STATE OF MICHIGAN

BEFORE THE JUDICIAL TENURE COMMISSION

Complaint against:

Hon. Paul J. Cusick
Third Circuit Court
Detroit, Michigan

Docket No. 165050
Complaint No. 104

HON. MONTE J. BURMEISTER, COMMISSIONER

HON. PABLO CORTES, COMMISSIONER

Concurring in Part, Dissenting in Part

Introduction

A majority of our fellow commissioners have adopted the Master's analysis and conclusions, as articulated in the Master's Report. We concur with our colleagues in their adoption of the Master's Report, with one exception. We would find that Judge Cusick violated MRPC 3.3[1] during the preliminary examination held in the 35th District Court in the *People v Joslin* matter, and, accordingly, offer the following dissent.

Analysis

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1 This rule of professional conduct pertains to the candor that an attorney owes toward a tribunal. It states, in relevant part, that an attorney shall not knowingly, "offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal." MRPC 3.3(a)(3).

Motive and bias, if established, directly impact a witness's credibility. As noted in *People v. Anderson*, 501 Mich 175; 912 NW2d 503 (2018), "This Court has held that during a preliminary examination, 'the magistrate ha[s] not only the right but, also, the duty to pass judgment not only on the weight and competency of the evidence, but also [on] the credibility of the witnesses.' *People v. Paille #2*, 383 Mich 621, 627; 178 NW2d 465 (1970); see also *People v. King*, 412 Mich 153; 312 NW2d 629 (1981)." *Anderson*, 501 Mich at 184-185.

In the instant case, a considerable amount of evidence indicates that, prior to the preliminary examination that occurred in the *Joslin* case, Judge Cusick was fully aware of the reasons for Brandy Loggie's involvement as a confidential informant (CI).

As trial judges we instruct juries that, in assessing a witness's testimony and the evidence presented in a trial, certain guiding principles are paramount:

1. Jurors should only accept things that comport with their common sense and everyday experience;

2. Jurors should consider whether a witness has a bias or a special reason to lie; and

3. Jurors should consider what evidence best agrees with the other evidence in the case.

While we are not a jury, we cite these principles because they aid in our view of the record established before the Master and, in particular, the credibility

determinations that the Master made in arriving at his decision.

Starting with common sense and everyday experience, there are several items in the record below that run afoul of Judge Cusick's version of events.

When a CI witness testifies, a prosecutor does not put a CI on the stand without knowing the reasons behind that witness's confidential informant work. The reason for this is because all prosecuting attorneys know that the first questions out of the defense counsel's mouth are going to be some variation of "why are you doing this work?" or "what benefit are you getting from providing the testimony that you have given?"

Only a new attorney would make the mistake of offering the testimony of a CI without knowing that witness's motivation. Judge Cusick was not a new attorney at the time of the preliminary examination in the *Joslin* matter.

Additionally, the stated reason offered by Loggie for providing the testimony that she did at the preliminary examination, i.e. that she was concerned about people being high and driving out of the dispensary parking lot, does not comport with the reasonable inferences drawn from the record. This CI was a person who was involved in a drug trafficking organization headed by her boyfriend. This was also a CI who was involved in the furtherance of that organization by transporting pounds of marijuana across state lines. This was the

person who, at the preliminary examination, offered her moral compass as the reason for becoming a CI in the *Joslin* case.

In addition to common sense and everyday experience, we also consider the testimony of two witnesses from the Attorney General's office, Dianna Collins and John Pallas. Collins' testimony is noteworthy based on the actions that she took once she became aware of Loggie's work through Sgt. Paul Calleja and when she realized that the information in her *Joslin* file had not been disclosed. Collins was so disturbed by it that she took immediate action to disclose and remedy the situation. Still further, Collins identified that the information as to the actual motive for Loggie's work should have been disclosed on direct examination and, if not disclosed at that point, under the circumstances that developed here, should have been, consistent with MRPC 3.3, corrected and elaborated on during re-direct examination. Judge Cusick did neither of these things.

We would also note that we do not adopt Respondent's view of the testimony of Detective Brian Zinser, the officer in charge of the *Joslin* investigation, related to letting Judge Cusick know of a discrepancy in Loggie's testimony. That said, we also did not find Detective Zinser's testimony reliable enough to confirm that Judge Cusick was notified of Loggie's false testimony.

Also noteworthy, from the Attorney General's standpoint, is John Pallas's

testimony. His testimony is important because it identifies that the Attorney General's office, after review of the court record and its own internal records, made the decision not to defend the claim of failure to disclose and perpetration of falsity on the record.

