

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

BEFORE

D.A. WAGNER

R.E. VINCENT

E.B. STONE

UNITED STATES

v.

**Hoot A. ROYER
Lance Corporal (E-3), U. S. Marine Corps**

NMCCA 200600530

Decided 7 February 2007

Sentence adjudged 02 August 2005. Military Judge: D.M. Jones. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Camp Pendleton, CA.

LT AIMEE SOUDERS, JAGC, USN, Appellate Defense Counsel
CDR JEFFREY MCCRAY, JAGC, USNR, Appellate Defense Counsel
LT MARK HERRINGTON, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VINCENT, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of conspiracy to wrongfully import marijuana, unauthorized absence, wrongful importation of marijuana, and wrongful possession of marijuana, in violation of Articles 81, 86, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 886, and 912a. The appellant was sentenced to confinement for twenty months, reduction to pay grade E-1, forfeiture of all pay and allowances and a dishonorable discharge. The convening authority approved the sentence as adjudged.

The appellant raises three assignments of error. First, he asserts that the appellant's attorney-client relationship with his initial detailed defense counsel was improperly severed. Second, he contends that the military judge erred in accepting the RULE FOR COURTS-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) mental competency report prepared by a clinical psychologist. His third assignment of error alleges that his

sentence, including an unsuspended dishonorable discharge, is inappropriately severe under the circumstances.

We have examined the record of trial, the appellant's three 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. Arts. 59(a) and 66(c), UCMJ.

Severance of Attorney-Client Relationship

In his first assignment of error, the appellant asserts that his attorney-client relationship with Captain L. M. Schotemeyer, USMC, his initial detailed defense counsel, was improperly severed. We disagree. The appellant's court-martial began on 2 June 2005, during which the military judge accepted the appellant's guilty pleas, commenced the sentencing portion of the trial, and ordered an R.C.M. 706 mental competency evaluation of the appellant. When the appellant's trial reconvened on 2 August 2005, the military judge stated that Captain Schotemeyer had notified the court and trial counsel via electronic mail that he was "seeking to withdraw from the case" due to an apparent conflict of interest between the appellant and another client. Record at 140. The military judge correctly noted that, although Major Boucher had been detailed as a defense counsel for the appellant since the court last convened, Captain Schotemeyer also continued to be the appellant's detailed defense counsel unless the military judge approved his request to withdraw. *Id.*

The rules that govern the excusal or withdrawal of defense counsel after the formation of an attorney-client relationship are R.C.M. 505(d)(2)(B) and 506(c). Specifically, R.C.M. 505(d)(2)(B)(ii) authorizes excusal or change of a detailed defense counsel "[u]pon request of the accused or application for withdrawal by such counsel under R.C.M. 506(c)." R.C.M. 506(c) states that a "defense counsel may be excused only with the express consent of the accused, or by a military judge upon application for withdrawal by the defense counsel for good cause shown." Good cause "includes physical disability, military exigency, and other extraordinary circumstances which render the . . . counsel, . . . unable to proceed with the court-martial within a reasonable time." R.C.M. 505(f).

The record of trial, however, establishes that the appellant consented to Captain Schotemeyer's withdrawal as counsel, obviating the need to show good cause on the record. After he officially released Captain Schotemeyer from the case based on representations made during an R.C.M. 802 conference, the military judge initiated the following exchange on the record with the appellant. The military judge informed the appellant that Captain Schotemeyer was taken off of the appellant's case due to a conflict of interest and that this situation was beyond the appellant's control. The appellant responded that he understood the situation. *Id.* at 141-42. In response to the

military judge's inquiry, the appellant acknowledged that he further understood that Major Boucher had been detailed to represent him for the duration of his court-martial. The appellant also informed the military judge that he (1) had enough time to discuss his case with Major Boucher; (2) felt comfortable with Major Boucher's representing him; and, (3) did not want to be represented by any other attorney. *Id.* at 142-43. The appellant's acquiescence to the requested withdrawal amounted to consent. *United States v. Acton*, 38 M.J. 330, 336-37 (C.M.A. 1993).

