

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS  
WASHINGTON NAVY YARD  
WASHINGTON, D.C.**

**BEFORE**

**W.L. RITTER**

**E.S. WHITE**

**J.F. FELTHAM**

**UNITED STATES**

**v.**

**Mark A. HURST  
Staff Sergeant (E-6), U. S. Marine Corps**

NMCCA 200401383

Decided 8 February 2007

Sentence adjudged 10 October 2002. Military Judge: E.W. Loughran. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Quantico, VA.

LCDR JAMES E. GOLLADAY II, JAGC, USN, Appellate Defense Counsel  
LT CRAIG POULSON, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

RITTER, Senior Judge:

Contrary to his pleas, a general court-martial, composed of officer members, convicted the appellant of two specifications of failing to obey a lawful general order, sodomy, and indecent assault, in violation of Articles 92, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 925, and 934. The appellant was sentenced to a bad-conduct discharge. The convening authority approved the sentence as adjudged

After carefully considering the record of trial, the appellant's ten assignments of error, and the Government's response, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. See Arts. 59(a) and 66(c), UCMJ. We address the appellant's first and second contentions in detail below, and resolve the rest summarily.

## Military Judge's Impartiality

The appellant contends the military judge abandoned his impartial role by pointing out a deficiency in the Government's case-in-chief after it had rested, and then allowing the Government to reopen its case. We disagree.

During the Government's case-in-chief, the trial counsel requested that the military judge take judicial notice of two orders that the appellant was alleged to have disobeyed.<sup>1</sup> Without defense objection, the military judge took judicial notice of both orders, but stated that he would not take judicial notice as to whether these orders were properly published or not. After the Government rested its case, the military judge noted that the Government had not offered any evidence that the two orders allegedly violated had been properly published, and reminded the trial counsel that he had specifically declined to take judicial notice as to whether the orders were properly published. The Government then requested to reopen its case and, over defense objection, the military judge allowed the Government to do so.

"In the military, a judge may not abandon his role as an impartial party and assist in the conviction of a specific accused." *United States v. Reynolds*, 24 M.J. 261, 264 (C.M.A. 1987). But RULE FOR COURTS-MARTIAL 913(c)(5), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.) recognizes that a military judge may, as a matter of discretion, permit a party to reopen its case after it has rested. Our superior Court has declined to fashion a specific rule to guide military judges in exercising this discretionary power. *United States v. Fisiorek*, 43 M.J. 244, 248 (C.A.A.F. 1995). We note, however, that even where a deficiency in the Government's case is pointed out by the defense in a motion for a finding of not guilty, the Discussion under R.C.M. 917(c) states that the military judge "ordinarily should permit the trial counsel to reopen the case as to the insufficiency specified in the motion."

First, we find that the military judge did not abuse his discretion in allowing the Government to reopen its case once it became aware of the technical deficiency in the evidence. Arguably, allowing a party to reopen its case to meet a technical deficiency is one of the most obvious reasons for this discretionary power. See *United States v. Blankenship*, 775 F.2d

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<sup>1</sup> The specific orders were Secretary of the Navy Instruction 5300.26C and United States Navy Regulations, 1990. Record at 75.

735, 740(6th Cir. 1985); *United States v. Hinderman*, 625 F.2d 994, 996 (10th Cir. 1980). Since the military judge allowed the Government to reopen its case prior to the defense evidentiary presentation, the appellant had ample opportunity to attempt to rebut the evidence presented after reopening, and, thus, there was no prejudice to the appellant.

Second, we find no indication that the military judge abandoned his impartial role in pointing out the technical deficiency before allowing the Government to reopen its case. The military judge had placed a limitation on the judicial notice he took of the two orders. In reminding the Government that the judicial notice did not embrace the question of whether the orders were properly published, we view the military judge as attempting to avoid confusion as to the scope of his previous action.

