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CONCURRING OPINION
PRESBYTERIAN CHURCH IN AMERICA
STANDING JUDICIAL COMMISSION
CASE 2012-05
RE GERALD HEDMAN
V.
PACIFIC NORTHWEST PRESBYTERY

We fully concur with the Decision of the Standing Judicial Commission in this case.

However, in light of concerns raised about this Decision, as well as our Concurring and Dissenting Opinions (respectively) in *Bordwine v. PNW Presbytery*, Case 2009-06, wherein we stated “the majority should have definitively ruled, based on the Record, that some of the views and teachings of TE Leithart [which were not subjected to cross examination and rebuttal at that time] are out of accord with some of the fundamentals of the system of doctrine taught in the Standards,” we believe the Church would be served by additional reasoning.

Scope of Review

As an initial matter, it is important to note the scope of review mandated by our Constitution for higher courts. Based on *RAO 17-1* (Standing Judicial Commission Vow 4), which states: “I will judge according to the Constitution of the Presbyterian Church in America, through my best efforts applied to nothing other than the record of the case and other documents properly before me,” as well as *BCO 42-5* which states “...[T]he higher court shall not admit or consider anything not found in [the] ‘Record’ without the consent of the parties in the case,” we were not at liberty to rule as we might have wished, or do the “right” thing and sustain the Complaint, as many might have desired that we do.

The purpose of these *RAO* and *BCO* provisions is to prevent future church courts/judges from moving toward liberalism, through judicial activism, much as we have witnessed in other denominations and our civil courts. These Constitutional provisions take away from judges in our church courts, the ability to rule or make decisions without regard to the record of the case that is before them. In short, the scope of our judicial review is limited, and judges in our church courts are not free to just rule as they wish or as their personal beliefs would lead them.

This polity, while designed to protect the church from judicial activism, prohibits judges/courts from going outside of the record of the case and/or using information or documentation not properly before them/it, to reach a decision that is not supported by the record of the case. While our personal beliefs about the theology, generally known as the Federal Vision, may have directed us toward a different decision in this Case, we are bound by the issues and Record of the Case that were before the SJC.

Also, this Case is illustrative of the need for a more practical mechanism for our higher courts to be able to take original jurisdiction. In this Case, there is a record of PNW Presbytery’s reluctance to properly resolve the issues surrounding TE Leithart. This history begins in *Bordwine v. PNW Presbytery*, Case 2009-06. Even after the *Bordwine* Decision returned the TE Leithart

1 matter to PNW Presbytery for further action, PNW Presbytery chose to not refer this matter to the
2 General Assembly/Standing Judicial Commission pursuant to *BCO* 41. Instead, PNW Presbytery
3 refused to find a strong presumption of guilt in regard to TE Leithart’s views before appointing a
4 prosecutor, drawing an indictment, and proceeding to trial, as is required by *BCO* 31-2. This
5 refusal could amount to bias or prejudice against the Prosecution and might have been grounds for
6 relief; however, this issue was not raised by the Complainant.
7

8 Unfortunately, this reluctance of our courts to deal with similar situations is not uncommon.
9 Our polity, as set out in *BCO* 34-1, limits a higher court’s ability to take original jurisdiction. This
10 *BCO* provision restricts the taking of original jurisdiction to a case in which the lower court has
11 “refuse[d] to act.” While in other instances the fact of whether a lower court has “acted” or not
12 has been an issue, in this case, PNW Presbytery has most certainly “acted” and thereby prevented
13 other concerned courts from seeking to have a higher court take up original jurisdiction of this
14 matter. Some might say that PNW Presbytery has not acted *properly* in dealing with TE Leithart,
15 but that conclusion is not apparent in the language of our rule. This provision of our *BCO* should
16 be amended to be clear and give additional guidance in how original jurisdiction might be assumed
17 in cases where a lower court is experiencing difficulty in fulfilling its responsibilities. It may even
18 be wise to allow the taking of original jurisdiction according to a different, clearer standard than
19 “refuses to act.”
20

21 **Complaint v. Appeal**

22 A second matter involves the difference between complaints and appeals under our *BCO*.
23 Many people, including myself at times, have confused how a higher court deals with complaints
24 and appeals; often treating complaints as appeals. The two are, however, distinct, with different
25 grounds and parties.
26

