

JUDICIAL COUNCIL OPINION

90-2

Hearing Dates: November 2 and 10, 1990

Date Opinion Issued: December 10, 1990

Judicial Council Members Hearing this Motion: Skidmore
(Chairman), Ellis, Hochfelder, Link, Hodes, Betts, and Spiegleman

Introduction

At a hearing conducted on November 2 and on November 10, 1990, the Judicial Council [hereinafter "Council"] denied Defendant-Student's Motion to Dismiss.

Majority Opinion

The Defendant moved for dismissal of the complaint on four grounds: (I) the alteration of the date on the Proctor's notarized charge and on the formal Complaint prejudiced the Defendant; (II) the charges, as stated in the Complaint, are "vague and ambiguous"; (III) the charges, as stated in the Complaint, fail to allege the requisite intent or knowing misconduct; and (IV) the cumulative irregularities in the pre-trial conduct impeded the Defendant's right to a fair and unbiased hearing. See Defendant's Brief.

The Council holds that none of these four grounds are sufficient to warrant the dismissal of the Complaint pending against the Defendant.

It should first be noted that Northwestern University Law

School is a private educational institution and is therefore not constrained by state and federal constitutions. Moreover, the Judicial Council proceedings are not criminal. The Council is bound only by the Northwestern Law School Honor Code [hereinafter "Honor Code" or "Code"] and the previous opinions of the Council.

I.

The defense and prosecution stipulate that the Prosecutor in this case changed the date of the exam, as stated on the Proctor's Charge and on the formal Complaint, from the 18th of May to the 7th of May, in order to reflect the actual date of the exam. The defense argues that the alteration of the date on the notarized Charge is a violation of Article IV, §2(b) of the Honor Code and is sufficiently prejudicial to warrant a dismissal. The defense further argues that, as a result of the incorrect Charge, the Student Bar Association Executive Committee's [hereinafter "Executive Committee"] finding of probable cause was based on incorrect documents and therefore the charge should be dismissed. The Council disagrees.

Article IV, §2(b) of the Honor Code requires only that the prosecutor take any charges to the Registrar who will then notarize them and open an official file of the case. The purely technical change of the exam date stated in the Charge does not

prejudice the defendant. The correction of the date does not change any substantial elements of the Charge, the original signature, or the fact that it was properly received by the Registrar. The correct date of the exam is undisputed. Therefore, the defendant has not been prejudiced by the correction of the date.

The defense further contends that the Executive Committee's finding of probable cause in this case is based on incorrect documents and therefore the charge should be dismissed. The date of the alleged violation is irrelevant to the elements of the charge. The Prosecutor's argument that rules prohibiting writing over time-limits of an exam apply to all exams, regardless of the date, is persuasive. Therefore, the Council finds that the incorrect exam date had no bearing on the finding of probable cause.

II.

The Defendant raises two arguments contending that the Complaint is "void for vagueness". First, s/he argues that the complaint fails to inform the Defendant of what s/he is accused. Second, the Defendant contends that the Honor Code is imprecise as to what is punishable. The Council disagrees with the defense on both contentions.

Article IV, §4(b) of the Honor Code requires that the complaint state the date and the "nature of the alleged violation". We now look to the Complaint in this case. The Prosecutor's Complaint states:

On May 24, 1990, a formal charge under the Northwestern University School of Law's Honor Code was filed with the Registrar's office by the proctor of the "Torts" exam given by Professor M. Grady on May 7, 1990. The complaint alleges that [Defendant] continued to write an extra 7 minutes after the required time for the exam ended.

The Prosecutor's Complaint clearly meets the requirements set forth in Article IV, §4(b). The Complaint is not vague in informing the Defendant of the "nature of the act alleged". The Complaint makes it clear that the Defendant is being charged with writing over the time allotted on a written examination. Additionally, the Complaint specifically quotes the charges, as stated in Article I, §2.