Moreover, this court has previously held that the act of calling for evidence which the judge believes the Government has overlooked does not, standing alone, amount to abandonment of a judge's impartial role. See *United States v. Masseria*, 13 M.J. 868, 871 (N.M.C.M.R. 1982). Finally, if the military judge should "ordinarily" have allowed the Government to reopen its case to rectify a deficiency identified by a defense motion, we see nothing partial or partisan in the military judge's pointing out a strictly technical deficiency that leads to the same result. R.C.M. 917(c), Discussion.

### **Ineffective Assistance of Counsel**

The appellant contends that his civilian defense counsel at trial provided ineffective assistance in that: (1) he suggested during opening statement that the appellant would testify when in fact the appellant did not testify; and (2) he presented a "grossly inadequate sentencing case for a Marine on the cusp of retirement eligibility." Appellant's Brief of 1 Mar 2006 at 5. In arguing these two points, the appellant also contends his civilian defense counsel<sup>2</sup> misinformed the members as to the consequences of a bad-conduct discharge, in that such a discharge would "likely" result in the loss of retirement benefits. He also contends that his counsel's conduct was "particularly inexcusable under the facts of Appellant's case where consensual sodomy was essentially conceded." *Id.* at 7.

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<sup>2</sup>According to the record in this case, the individual civilian counsel allowed the detailed defense counsel to handle the sentencing case, and it was the latter who gave the sentencing argument.

We find no merit in the appellant's contentions that his counsel rendered ineffective assistance at his court-martial.

In order to show ineffective assistance of counsel, an appellant must show that his counsel's performance was so deficient that: (1) he was not functioning as counsel within the meaning of the Sixth Amendment; and (2) his counsel's deficient performance rendered the results of the trial unreliable or fundamentally unfair. See *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Counsel are strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.*; *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987); *United States v. Lowe*, 50 M.J. 654, 656 (N.M.Ct.Crim.App. 1999). "Acts or omissions that fall within a broad range of reasonable approaches do not constitute a deficiency." *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001).

The Court of Appeals for the Armed Forces (CAAF) has set forth the following 3-part test for evaluating whether the strong presumption of competence has been overcome:

- (1) Are the appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions?"
- (2) If the allegations are true, did defense counsel's level of advocacy fall measurably below the performance . . . [ordinarily expected] of fallible lawyers?"; and
- (3) If defense counsel was ineffective, is there a "reasonable probability that, absent the errors," there would have been a different result?

*United States v. Grigoruk*, 56, M.J. 304, 307 (C.A.A.F. 2002) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)).

The appellant's contentions suffer from a lack of factual basis. First, we do not view his counsel's opening statement as having clearly suggested that the appellant would testify. Second, contrary to the appellant's misleading argument, his counsel did **not** request the rules of evidence be relaxed during the presentencing hearing, and yet fail to offer Defense Exhibit C, a chart showing the value of retirement pay over time, into

evidence.<sup>3</sup> Record at 367. Third, we see absolutely no indication in the record that the defense team in any way conceded that the appellant engaged in consensual sodomy. To the contrary, his counsel argued that the sodomy allegation was fabricated by the victim, aggressively attacked the victim's credibility, and offered strong evidence of the appellant's good military character.

Finally, the appellant mischaracterizes his counsel's sentencing argument. Rather than arguing that a bad-conduct discharge would only "likely" result in the loss of retirement benefits, his counsel argued that a bad-discharge was unnecessary because the conviction **alone** would likely result in the loss of retirement benefits. Thus, not only does the appellant's brief on appeal mischaracterize the argument, it does so while attacking a reasonable strategy that gave the members a logical basis for declining to adjudge a punitive discharge.

We find the appellant has failed to meet his burden to establish that his allegations are even true, let alone that his counsel's conduct fell measurably short of the performance expected of fallible lawyers, or that he was prejudiced thereby. He has thus failed to overcome the strong presumption of competence of his counsel. Moreover, we conclude from our review of the record that the appellant was effectively represented at trial, resulting in his acquittal of two charged offenses, a finding of guilty only to the lesser included offense under the forcible sodomy charge, and a relatively light sentence of a bad-conduct discharge without forfeitures, reduction, or confinement for charges that included divers indecent assaults on one of the appellant's subordinates.

