

FILED

MAY 20 2008

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

**JUDICIAL COUNCIL
OF THE NINTH CIRCUIT**

**IN RE COMPLAINT OF
JUDICIAL MISCONDUCT**

No. 07-89105

ORDER

KOZINSKI, Chief Judge:

A complaint of misconduct has been filed against a magistrate judge of this circuit. Complainant, a pro se litigant, challenged a search warrant issued by the subject judge.

Complainant alleges that the judge issued the search warrant in violation of Federal Rule of Criminal Procedure 41, because the judge did not file the Application and Affidavit for Search Warrant until after the search warrant was executed. Rule 41 does not require a judge to file the affidavit prior to the execution of the search warrant. See Fed. R. Crim. P. 41(d). This charge is therefore dismissed because the charged behavior does not amount to “conduct prejudicial to the effective and expeditious administration of the business of the courts.” Rule 4(c)(2)(A) of the Rules of the Judicial Council of the Ninth Circuit Governing Complaints of Judicial Misconduct or Disability (Misconduct Rules); see 28 U.S.C. § 351(a).

Complainant alleges that the copy of the search warrant that was left at the premises referred to an “Attachment A,” and that there was no “Attachment A” included in this copy. However, the search warrant doesn’t refer to an “Attachment A”—it only refers to an “Attachment B.” This charge is therefore dismissed because it lacks a factual foundation. 28 U.S.C. § 352(b)(1)(B). Even if complainant were actually referring to Attachment B, the subject judge wouldn’t have been involved in determining which documents remained at the premises. This charge would therefore still be dismissed, because this doesn’t amount to “conduct prejudicial to the effective and expeditious administration of the business of the courts.” Misconduct Rule 4(c)(2)(A); see 28 U.S.C. § 351(a).

Complainant alleges that the judge’s deputy clerk did not return complainant’s phone message, which requested a copy of Attachment A and information about the entity responsible for executing the warrant. This information is on file in the public docket, and was available to complainant nine days after the warrant was executed. In any event, the allegation is dismissed because this complaint procedure applies only to federal judges, and the deputy clerk is not a federal judge. Misconduct Rule 1(d).

Complainant alleges that the judge violated Federal Rule of Criminal Procedure 41 by failing to take recorded testimony from the affiant. Rule 41

doesn't require a judge to take recorded testimony for every search warrant application; it only requires recorded testimony when the judge dispenses with a written affidavit, see Fed. R. Crim. P. 41(d)(2), or relies on information communicated by telephone or by electronic means, see id. 41(d)(3). Here, the judge relied on the written affidavit, and the information was communicated to him in his presence. This charge is therefore dismissed because the charged behavior does not amount to "conduct prejudicial to the effective and expeditious administration of the business of the courts." Misconduct Rule 4(c)(2)(A); see 28 U.S.C. § 351(a).

To the extent that complainant is challenging the validity of the warrant itself, the charge must be dismissed. 28 U.S.C. § 352(b)(1)(A)(ii); Misconduct Rule (4)(c)(1). A complaint of judicial misconduct is not a proper vehicle for challenging a judge's decisions. See In re Charge of Judicial Misconduct, 685 F.2d 1226, 1227 (9th Cir. Jud. Council 1982).

DISMISSED.