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COURT OF APPEALS
STATE OF NEW YORK

MATTER OF HONORABLE LETICIA D. ASTACIO

No. 94

20 Eagle Street
Albany, New York
September 5, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next matter on the
2 court's calendar is appeal number 94, the Matter of the
3 Honorable Leticia D. Astacio.

4 Counsel.

5 MR. JULIAN: May I reserve, Judge, two minutes
6 for rebuttal?

7 CHIEF JUDGE DIFIORE: You may, sir.

8 MR. JULIAN: Thank you.

9 CHIEF JUDGE DIFIORE: You're welcome.

10 MR. JULIAN: It is my honor to represent Judge
11 Astacio who is present here today. We argue that Judge
12 Astacio should not be removed from the bench. She is
13 remorseful.

14 JUDGE FEINMAN: So before we go any further, I
15 just want to be very, very clear about what it is you are
16 seeking. You are not disputing any of the findings of fact
17 or the fact that the charges were sustained to the extent
18 that they were sustained but merely arguing for a reduction
19 of sanction?

20 MR. JULIAN: Yes.

21 JUDGE FEINMAN: Is that correct?

22 MR. JULIAN: Yes.

23 JUDGE FEINMAN: Okay.

24 CHIEF JUDGE DIFIORE: So is it your position that
25 Ms. Astacio's limited judicial experience should somehow



1 mitigate her conduct on the bench?

2 MR. JULIAN: As to certain of the charges, yes.

3 CHIEF JUDGE DIFIORE: Which charges, sir?

4 MR. JULIAN: Well, to make a distinction between
5 the on-the-bench charges, if you will, to lump it into that
6 category, and the violation of the conditional discharge.
7 I'm not going to argue that the conditional discharge
8 violations were anything but poor judgment on her part.
9 There were two violations which I thought she explained
10 eloquently at the hearing. The first she did not read
11 carefully the conditional discharge component that required
12 her not to drink alcohol. It's - - - it's like doing an
13 autopsy - - -

14 JUDGE STEIN: Does she have to read it carefully?
15 Or - - - I mean it's - - - first of all, it seems to me
16 that anybody, and particularly a judge, would want to read
17 those conditions very carefully. In this particular case,
18 the judge actually, as I understand it, presided over DWI
19 cases, so she even had more reason to be familiar with
20 those types of conditions, so that seems like a little bit
21 of a shaky - - -

22 MR. JULIAN: Well, Judge Stein, let me say this,
23 this is a form that was used by some judges and not other
24 judges. And I'm not here to tell this court that Judge
25 Astacio was not familiar with the form per se. What I am



1 saying to you is that I believe - - - and - - - and I think
2 the medical records demonstrate this was a traumatic event
3 for her reading in detail what happened to her. She should
4 have done it. She acknowledges she should have done it.
5 She apologized to the Commission nine times in her ten-
6 minute - - -

7 JUDGE RIVERA: Can I ask was the requirement not
8 to consume alcohol or not to consume alcohol and also not
9 to drive while under the influence of alcohol - - -

10 MR. JULIAN: Yes.

11 JUDGE RIVERA: What - - - just to be clear, what
12 - - - what were the conditions?

13 MR. JULIAN: Oh, thank you. The condition was
14 not to consume alcohol.

15 JUDGE RIVERA: Then it - - - it made no mention
16 of driving while under the influence?

17 MR. JULIAN: It's a conditional discharge, and so
18 I think implied is that one should not drive also under the
19 influence.

20 JUDGE RIVERA: Correct, perfect. So then when
21 she got behind the wheel and didn't pass the blow test - -
22 -

23 MR. JULIAN: Yes.

24 JUDGE RIVERA: - - - how - - - how - - -

25 MR. JULIAN: Oh, I'm sorry. I didn't mean to



1 interrupt.

2 JUDGE RIVERA: No, no, no. Doesn't that already
3 show that regardless of whether or not she had read the
4 document that she was not complying?