But we cannot end our discussion of this assignment of error without expressing our deep concern and dismay at the disturbing lack of candor in the appellate defense brief. Taken alone, we would have viewed the appellate defense counsel's misstatement concerning the trial defense team's request not to relax the rules of evidence at the presentencing hearing as a simple mistake. However, when combined with the mischaracterization of the defense strategy as "essentially conceding" consensual sodomy and their sentencing argument as misinforming the members concerning the effects of a bad-conduct

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<sup>3</sup> Although the defense team chose not to offer Defense Exhibit C, they informed the members of its substance through the appellant's unsworn statement. Record at 366.

discharge on retirement benefits, we see a pattern of deliberate mischaracterization of the facts by appellate defense counsel.

The same could be said concerning the assertion in the appellant's brief under the previous assignment of error that the military judge "improperly **directed**" the Government to reopen its case, when in fact he pointed out a technical deficiency and **allowed** the Government an opportunity to correct it. That such liberties would be taken with the facts is bad enough, but to do so while attacking the competence and professionalism of others is unacceptable. We admonish counsel that this court expects those practicing before it to be candid in any assertion made, either orally or in filings to the court.

### Other Assignments of Error

We have considered the appellant's other assignments of error and find them to be wholly without merit.<sup>4</sup> We note that, while we do not condone the delay in the post-trial processing of this case, we have balanced the four factors outlined in *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005) and found no due process violation. We also considered whether this case merits discretionary relief under Article 66(c), UCMJ, and find no reason to grant such relief where the appellant never asserted his right, no discernible prejudice resulted or was argued, and where the sentence was relatively light for the

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<sup>4</sup> III. THE MILITARY JUDGE IMPROPERLY ALLOWED INADMISSIBLE EVIDENCE REGARDING THE COMPLAINING WITNESS' POST-TRAUMATIC STRESS DISORDER (PTSD), AND A MYRIAD OF BOLSTERING HEARSAY.

IV. THE MILITARY JUDGE IMPROPERLY ADMITTED HOMOSEXUAL LITERATURE AGAINST APPELLANT.

V. THE GOVERNMENT VIOLATED APPELLANT'S RIGHT TO SPEEDY TRIAL, POST TRIAL REVIEW AND DUE PROCESS OF LAW BY EXCESSIVE DELAYS PRIOR TO REFERRAL, DURING AND AFTER TRIAL.

VI. THE GOVERNMENT SELECTIVELY PROSECUTED APPELLANT BECAUSE HE WAS A SUSPECTED HOMOSEXUAL.

VII. APPELLANT'S CONVICTION FOR CONSENSUAL SODOMY IS UNCONSTITUTIONAL.

VIII. APPELLANT'S SENTENCE IS INAPPROPRIATELY SEVERE.

IX. THE SJAR IS DEFECTIVE IN THAT IT IMPROPERLY STATES APPELLANT'S TIME AND CHARACTERIZATION OF SERVICE.

X. THE TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT BY MAKING SENTENCING ARGUMENTS SUGGESTING THE MEMBERS PUNISH APPELLANT FOR NON-CONSENSUAL SODOMY, A CRIME HE WAS ACQUITTED OF.

offenses of which he was convicted. See *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc).

We note further that, as to the appellant's contention that the non-forcible sodomy conviction is unconstitutional under our superior Court's holding in *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004), we find the appellant's conduct at issue was outside the protected liberty interest created by the United States Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), because it occurred in a situation in which consent might not easily be refused, and it involved additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest. See *Marcum*, 60 M.J. at 207-08. Specifically, the sodomy incident occurred in the course of fraternization with a much younger, more junior subordinate, who had at times worked under the appellant's supervision in the same military unit, and would likely have been required to do so again but for his pleas for reassignment.

We have also considered the matters submitted by the appellant in his affidavit of 27 February 2006, most of which relate generally to the issues outlined in the defense brief, and find no basis for remedial action by this court. Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Judge FELTHAM and Judge WHITE concur.

For the Court

R.H. TROIDL  
Clerk of Court