If we were dealing solely with inferences from common sense and everyday experience drawn from the record, and subsequent evaluations by the Attorney General of what occurred in the *Joslin* case, we might concur with the majority's decision. However, sandwiched between the reasonable inferences derived from common sense and everyday experience and the after-the-fact analysis by the Attorney General's office, lies the central question of Judge Cusick's actual knowledge that the preliminary examination testimony presented by Loggie was not accurate.

Sgt. Calleja was less than a stellar witness, and after his cross examination was not rehabilitated very well. In considering his testimony, we are not persuaded or guided by his "cup of coffee" revelation. Nonetheless, there is testimony, and there are emails to Judge Cusick from Sgt. Calleja that are supportive and complementary to his assertions that Judge Cusick knew that Loggie was working as a CI for the benefit of her boyfriend. This evidence was also complemented by various emails from Steven Fishman, the attorney who was representing Loggie's

boyfriend.

Respondent's counsel spent considerable effort refuting the argument of an agreement (for legitimate reasons in light of the claims by Disciplinary Counsel) and attacking the professionalism and skill set of Michael Kormoren, the attorney who represented the defendant in the *Joslin* matter. However, the issue here is not whether there was an agreement that Judge Cusick was involved in. Rather, the issue is his knowledge surrounding the circumstances in which Loggie became a CI and why she continued to do CI work. Furthermore, the issue here is also not one of purported poor lawyering on the part of Kormoren or his violation of court decorum or ethics rules when he surreptitiously recorded Loggie. The simple fact is that none of Kormoren's purported failings or misconduct obviated Judge Cusick's duties under MRPC 3.3. In other words, no matter how bad another attorney acts, Judge Cusick held no license to violate MRPC 3.3.

At the *Joslin* preliminary examination, the question was asked of Ms. Loggie if something happened that caused her to become a CI. She answered "no." The true answer to that question was, "yes, my boyfriend was arrested for a drug charge to which he has pled guilty and is working to mitigate his sentence, and I am helping him do that."

MRPC 3.3(3) is implicated here because Judge Cusick knew of Loggie's

original reasons and circumstances for becoming a CI. Those reasons were not because people were driving high or that their driving created a danger. And, even if she had a change of heart and there were additional reasons behind her decision to provide the testimony that she did, there was no way for the defense attorney or the judge presiding over the preliminary examination to gauge her credibility. There was no way to determine that because no disclosure of her actual or initial motivation was made and there was no later correction of the record as MRPC 3.3 requires.

We are also mindful of the fact that Disciplinary Counsel's burden in this case was proof by a preponderance of the evidence. *In re Simpson,* 500 Mich 533, 545-546; 902 NW2d 383 (2017). We believe that Disciplinary Counsel did, in fact, establish that it was more likely than not that Judge Cusick violated the duty imposed on him under the Rules of Professional Conduct regarding candor to the court. We would find that Judge Cusick violated MRPC 3.3(3), and the corresponding derivative claims in the complaint stemming from such a violation.

Conclusion

The Master, in drafting his report, did not devote much discussion to MRPC 3.3 and the obligations that it imposed on Judge Cusick. Nor did the Master engage in much analysis regarding the evidence that supports our opinion as expressed in

this dissent. We recognize the Master is free to say he does not believe a witness's testimony or the contents of exhibits that were admitted, in whole or in part. However, our view is that there is a considerable amount of evidence that simply was not commented on. We do not say this to suggest that the Master did not consider it, but if he did, we are unaware of what his findings were relative to those considerations. That is a flaw that we believe renders it imprudent to adopt the Master's findings. Additionally, aside from whatever concerns we may have about any analysis omitted from the Master's report, we are convinced that Judge Cusick had knowledge of material facts which he chose not to disclose, which, in turn, supports our conclusions as to his violation of MRPC 3.3. For these reasons, we believe the majority's decision is in error and fails to account for the record evidence of Judge Cusick's knowledge.

Because the current system adopted by the Supreme Court does not allow for further appeal of the Commission's decision in this matter, we recognize our dissent will not receive any further review. Because of that fact, we decline to comment on the factors set out in *In re Brown*, 461 Mich 1291, 1292-1293; 625 NW2d 744 (2000), as the same is now moot.

/s/ Hon. Monte J. Burmeister
HON. MONTE J. BURMEISTER,
COMMISSIONER

/s/ Hon. Pablo Cortes
HON. PABLO CORTES,
COMMISSIONER