

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

**BEFORE**

**E.E. GEISER**

**F.D. MITCHELL**

**J.G. BARTOLOTTA**

**UNITED STATES**

**v.**

**Amador NIETO  
Corporal (E-4), U.S. Marine Corps**

NMCCA 200600977

Decided 5 April 2007

Sentence adjudged 23 November 2005. Military Judge: S.F. Day. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Headquarters and Support Battalion, Marine Corps Base, Camp Lejeune, NC.

Maj BRIAN JACKSON, USMC, Appellate Defense Counsel  
Capt ROGER MATTIOLI, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

MITCHELL, Judge:

A special court-martial, comprised of officer and enlisted members, convicted the appellant, contrary to his pleas, of wrongful use of cocaine, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to confinement for three months, reduction to pay grade E-1, forfeiture of \$350.00 pay per month for three months, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

We have examined the record of trial, the appellant's three assignments of error,<sup>1</sup> and the Government's response. We

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<sup>1</sup> I. THE MILITARY JUDGE'S AMENDMENT TO THE SINGLE CHARGE (OVER DEFENSE'S OBJECTION) WAS ERROR AND PREJUDICED APPELLANT'S SUBSTANTIAL RIGHTS.

II. THE MILITARY JUDGE COMMITTED PLAIN ERROR WHEN HE PERMITTED THE TRIAL COUNSEL TO ASK VOIR DIRE QUESTIONS THAT PRESENTED THE MEMBERS WITH SUCH DETAILED FACTS ABOUT APPELLANT'S CASE THAT THE TRIAL COUNSEL WAS IN EFFECT

conclude that the findings and sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

### **Amending the Charge Sheet After Arraignment**

The sole charge and specification on the charge sheet alleged that the appellant wrongfully used cocaine between on or about 28 May 2005 and on or about 7 June 2005. After arraignment and during the Government's case in chief on the merits, the first two Government witnesses testified that the date of the urinalysis collection was 6 July 2005. The military judge permitted the trial counsel, over defense objection, to amend the charge sheet to change the date "7 June 2005" to "6 July 2005" pursuant to RULE FOR COURTS-MARTIAL 603(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). Record at 152, 230. In his initial assignment of error, the appellant avers that the military judge erred as the date change was not "minor" as permitted by R.C.M. 603(c), but rather resulted in a different offense. Appellant's Brief of 11 Sep 2006 at 5. We disagree.

R.C.M. 603(c) allows a military judge to permit the Government to make minor amendments to a specification, after arraignment and prior to findings, as long as the accused is not prejudiced. R.C.M. 603(d) prohibits major amendments to specifications over the accused's objection. Whether the amendment to the specification was a minor change or a major change properly objected to by the trial defense counsel is a question of law that is reviewed *de novo*. See *United States v. Sullivan*, 42 M.J. 360, 364-66 (C.A.A.F. 1995); *United States v. Loving*, 41 M.J. 213, 287 (C.A.A.F. 1994).

R.C.M. 603(a) defines minor changes as any change "except those which add a party, offenses, or substantial matter not fairly included in those previously preferred, or which are likely to mislead the accused as to the offense charged." It is also noted that the Government is afforded some latitude in alleging the date and location of the offense in drug cases. See *United States v. Esslinger*, 26 M.J. 659 (N.M.C.M.R. 1988); *United States v. Miller*, 34 M.J. 598 (A.C.M.R. 1992). In

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COMMITTING THE MEMBERS TO RETURN A VERDICT OF GUILTY PRIOR TO THE PRESENTATION OF EVIDENCE, ARGUMENT, AND INSTRUCTION.

III. THE MILITARY JUDGE ERRED IN GRANTING THE TRIAL COUNSEL'S CHALLENGE FOR CAUSE (OVER DEFENSE OBJECTION) AGAINST A PANEL MEMBER?

deciding whether the change is major or minor, a two-prong test is applied. First, does the change result in an additional or different offense? Second, does the change prejudice a substantial right of the appellant? *Sullivan*, 42 M.J. at 365. Both parts of the test must be answered in the affirmative before an appellant is entitled to relief. See *United States v. Smith*, 49 M.J. 269, 271 (C.A.A.F. 1998).