5 MR. JULIAN: Right, so - - - so I would refer the
6 court to page 369 of the record. As to that issue, she was
7 present with her aunt. The - - - the requirement as I
8 understand it is she is to blow and then the other person
9 is to drive if she passes the blow. What you do when you
10 don't pass the blow I'm not exactly sure. In this
11 instance, she failed. So I would respectfully argue,
12 Judge, that her intent was not to drive.

13 JUDGE RIVERA: What are the other mitigating
14 factors in addition to the - - - as the Chief Judge already
15 mentioned the lack of experience, judicial experience?
16 What other mitigating factors?

17 MR. JULIAN: Well, I think one of the important
18 mitigating factors here is that this judge, she violated a
19 conditional discharge that - - - and took a trip. She had
20 arranged to be contacted by her attorney by email. For
21 whatever reason, he left the message for her by cell phone.
22 And so she was not aware in real time that Judge Aronson on
23 May 15th had required her to be present and take a test to
24 ascertain whether or not she had been consuming alcohol.

25 JUDGE STEIN: At that time did she know that she



1 was under a continuing requirement to take tests as
2 directed?

3 MR. JULIAN: Well, the - - - the conditional
4 discharge - - - and I say this respectfully to that court.
5 I'm not here to point the finger at them, but it's not
6 exactly clear that she can't travel or can't be away in the
7 conditional discharge.

8 JUDGE FEINMAN: Right, so it's not like very
9 often on probation or parole there's a condition that says
10 you can't leave the state or sometimes even the county
11 without permission. I get that. I want to go focus on the
12 difference between a removal and a censure. And in the
13 cases where we have approved a removal, it's because
14 there's a belief that the judge has been - - - has lost the
15 public confidence irretrievably. So what evidence in this
16 record would lead us to conclude that that is not the case?

17 MR. JULIAN: I think there are several components
18 of evidence. First of all, you have her biography in the
19 record as she was elected by - - - as the first woman of
20 her ethnicity to the bench in that community. Second, you
21 have the very clear demonstration by the judge that she is
22 remorseful. And - - - and I have to say this, when she was
23 trying to express to the Commission her remorse she was
24 interrupted, and she was - - - and introduced into the
25 proceeding was a statement that the chair of the commission

1 apparently had read or seen or thought he had read or seen
2 - - -

3 JUDGE STEIN: Is - - - is there any evidence as
4 to that that in fact that commissioner or indeed any of the
5 commissioners took that into account in determining the
6 sanction?

7 MR. JULIAN: Well - - -

8 JUDGE STEIN: Or - - - or as I understand it was
9 expressly stated that they would not and did not.

10 MR. JULIAN: Judge, that is - - - that would be a
11 difficult thing to prove but let me say the statement
12 speaks for itself. The statement if it is to be believed
13 and uttered reflects contempt on Judge Astacio's part for
14 both the body - - -

15 JUDGE STEIN: Well, I thought it was just calling
16 into question her sincerity in - - - in something that she
17 had said.

18 MR. JULIAN: Well, no - - -

19 JUDGE STEIN: And I'm not suggesting that it was
20 appropriate by the way.

21 MR. JULIAN: Thank you. Well, may I just finish
22 by saying to you and - - - and to the other members of the
23 court that statement not only suggested that she had
24 contempt for the body but also contempt for the rule of
25 law. That was central to our argument in front of the



1 Commission. What we were attempting to demonstrate, what
2 we were attempting to say to the Commission is we're a
3 young judge, we're only thirty-seven, thirty-eight years
4 old, and we understand that we've made mistakes and there
5 was sort of a cascading of mistakes. But we have not done
6 or engaged in conduct that the people who you have - - -
7 this court has historically removed, that conduct. We have
8 not - - -

9 JUDGE RIVERA: Well, we - - - but the court has
10 recognized that driving under the influence is a serious,
11 grave matter, correct?

12 MR. JULIAN: Correct. Remove - - -

13 JUDGE RIVERA: And so it's not once, it's more
14 than once that - - - or at least more than once that she
15 attempted to do so post the misdemeanor, right?

