was replaced with an alternate juror. When the late juror appeared, Judge Heene asked for his explanation for being late, then found him in contempt and remanded him. Judge Heene did not cite the juror for contempt or otherwise inform the juror that he was conducting a contempt hearing before finding him in contempt.

COUNT SIX*People v. MacLeod*

On February 19, 1998, a defendant charged with speeding and a related misdemeanor for failure to attend traffic school appeared before Judge Heene for arraignment on the misdemeanor in the case of *People v. MacLeod*. Defendant MacLeod appeared without an attorney. She had not entered a plea on the traffic ticket; criminal proceedings had been stayed pending the completion of traffic school. MacLeod had not entered a guilty or no contest plea (or a not guilty plea) on the misdemeanor. The following occurred:

THE COURT: ...What seems to be the problem?

THE DEFENDANT: Well, I came to court once and I got an extension to January 1st.

THE COURT: Yeah, I know that. You got actually two extensions.

THE DEFENDANT: And I did lose my job. I wasn't able to pay the fine in full.

I do have the original money for the original fine, I just don't have the additional fine.

THE COURT: Well, ma'am, it is \$589 at the present time.

THE DEFENDANT: Uh-huh.

THE COURT: Okay. Can you pay that today?

THE DEFENDANT: No, I only have \$329, the original –

THE COURT: Well, it will be \$589 or 20 days in the county jail. Okay. You are remanded into custody. Good luck to you.

Judge Heene sentenced the defendant in the absence of a plea of guilty or no contest or conviction at trial. The defendant then paid the fine of \$589 and was released.

COUNT SEVEN

People v. Howell

On March 24, 1998, Judge Heene presided over a pretrial hearing in the misdemeanor case of *People v. Howell*. Defendant Howell appeared without an attorney and requested that the public defender be appointed. Howell stated that he had been unemployed since February 1998 and had almost depleted his other resources. The following occurred:

THE COURT: How do you expect to eat next week?

THE DEFENDANT: I just received an income tax return of one thousand dollars.

THE COURT: Okay.

THE DEFENDANT: And in the meantime I expect to be looking for employment.

THE COURT: Okay. Now we are getting to the real crux of the situation. When was the last time that you filled out an employment application for work?

THE DEFENDANT: That would be prior to my employment with the City of Chino Hills.

THE COURT: Yeah. Okay. I strongly suggest, sir, that (a) you use that tax return money to get an attorney; and (b) that you go out and find a job right away, okay?

THE DEFENDANT: I intend to do that.

THE COURT: The Court will not appoint the Public Defender at this point in time. You are an able-bodied person. You can get a job, okay? There is lot [sic] of jobs out there. I would suggest you go find one. All right. Now based on all of that, you want to go back and talk to the D.A. in earnest about the case?

THE DEFENDANT: Yes, sir.

THE COURT: Good. Okay.

The case was continued to April 7, when the defendant appeared without an attorney and asked for a continuance. The case was continued until April 28. On April 21, the defendant appeared on a new felony charge and stated that he had not worked for two months. Judge Heene appointed the public defender on both cases.

COUNT EIGHT

People v. Anderson

On May 6, 1998, Judge Heene presided over a probation revocation hearing in the misdemeanor case of *People v. Anderson*. Defendant Anderson appeared without an attorney. Without advising Anderson of his constitutional rights regarding revocation of probation (e.g., the rights to an attorney, a hearing, and to subpoena and examine witnesses), Judge Heene reinstated and modified the terms of Anderson's probation by adding 30 days to the jail sentence, and remanded him.

COUNT NINE

People v. Aguilar

On May 6, 1998, Judge Heene presided over a probation revocation hearing in the misdemeanor case of *People v. Aguilar*. Defendant Aguilar appeared without an attorney. Without advising Aguilar of her constitutional rights regarding revocation of probation (e.g., the rights to an attorney, a hearing, and to subpoena and examine witnesses), Judge Heene reinstated and modified the terms of Aguilar's probation by imposing community service hours in lieu of a fine.

* * *

In the "Proposed Disposition" Judge Heene and Trial Counsel also stipulated that the commission may impose discipline for any or all of the allegations in the Notice of Formal Proceedings, not to exceed a public censure.

The "Proposed Disposition" is signed by Judge Heene, his attorney and by Trial Counsel. It is accompanied by an affidavit of consent for discipline signed by Judge Heene admitting the truth of the charges as alleged in the Notice of Formal Proceedings, stating that he freely and voluntarily consents to the imposition of discipline up to and including a public censure, and waiving review by the Supreme Court.

DISCIPLINE

The commission adopts the factual stipulations set forth in the "Proposed Disposition" and finds that in these stipulations Judge Heene has admitted all of the factual allegations set forth in the Notice of Formal Proceedings.

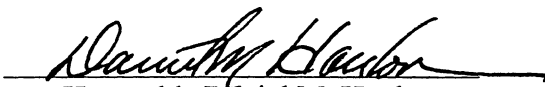
The commission finds that Judge Heene's actions constitute misconduct under article VI, section 18(d) of the California Constitution. His actions on each count violated the Code of Judicial Ethics, canon 1 ("a judge shall uphold the integrity and independence of the judiciary") and canon 2A ("a judge 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"). In addition, Judge Heene's actions on all the counts, other than count seven, violated several subsections of canon 3B ("a judge shall perform the duties of judicial office impartially and diligently").

The commission, in accepting the "Proposed Disposition," carefully reviewed the Notice of Formal Proceedings and determined that Judge Heene's misconduct does not rise to a level that recommends his removal from office. The commission concludes that public censure is the appropriate disposition for this case. The nine incidents in slightly less than two years are not isolated unrelated incidents of misconduct. In every instance, Judge Heene failed to respect the rights of unrepresented individuals. The "Proposed Disposition" recites no mitigating factors. The commission notes, however, that Judge Heene has not been previously disciplined and that his entry into the "Proposed Disposition" implicitly signals appreciation of his misconduct.

Commission members Justice Daniel Hanlon, Mr. Mike Farrell, Judge Madeleine Flier, Mr. Michael Kahn, Mr. Patrick Kelly, Mrs. Crystal Lui, Judge Rise Jones Pichon, and Ms. Ramona Ripston voted to impose a public censure. Commission members Ms. Lara Bergthold and Ms. Julie Sommars did not participate in this matter. There is one vacancy.

This decision and order shall constitute the order of public censure.

Dated: October 13, 1999


Honorable Daniel M. Hanlon
Chairperson