On the second point, the Defendant argues that the Honor Code is vague and ambiguous, and, hence, failed to warn the Defendant of what conduct is punishable. The Honor Code could

not expressly enumerate all of the factual circumstances that might arise under its auspices. The Honor Code violations for which the Defendant is charged are not too vague or ambiguous because they give adequate notice as to the behavior expected of members of the law school community. For these reasons, we deny Defendant's motion for dismissal on this ground.

III.

The defense contends that the Complaint fails to allege the requisite intent or knowing misconduct by the Defendant. The charges were brought under Article I, §2 of the Honor Code, which states that the violation must be committed "knowingly." The Council holds that the Prosecutor's Complaint was sufficient under the Honor Code. As stated above, the Code only requires that the Complaint include the date and nature of the offense. See Honor Code, Article IV, §4(b). The Complaint satisfied this requirement. Further, the Complaint did allege that the Defendant committed the act "knowingly." Whether the Defendant had the requisite knowledge is a question of fact for the trial.

IV.

The final assertion in the motion to dismiss is that the

Defendant's right to a fair trial has been prevented by certain pre-trial conduct. Specifically, the Defendant claims that the cumulative effect of the following events impedes his/her right to a fair trial: (1) the Prosecutor failed to inform the Defendant of his/her rights in this proceeding when the Prosecutor informed the Defendant that s/he had been accused of violating the Honor Code; (2) the Prosecutor conferred with the Defendant's Faculty Advisor concerning whether it was proper for the Prosecutor to take the Defendant's statement; (3) the Prosecutor subsequently had a conversation with the Defendant concerning the Code and the issues in this case; (4) prior to the Executive Committee's finding of probable cause, the Committee was never informed that the Prosecutor communicated with a student identified by the Defendant as a potential witness. Under these circumstances, a dismissal of the matter investigated is unwarranted.'

The Defendant asserts that his/her right to a fair trial has been impeded by the Prosecutor's failure to warn the Defendant of his/her rights in this matter when the Prosecutor informed the Defendant that s/he had been accused of violating the Code. It should be reiterated that Northwestern University Law School, as a private educational institution, is not constrained by state and federal constitutions. Moreover, this is not a criminal

'Both the Defendant and the Prosecutor had the opportunity to call witnesses regarding disputes of fact in the fourth issue. This section incorporates the Council's findings of fact, as well as the parties' stipulations to the facts. Stipulated facts are so noted.'

proceeding. Consequently, the rights afforded to an individual accused of a Code violation are guaranteed by the requirements contained in the Code itself, not by the United States or Illinois constitutions. Nowhere does the Code require the Prosecutor to inform the Accused of any rights. Furthermore, the Defendant failed to show that s/he was prejudiced by the conversation between him/herself and the Prosecutor.

The Defendant also asserts that the Prosecution's conversation with the Defendant's Faculty Advisor was improper pre-trial conduct which warrants dismissal. After identifying herself as the Prosecutor in this case and informing the Defendant that s/he had been accused of violating the Code, the Prosecutor provided the Defendant with the name of the Defendant's Faculty Advisor. During this conversation, the Prosecutor also informed the Defendant that the Prosecutor would be contacting the Defendant's Faculty Advisor. The parties stipulated at the hearing that the Prosecutor asked the Defendant's Faculty Advisor whether it was proper for the Prosecutor to take the statements of the defendant and potential defense witnesses. The Defendant's Faculty Advisor confirmed that the taking of the Defendant's statement fell within the Prosecutor's duties as an investigator. Moreover, the Defendant failed to show how s/he was prejudiced by the conversation between the Defendant's Faculty Advisor and the Prosecutor.

In support of the Defendant's allegation that any communication between the Defendant's Faculty Advisor and the

Prosecutor is improper, the Defendant cites Article III, §2 of the Code which states "[t]he faculty advisor shall be available, within reason, to advise and consult with their respective parties." The Council disagrees that Article III, §2 has been violated. This provision merely states that the Defendant's Faculty Advisor shall be available for consultation with the Defendant. Article III, §2 imposes no restrictions upon the prosecutor's conduct. In other words, there is no language in the provision that prohibits a prosecutor from talking to the defendant's faculty advisor. Moreover, the Defendant failed to show how s/he was prejudiced by communications between the Defendant's Faculty Advisor and the Prosecutor.