27 *BCO* 42 covers Appeals. It should be noted that an appeal is ONLY taken by someone
28 who has submitted to a trial, been found guilty of an offense, and censured. The grounds for an
29 appeal are: procedural irregularities, refusal of reasonable indulgence, improper evidence, hurrying
30 to a decision, prejudice, mistake or injustice. An appeal may be affirmed, in whole or in part, or
31 reversed in whole, or in part. Also, the court may render the decision that should have been reached
32 or remand the case back to the lower court for a new trial.
33

34 *BCO* 43 covers Complaints. A complaint is made against some act or decision of a court;
35 however, the right to make a complaint is limited to those in good standing, who are subject to the
36 court’s jurisdiction. A court hearing a complaint may annul the whole or any part of the action or
37 send the matter back to the lower court with instructions for a new hearing.
38

39 In this case, TE Leithart submitted to a regular trial before the PNW Presbytery. The
40 Presbytery adopted judgments of Not Guilty on each of the five Charges. Accordingly, there was
41 nothing to appeal in this case, and *BCO* 42 does not apply. However, RE Hedman complained,
42 pursuant to *BCO* 43, that: a) PNW Presbytery acted unconstitutionally in adopting its
43 Commission’s report that TE Leithart was not guilty of the five Charges, b) this egregious and
44 unconstitutional error permits TE Peter Leithart, who is flagrantly out of accord with the
45 Westminster Standards, to teach and publish his false doctrines with impunity, and c) this action

1 of PNW Presbytery undermines the Westminster Standards and the system of doctrine taught in
2 the Scripture.

3
4 Had this case been an appeal, the Standing Judicial Commission could have reviewed this
5 judicial proceeding based upon any of the foregoing appeal grounds raised by the man found guilty.
6 However, in this case there was a not guilty verdict and anyone aggrieved with this outcome is
7 limited to filing a complaint against an action of PNW Presbytery, just as RE Hedman has done.
8 His Complaint is that PNW Presbytery has acted unconstitutionally in adopting its Commission's
9 judgments of Not Guilty to the five Charges.

10
11 It should be noted that the theology, generally known as the Federal Vision, was not on
12 trial in this Case. TE Leithart's views and teachings, as set out in the five Charges in the
13 Indictment, were the subject of the trial before the PNW Presbytery. The Record of the Case
14 shows how the Prosecutor sought to introduce evidence of TE Leithart's statements and writings,
15 including analysis thereof, to meet his burden of proof, which, if unchallenged, could very well be
16 evidence of the lower court's clear error. However, the Record of the Case shows TE Leithart's
17 Defense cross examined the Prosecution's witnesses and rebutted the evidence offered against
18 him. TE Leithart testified, clarified his views, and affirmed his agreement with the Westminster
19 Standards. The Presbytery Commission, as the trier of fact and after weighing evidence offered
20 by both Prosecution and Defense, found the Prosecution had not met its burden of proving TE
21 Leithart's guilt.

22 23 **Standard of Review**

24 Thirdly, a higher court (and its members) is bound by the Constitutional Standard of review
25 of the decisions of a lower court. Showing that a trier of fact has reached the judgment of not guilty
26 that is not supported by the Record, as had to be done in this Case, is a difficult burden. In order
27 to prevail, a complainant is required to point to evidence of the lower court's error in the Record
28 of the Case, i.e. the lower court/trier of fact reached a judgment that is not supported by the Record
29 of the Case.

30
31 *BCO 39-3.2,3* states: "[A] higher court should not reverse a factual finding of a lower court,
32 unless there is clear error on the part of the lower court" and "a higher court should not reverse a
33 judgment of the lower court [regarding matters of discretion and judgment], unless there is clear
34 error on the part of the lower court." As previously noted, PNW Presbytery made a determination
35 about the "comparative credibility of conflicting witness" (*BCO 39-3.3*) and the SJC was required
36 to exhibit "great deference" to such.

37
38 We believe the five Not Guilty judgments are factual findings, but also reflect the exercise
39 of the discretion and judgment of the PNW Presbytery that, based on the evidence in the Record,
40 the Prosecution had failed to prove TE Leithart guilty of any of the five Charges. RE Hedman was
41 required to show, from the Record of the Case, that PNW Presbytery acted unconstitutionally and
42 *clearly* erred in adopting the five Not Guilty judgments. In short, this burden showing clear error
43 was not met, and the Standing Judicial Commission was required to deny RE Hedman's
44 Complaint.