16 MR. JULIAN: Judge, I think that's a question of
17 fact on the record. I refer you back to page 369. But
18 there is no question Judge Astacio acknowledged that she
19 recognizes that driving under the influence is indeed a
20 serious offense.

21 JUDGE FAHEY: Let me ask this.

22 MR. JULIAN: Yes, Judge Fahey.

23 JUDGE FAHEY: In - - - Mr. Julian, in the cases
24 where judges have been pulled over, gotten DWIs but haven't
25 been removed, they've - - - they've acknowledged that



1 they're alcoholics and they've gone to AA. Usually,
2 there's been that kind of proof in the record. Do we have
3 that kind of proof in the record here with Judge Astacio?

4 MR. JULIAN: What we have in the record - - - and
5 there - - - there are exceptions, Judge Fahey.

6 JUDGE FAHEY: That's fine. I bow to your
7 superior knowledge on that. Trust me. But I just want to
8 know in this case.

9 MR. JULIAN: In this case, we put into the record
10 the analysis of her psychologist who pointed out that she
11 was engaging in - - - anesthetizing - - -

12 JUDGE FAHEY: So - - - so - - - I saw that.

13 MR. JULIAN: - - - by alcohol.

14 JUDGE FAHEY: So let's assume that's true. But
15 she didn't say she was an alcoholic. I think - - - and I
16 thought the psychologist said something like some mild
17 cognitive disability related and that alcohol was used
18 under moments of stress.

19 MR. JULIAN: You - - - you have it pretty much,
20 but the - - - she also went through two outpatient alcohol
21 programs, one finding her to have a mild alcohol abuse
22 disorder.

23 JUDGE FAHEY: Okay. Has there been a public
24 acknowledgment that I'm an alcoholic, I was wrong, I
25 shouldn't have done this?



1 MR. JULIAN: Yes, throughout the - - - an
2 alcoholic, I cannot say that.

3 JUDGE FAHEY: Oh, okay.

4 MR. JULIAN: But what I can say is a public
5 acknowledge - - - acknowledgment and nine times to the
6 Commission in ten minutes.

7 CHIEF JUDGE DIFIORE: Thank you, Counsel.

8 MR. JULIAN: Thank you, Judge.

9 MR. LINDNER: Good afternoon, Chief Judge
10 DiFiore, good afternoon, Your Honors. May it please the
11 court. On October 3rd, 2016, just six weeks after the
12 petitioner was convicted of driving while intoxicated she
13 attempted to commit the same crime again. She admitted in
14 her testimony that she had four glasses of wine, three
15 shots of tequila. She was drunk. She shouldn't have been
16 driving, and yet she admits that she got in her car and she
17 attempted to start and to operate the vehicle. Only her
18 court-ordered ignition interlock device stopped her from
19 doing so again. There are a lot of aggravating factors in
20 this case. There really are a lot of them, most notably
21 that she was incarcerated for violating a court order. But
22 I think this incident - - -

23 JUDGE STEIN: Does that - - - that go to the
24 public confidence?

25 MR. LINDNER: Absolutely.



1 JUDGE STEIN: Is that your point on that?

2 MR. LINDNER: You said in Quinn the notorious
3 involvement with the law was a factor, and I think you have
4 that here in - - - in droves.

5 JUDGE STEIN: So - - - so a judge who has a DWI
6 and happens to make the news is more subject to removal
7 than a judge who does the same thing but it's not a good
8 news day?

9 MR. LINDNER: The judge has no control over what
10 the news does, Your Honor. I understand where you're going
11 with that. No, a judge is responsible for her conduct.
12 When a judge commits crimes that are newsworthy it has an
13 impact on public confidence. You have never had a judge
14 who was incarcerated for violating a court order and went
15 back on the bench, and it would be unprecedented to do that
16 here.

