

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 05, 2008
LEONARD GREEN, Clerk

UNITED STATES OF AMERICA,)
)
Plaintiff - Appellee,)
)
v.)
)
HERBERT S. MONCIER,)
)
Defendant - Appellant.)

ORDER

Before: GILMAN, ROGERS, and COOK, Circuit Judges.

The defendant, Herbert Moncier, is an attorney who was admitted to practice in the Eastern District of Tennessee. In November of 2006, he appeared in that court on behalf of a client who was being sentenced in a criminal case. Based upon his actions at that hearing, Moncier was charged with criminal contempt. *United States v. Moncier*, No. 2:07-CR-40 (E.D. Tenn.). He has appealed the judgment of conviction and the resulting sentence.

While this direct criminal appeal has been pending, the district court issued a show-cause order that initiated disciplinary proceedings against the defendant under E.D. Tenn. Local Rule 83.7(b). *In re Moncier*, No. 1:08-MC-9 (E.D. Tenn.). Moncier was directed to respond to the show-cause order, and the matter was referred to a magistrate judge for a hearing and recommendation.

On the day that the hearing before the magistrate judge convened, the defendant filed in the instant appeal a motion under Fed. R. App. P. 8 to stay that hearing. That motion was considered as a request for expedited relief. It was denied on the grounds that the defendant had not cited any

legal authority that the criminal-contempt appeal must be concluded prior to the disciplinary proceedings. The order suggested the defendant could appeal a final order of suspension.

Following the completion of the hearing, the magistrate judge issued a lengthy recommendation that the district court impose appropriate discipline. The defendant then filed in this appeal a document styled as a “Fed.R.App.P. 8(a)(2) Application For Injunction; Second Fed.R.App.P. 8(a)(2) Motion For Stay; and Fed.R.App.P. 21 Petition For Alternative Writ of Mandamus And *Rule Nisi* all regarding *In re Herbert S. Moncier*, E.D. Tenn. No. 1:08-mc-09.”

On April 29, 2008, before this court had addressed that request, the district court issued a memorandum and order adopting the magistrate judge’s recommendation. The court imposed a seven-year period of disciplinary suspension from practice before the Eastern District of Tennessee, with provisions for request of an early reinstatement. In view of the district court’s order, the United States filed a brief response to the defendant’s motion filed in this appeal stating that the relief requested was moot. The defendant has filed a supplemental pleading in support of his request. The United States advises that it will not be responding to the defendant’s supplemental pleading.

The defendant’s motion before this court makes several requests. He asks, pursuant to Fed. R. App. P. 8(a)(2), that this court stay the district court’s order of suspension issued on April 29. Alternatively, he asks for an immediate writ of mandamus directing the district court to delay implementation of that order pending the outcome of this appeal. Finally, he asks that if this direct criminal appeal is successful, that the court also direct the dismissal of the disciplinary proceedings. There are several reasons that this relief is not appropriate.

The defendant has yet to appeal the district court’s order in the disciplinary proceedings. We note that this court has heard the direct appeal of similar decisions. *See In re Baumgartner*, 123 F. App’x 200 (6th Cir. 2005); *In re Lewellen*, 56 F. App’x 663 (6th Cir. 2003); *In re Desilets*, 291 F.3d

925 (6th Cir. 2002); *In re Czuprynski*, 73 F.3d 361 (6th Cir. 1995); *In re Ginger*, 372 F.2d 620 (6th Cir. 1967). The instant appeal brings to this court for review the criminal-contempt conviction, not the subsequent disciplinary suspension.

Further, the defendant has not moved the district court to stay the immediate effectiveness of its April 29 Order. Normally, when an injunction or stay is sought, the party must first make such an application in the district court. Fed. R. App. P. 8(a). The defendant has not stated why he did not first seek such relief. He does state that he is counsel in pending criminal cases in which there are deadlines approaching.

In general, the factors relevant to whether a stay pending appeal should issue are: 1) whether the applicant has demonstrated a likelihood of success on the merits; 2) whether the applicant will be irreparably injured absent a stay; 3) whether issuance of the stay will substantially injure the other interested parties; and 4) where the public interest lies. *Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). We conclude that these factors do not favor a stay or injunction in this case.

The sole basis on which the defendant seeks a stay of the disciplinary order appears to be his argument that success in this pending appeal would require dismissal of the disciplinary proceedings. Such an argument is of course best addressed first to the district court. Moreover, while we express no opinion on the likely success of this appeal, we observe that the conviction for criminal contempt, under 18 U.S.C. § 401, and the disciplinary sanction, under E. D. Tenn. Local Rule 83.7(b), state separate standards. In further support of relief, the defendant argues that there will be immediate and irreparable injury in the pending cases in which he is counsel. Notwithstanding this natural result of the district court's disciplinary order, we are not persuaded that a stay is supported at this time.

Finally, insofar as the papers before the court seek relief in mandamus, it is denied. Several factors are relevant to the consideration of whether relief in mandamus is appropriate: 1) the party has no other adequate means, such as direct appeal, to attain the relief desired; 2) the party will be damaged or prejudiced in a way not correctable on appeal; 3) the district court's order is clearly erroneous as a matter of law; 4) the district court's order is an oft-repeated error, or manifests a persistent disregard error of the federal rules; and (5) the district court's order raises new and important problems, or issues of law of first impression. *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 304 (6th Cir. 1984). In this situation, where the defendant may appeal the disciplinary suspension, relief in mandamus is not appropriate.

For these reasons, the defendant's application for relief, as further requested in his supplementary pleading, is **DENIED**.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Leonard Green".

Leonard Green
Clerk