Applying the two-prong test laid out in *Sullivan*, the appellant maintains that the military judge, by allowing an amendment to the specification, essentially created a completely different charge. We disagree. The charge and specification remained for all practical purposes exactly the same with the only difference being the change in date from "7 June 2005" to "6 July 2005." There were no additional elements added, the charge alleged the exact same act, and the appellant was not exposed to any additional liability.

We next look to see if this change prejudiced a substantial right of the appellant. We find it did not. The impetus for notice pleading is to ensure that the appellant is aware of the charges against him and to give him an opportunity to defend those charges in a court of law. In the instant case, the appellant was on notice that he was charged with one specification of wrongfully using cocaine. During discovery, the appellant was additionally aware that this charge stemmed from a urine sample the appellant provided on 6 July 2005 which tested positive for benzoecgonine, the metabolite found in cocaine. Although amending the specification possibly resulted in the defense having to reevaluate their strategy, which was apparently based on challenging the errant dates, we do not find that this prejudiced a substantial right of the appellant. We also note that the defense did not request additional time to retool his defense strategy in light of the judge's ruling. Quite to the contrary, when asked if he was ready to proceed with his witnesses, the trial defense counsel answered in the affirmative. Record at 230. We conclude that neither prong of the *Sullivan* test is answered in the appellant's favor. Accordingly, we find this assignment of error to be without merit.

### **Challenges for Cause**

In his third and final assignment of error,<sup>2</sup> the appellant alleges that the military judge abused his discretion in

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<sup>2</sup> We find the appellant's second assignment of error without merit.

granting the Government's challenge of a member for cause. We disagree.

An accused "has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004)(quoting *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001)). A member shall be removed for cause if it is shown that he or she should not sit "in the interest of having the court-martial free from substantial doubt as legality, fairness, and impartiality." R.C.M. 912 (f)(1)(N). The party that makes the challenge for cause has the burden of proving that grounds for a challenge exist. R.C.M. 912(f)(3).

In evaluating a military judge's ruling on a challenge for cause, it is "appropriate to recognize the military judge's superior position to evaluate the demeanor of court members. A military judge's ruling on a challenge for cause will therefore not be reversed absent a clear abuse of discretion." *United States v. James* 61 M.J. 132, 138 (C.A.A.F. 2005)(citing *United States v. McLaren*, 38 M.J. 112, 118 (C.M.A. 1993)); see also *United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993). In evaluating challenges for cause based on claims of inelastic attitude as asserted by the appellant, "[t]he test is whether the member's attitude is of such a nature that he will not yield to the evidence presented and the judge's instructions." *McLaren*, 38 M.J. at 118 (quoting *United States v. McGowan*, 7 M.J. 205, 206 (C.M.A. 1979)).<sup>3</sup>

In the case *sub judice*, the appellant was charged with one specification of use of cocaine which was detected via urinalysis testing. Evidently, during the urinalysis collection process of the appellant's sample, there may have been some deviation from the standard operation procedure (SOP) established by the urinalysis collection regulations. During individual *voir dire*, Sergeant (Sgt) Zammit, in response to trial counsel's questions, expressed an opinion that any technical violations from the SOP, automatically renders the test results unreliable. He further stated that he felt "that [urinalysis collection] is something that seriously needs to be perfect, sir." Record at 60-61. While it is noted that Sgt Zammit gave the appropriate responses to rehabilitative questions asked by the trial defense counsel, the military judge

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<sup>3</sup> We note that since this challenge for cause was brought by the Government and not the appellant, the "liberal grant" policy for challenges is not applicable and the evidence adduced from the record does not suggest that the military judge applied this standard.

was able to evaluate his demeanor and found that Sgt Zammit was "very emphatic" in his opinion that evidence derived from urinalysis testing should be disregarded if the SOP wasn't followed to the letter. *Id.* at 75 and 76. As this effectively holds the Government to a standard of proof greater than beyond a reasonable doubt, we conclude that the military judge did not abuse his discretion in granting the Government's challenge to Sgt Zammit.

#### **CONCLUSION**

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Senior Judge GEISER and Judge BARTOLOTTA concur.

For the Court

R.H. TROIDL  
Clerk of Court