Assuming, arguendo, that the appellant did not consent, we would still decline to award any relief in this case. In *Acton*, 38 M.J. at 336-37, our superior court determined that, although the appellant's detailed defense counsel unilateral withdrawal was improper, the specific facts of the case indicated that the appellant was not prejudiced. The Court concluded that the appellant initially acquiesced to, and then consented to, his counsel's withdrawal. *Id.* at 337. Furthermore, the Court also indicated that it applied a test for prejudice because "[t]his case involves defense counsel's improper withdrawal from an attorney-client relationship, but with assurance of his client's uninterrupted representation by another lawyer and followed by the client's subsequent knowing ratification of that withdrawal." *Id.* at 336 n.2.

Similarly, we have concluded that the specific facts of this case indicate that the appellant was not prejudiced. We find that the appellant's responses to the military judge established that the appellant acquiesced to and ratified Captain Schotemeyer's application for withdrawal and the military judge's decision to officially release him from the appellant's case. Furthermore, the appellant was detailed another attorney, Major Boucher, prior to Capt Schotemeyer's release, who, according to both Major Boucher and the appellant, had sufficient time to discuss this case with the appellant, assess whether to present additional sentencing evidence, and make a closing argument. Finally, the appellant specifically stated that he only wanted to be represented by Major Boucher for the remainder of his court-martial.

R.C.M. 706 Mental Competency Report

In his second assignment of error, the appellant contends that the military judge should not have considered the R.C.M. 706 mental competency report since it contained clinical psychological diagnoses rather than a clinical psychiatric diagnosis. We disagree.

During the sentencing portion of the appellant's trial, a civilian physician, who had provided medical treatment for the appellant on a couple of occasions in early 2005, testified that the appellant might be suffering from a bipolar disorder. The civilian physician further testified that he was not certain that

the appellant understood right from wrong and needed additional information in order to clinically make that determination. Record at 91, 93. In view of this testimony, the military judge ordered a mental competency examination pursuant to R.C.M. 706. See Appellate Exhibit VI.

On 24 June 2005, LT Danielle Stewart, MSC, U.S. Navy, a clinical psychologist, conducted a mental competency examination of the appellant and filed a report with the court. See Appellate Exhibit VII. R.C.M. 706 requires a board, which consists of one or more persons and can include a clinical psychologist, "to make separate and distinct findings" to four specific questions, including a question addressing clinical psychiatric diagnosis.

In response to the particular question concerning clinical psychiatric diagnosis, LT Stewart states that "[t]he clinical psychiatric diagnoses are noted above", because her diagnoses are contained in the diagnosis, rather than the findings section of her report. See ¶¶ 3 and 5(b) of Appellate Exhibit VII. We note that, at first glance, LT Stewart's report is confusing because she labels her diagnoses and findings as psychological. *Id.* However, there is no doubt that her report contains clinical psychiatric diagnoses since she specifically denotes that they are based on the criteria listed in the Diagnostic and Statistical Manual of Mental Disorders, 4th, Technical Rewrite (DSM IV-TR). *Id.* The DSM-IV-TR, which is published by the American Psychiatric Association, uses a multi-axial approach to diagnose psychiatric illnesses, and LT Stewart's report lists a specific clinical psychiatric diagnosis for each of the five applicable axes. *Id.* Accordingly, this assignment of error is without merit.

Sentence Appropriateness

The appellant's third assignment of error alleges that his sentence is inappropriately severe. We disagree. "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

The appellant conspired to wrongfully use the services of a private mailing service to illegally import ten pounds of marijuana into the United States from Mexico while he was in an unauthorized absence status. He and his co-conspirators devised an elaborate packaging scheme designed to prevent customs inspectors from discovering the illegal drugs. The appellant could have received a sentence which included confinement for

thirty-one years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge.

We have reviewed the entire record and conclude that the sentence, including a dishonorable discharge, is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *Healy*, 26 M.J. at 395; *Snelling*, 14 M.J. at 268. This assignment of error is without merit.

Conclusion

Accordingly, the findings and sentence, as approved by the convening authority, are affirmed.

Chief Judge WAGNER and Judge STONE concur.

For the Court

R.H. TROIDL
Clerk of Court