After speaking with the Defendant's Faculty Advisor, the Prosecutor contacted the Defendant. During this conversation, the Prosecutor clarified issues in the instant matter for the Defendant and outlined the procedures to be followed.

The Defendant asserts that the Prosecutor's conversations with the Defendant and with the Defendant's Faculty Advisor were ex parte communications in violation of Article IV, §6(b) of the Code. That provision states that "[t]he parties and their faculty advisors shall not engage in ex parte communications regarding the proceeding with members ... of the Judicial Council, Executive Committee, witnesses and others involved in the proceeding." This prohibition against ex parte conversations forbids discussion between either party and the triers of fact without notice to the opposing party. Thus, the conversations

between the Prosecutor and the Defendant and between the Prosecutor and the Defendant's Faculty Advisor were not ex parte because they did not involve the trier of fact. Moreover, the Defendant has not shown that any of these conversations have prejudiced the Defendant. Furthermore, the conversation between the Prosecutor and the Defendant's Faculty Advisor was not prejudicial since the Defendant was notified that the conversation was forthcoming.

The Defendant also asserts that "communications between the Prosecutor and the Defendant should have been directed to Defendant's representative. . ." Defendant's Brief at 11, 12. This right is not granted by the Honor Code. Furthermore, the Defendant failed to show that this conversation involved any substantive elements of the case. Moreover, the Defendant has failed to show that s/he was prejudiced by the conversation.

The final issue addressed in this portion of the Council's opinion is whether the Prosecutor's failure to inform the Executive Committee that she communicated with a student identified by the Defense as a potential witness merits dismissal of this matter. Article IV, §2(d) states that "[w]ithin two weeks of receiving the charge, the Prosecutor shall present the results of the investigation in writing to the Executive Committee, including ... the substance of any interviews." In this particular matter, the Prosecutor asked that all witnesses reduce their statements to writing. It was stipulated by the parties that the Prosecutor talked to a student identified by the

Defendant as a potentially favorable witness. This student failed to submit a written statement. It was further stipulated that this witness' oral statement to the Prosecutor was never related to the Executive Committee prior to their determination of probable cause. The Defendant failed to offer the substance of the statement at the pre-trial hearing.

The plain language of Article IV, §2(d) states that the Prosecutor shall present the substance of any interviews to the Executive Committee. The Prosecutor's obligation to disclose the results of witness interviews is not conditioned upon the witness reducing his/her statement to writing. Although requesting witnesses to put their pre-trial statements in writing is advisable because it ensures the accurate transmission of the statements to the Executive Committee, the Prosecutor may not require a witness to put his/her statement in writing. Consequently, the Prosecutor's failure to present the substance of her interview to the Executive Committee breached the requirements of Article IV, §2(d).

Upon finding a violation of Article IV, §2(d), the Council must determine if dismissal is an appropriate remedy. The Code does not provide a remedy for a breach of this particular pre-trial procedure. However, Article IV, §8(d) provides guidance in deciding the propriety of the dismissal remedy under the circumstances of this case. The Defendant has the right to receive on an ongoing basis, all material relating to the alleged violation. See Article IV, §7(c). In the event the Prosecution

withholds material evidence from the Defendant, the Council may only dismiss the cause of action if the Council determines that the withholding has "substantially prejudiced the Accused." Article IV, §8(d). In the Official Comments on the 1986 Honor Code Amendment, the drafters indicated that the "substantially prejudiced" standard was a substantive change to the prior Code.

The amended Code differs from the prior Code on another important point: previously if the prosecution withheld "material evidence," it was automatic cause for dismissal or reversal. Under the amended Code, it is cause for dismissal only if the withholding has "substantially prejudiced the defendant."