17 JUDGE RIVERA: Absent the - - - the DWI, are the
18 other charges on their face enough for the removal?

19 MR. LINDNER: The other - - - well, I think that
20 the - - - the DWI with the multiple aggravating factors and
21 the two violations of the conditional discharge, we'd
22 consider those as a package. If you're asking about charge
23 5 and charge - - - I'm sorry, charge 4 and charge 5, which
24 are the on-the-bench conduct, we concede in the brief that
25 those are less egregious. But I think they show a certain



1 amount of lack of impulse control that you see through
2 these other charges. You know, the comments about the - -
3 - the buyer's remorse were really uncalled for, and she's
4 not accepting responsibility for that. She's tried to say
5 - - -

6 CHIEF JUDGE DIFIORE: Counsel, how can we be
7 assured that the Chair's comments didn't prejudice the
8 Commission's determination?

9 MR. LINDNER: Read the determination. The
10 determination at every turn points to record evidence in
11 support of the findings of fact and the conclusions of law
12 that they made. And really, how could it not? I mean the
13 - - - the DWI and the Thailand violation were established
14 after trial and upheld on appeal. She admits to the first
15 violation. She admits that she was rude and profane with
16 the police officer. She admits nearly everything that you
17 would need to find removal regardless of what she said.

18 In terms of her remorse or accepting
19 responsibility, you have her own brief to this court. She
20 says she accepts responsibility except she didn't really do
21 it. She accepts responsibility for having been convicted
22 of DWI. But she wasn't drunk, and she was wrongly
23 convicted. She's sorry that she spoke profanely to state
24 troopers who were just doing their job, but they provoked
25 it.



1 And now you have an argument in her reply brief,
2 which I really was quite surprised to see - - - and Counsel
3 mentioned it - - - an argument that she didn't really
4 intend to drive on October 3rd, that her aunt was going to
5 drive. What's surprising about that - - - it's surprising
6 on several levels. First of all, it's an argument that
7 appears for the first time in the reply brief. It's not in
8 her main brief to this court. You won't find it in the
9 briefs to the Commission or to the referee. You won't find
10 it in her statement that she made when she appeared before
11 the Commission.

12 And it's completely at odds with her plea - - -
13 her guilty plea. She stood in open court, it's at page 870
14 of your record, and she admitted that she attempted to
15 start and to operate - - - to operate the vehicle. And
16 then she goes on - - - there is pages of her explanation
17 for how that happened and it's all about how she didn't
18 read the conditions. She says nothing about the fact that
19 she didn't intend to drive. The fact that she's raising
20 that defense now in her reply brief for the first time is
21 evidence that she's still not willing to accept
22 responsibility.

23 JUDGE RIVERA: Did she seek mitigation on the
24 basis of some alcohol abuse problem or difficulty or
25 challenge?



1 MR. LINDNER: Well, there's no medical evidence
2 here to support alcoholism, but let me say the disease of
3 alcoholism is not a defense. It's an explanation. If you
4 have a case like Landicino in which there's substantial
5 medical evidence that a judge suffers from a disease and
6 there's also substantial evidence in the form of multiple
7 people who come in and testify about the judge's efforts to
8 rehabilitate himself and to conquer his disease, the
9 Commission in that case said we would remove this judge but
10 for the extensive evidence of rehabilitation. But if you
11 go back to Quinn and to Aldrich, in Aldrich there's
12 evidence in that record that the judge had been sober for
13 two years by the time it got to this court. He was an
14 alcoholic and nobody disputed that. But the nature his - -
15 - of his conduct, which was being intoxicated on the bench
16 and making racist statements - - -

17 JUDGE FAHEY: So - - - so let me ask you this.
18 Everything that happened, the - - - the three violations
19 ultimately of the conditional discharge, if afterwards the
20 judge had gone to Alcoholics Anonymous, gone to a program,
21 forsworn all alcohol, came out public and said I was an
22 alcoholic, I made some mistakes, but I still want to be a
23 judge and I think I can still serve the community
24 effectively, in point of fact maybe I even learned
25 something from these experiences and I can be a better



1 judge as a result of them - - - because some of the remarks
2 struck me more as immature than - - - than venal, I guess
3 that - - - that would be the way I would characterize them.
4 As I think one of your commissioners said she may have been
5 her own worst enemy. In that circumstance, would your - -
6 - do you think the recommendation might have been
7 different?