The Council fails to see any distinction between the prosecution withholding evidence from the defense and the prosecution failing to present evidence to the Committee which would justify a different standard on motions to dismiss. Therefore, the Council concludes that a dismissal is only warranted if the Prosecutor's failure to present the substance of the interview "substantially prejudiced the defendant."

The Defendant has not shown any prejudice resulting from the Prosecutor's failure to communicate to the Executive Committee that she spoke with a student identified by the Defendant as a potential witness. Indeed, despite its opportunity to call witnesses regarding this conversation at the pre-trial hearing, the defense made no attempt to establish the relevancy, if any, of the excluded interview. The defense also failed to establish the substance of the interview in their pre-

trial briefs. Under these circumstances the Council can only speculate whether the witness possessed any knowledge concerning the matter investigated. The Council therefore holds that the defense has not met its burden of showing that the failure to present the witness' statement substantially prejudiced the Defendant. A dismissal remedy would be inappropriate here.

Neither individually nor in toto has the Defendant's right to a fair trial been prevented by pre-trial conduct.

Conclusion

For all foregoing reasons, the Judicial Council denies the motion to dismiss.

Scott Hochfelder, Brian Hodes, Julie Spiegleman concurring with the majority.

We agree with the Judicial Council's decision not to grant the Defendant's motion to dismiss. We do, however, take exception with the Council's reasoning in Part Four of the opinion. In particular, we find that the Prosecutor acted properly in not reporting a conversation between her and a student identified by the Defendant as a potential witness to the Executive Committee.

The Honor Code requires the Prosecutor, in her role as investigator, to present the "substance" of a witness' interview to the Executive Committee for determination of probable cause.

Article IV, §2(d). We believe that the Prosecutor retains some discretion in determining what is substantive. In this decision, the Prosecutor must make a judgment whether there is any substance to the communication and, implicitly, whether it is relevant to the Executive Committee's finding of probable cause.

In the present case, the burden rests on the Defendant to demonstrate how this witness' participation was in any way relevant to the substantive finding of probable cause. Moreover, the Defendant must show how the Prosecutor's failure to report such information was in any way prejudicial to his/her case.

The Defendant failed to present any evidence that would demonstrate the relevance or substance of the witness' communication to the Executive Committee's finding of probable cause. Nor did the Defendant provide any evidence demonstrating how the Prosecutor's actions were prejudicial to his/her case. As such, we concur that there is no compelling reason to grant the Defendant's motion to dismiss.

Judicial Council, Concurring Opinion (Issue #3)

In oral arguments, defense argues that the complaint must contain an allegation of *how* the defendant had knowledge that the alleged act was a violation of the Honor Code. Absent this portion of the complaint, defense contends, the defendant is not fully apprised of what s/he is charged. In short, the defense cannot prepare to disprove allegations that are not specifically stated to him/her. Unlike the majority, I agree that in this case, the defendant deserves to know how the prosecution alleges that the defendant had this knowledge. One could have knowledge of the rule against writing over the allotted time for an exam in a number of ways--the rule may be stated in memoranda issued by the law school; the proctor may state the rule prior to the test; there may be a presumption that all students are aware of this rule; etc.--and the defendant should not be expected to predict which allegation(s) the prosecution will choose.

I agree with the majority in the result, however, because I do not believe that the defendant was prejudiced by this omission. I hold so because the defendant was provided with two exhibits of evidence that reasonably apprised him/her of how s/he had the alleged "official" knowledge of both the time limitations and the consequences of disobeying these limitations. These exhibits were the front page of the torts examination, which contained a clause stating what the total time was for the examination, and a memorandum from the Registrar stating that writing beyond the time limitation on an examination is a violation of the Honor Code. I believe that the defendant has notice of what the prosecution alleges was his/her sources of knowledge and is therefore not impaired from providing his/her best possible defense.

David Ellis