8 MR. LINDNER: I think - - - and that's exactly
9 where I was going with - - - with Aldrich, Your Honor. In
10 Aldrich there was evidence that the judge had gone to AA,
11 that he was sober, that he was no longer an alcoholic and
12 that was - - - but you said the - - - the nature of the
13 misconduct there was - - - I because you called it of such
14 an aggravated nature that it simply wasn't enough. You
15 said in other cases, in Bauer, sometimes no amount of
16 contrition is enough. And in a case where a judge has gone
17 to jail for violating a court order, who's twice tried to
18 drive while intoxicated, I think this might be a case where
19 even if there had been sincere contrition it would not have
20 been enough.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 MR. LINDNER: Thank you, Your Honors.

23 CHIEF JUDGE DIFIORE: Mr. Julian.

24 MR. JULIAN: Yes; thank you, Judge. First of
25 all, this judge went - - -



1 JUDGE RIVERA: Counsel, could you - - - could
2 address the Commission's - - - counsel for the Commission's
3 point that despite the representations that she's
4 remorseful the reality is that she blames others or says
5 others provoked her or says no, I never did that. In other
6 words, she doesn't really recognize that she has violated
7 rules or that - - - that she's done something that - - -

8 MR. JULIAN: She fully - - - I'm sorry.

9 JUDGE RIVERA: - - - warrants removal.

10 MR. JULIAN: I'm sorry. I didn't mean to speak
11 up.

12 JUDGE RIVERA: No, no. Please.

13 MR. JULIAN: She fully recognizes that she
14 violates rules. She - - - she had a trial in city court.
15 She was convicted. She - - - she did not believe - - - at
16 the time she was driving at 7:00 in the morning and she was
17 driving to the YWCA to work out, she did not believe she
18 was under the influence of alcohol. But she accepts the
19 verdict. She understands that that's the verdict. And
20 this court has - - - has held - - - has said that simply
21 because a judge contests the issue that in and of itself is
22 not an expression of remorse. You don't check your rights
23 at the door as a judge. She then went to three different
24 programs, two of them outpatient, one required by the
25 conditional discharge, to address her alcohol issues.



1 And then she has said at - - - and again, I want
2 to reiterate, to the Commission nine times during the
3 argument that was punctuated by the reference that I
4 referred to that she was sorry, that she accepted
5 responsibility. In fact, her words in front of the
6 Commission were I accept responsibility for everything.
7 During the hearing as to each of the charges that are
8 relevant, including the charge dealing with her treatment
9 of the police officer, she said she was sorry, she
10 apologized. At the station, she apologized to the police
11 officer after she had engaged in - - -

12 JUDGE RIVERA: No, I understand. But I think - -
13 - I thought Counsel's point was that she may be saying
14 those things but - - - but then she also says but I was
15 provoked and that helps to explain. I - - - I take
16 responsibility. I shouldn't have done that, but I was
17 provoked, right?

18 MR. JULIAN: Well - - -

19 JUDGE RIVERA: Or as you were saying she blows
20 but it's really someone - - - she blows to be able to - - -
21 to get her BAC number up, but - - - but it's her aunt who
22 was going to drive.

23 MR. JULIAN: Well - - -

24 JUDGE RIVERA: And I wasn't - - - I - - - as you
25 said now, I didn't think I was drunk, but I accept that



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that's the conclusion. And that's what he's saying, that that's different from true - - - someone who really shows contriteness, who really says I recognize that I was wrong.

MR. JULIAN: There are always facts that underline contriteness, and if we're being penalized for trying the case to point out what exactly the mitigating factors were - - - I mean you don't get to a place without walking there. And she got to the place where she apologized, but we also in trying the case talked about our journey. And if that - - - if that is bad lawyering on my part I plead guilty.

CHIEF JUDGE DIFIORE: Thank you, Counsel.

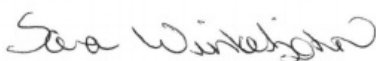
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Honorable Leticia D. Astacio, No. 94 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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