

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
E.S. WHITE, J.F. FELTHAM, J.E. STOLASZ
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JEFF R. WIECHMANN
LIEUTENANT COLONEL (O-5), U.S. MARINE CORPS RESERVE**

**NMCCA 200700593
GENERAL COURT-MARTIAL**

Sentence Adjudged: 10 January 2007.

Military Judge: Col Bruce Landrum, USMC.

Convening Authority: Commander, U.S. Marine Corps Force,
Pacific, Camp H.M. Smith, HI.

Staff Judge Advocate's Recommendation: Col L.J. Puleo,
USMC.

For Appellant: Capt Kyle Kilian, USMC.

For Appellee: LT Timothy Delgado, JAGC, USN.

14 August 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

STOLASZ, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of failing to obey a lawful order, making a false official statement, conduct unbecoming an officer, adultery, and obstructing justice, in violation of Articles 92, 107, 133, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 907, 933, and 934. The appellant was sentenced to confinement for 90 days and dismissal from the naval service. Pursuant to the terms of the pretrial

agreement, the convening authority (CA) suspended all punishment for 12 months from the date of trial.

We have carefully considered the record of trial, the appellant's brief asserting five assignments of error,¹ the Government's answer, and the excellent oral arguments of both counsel.² 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.

Facts and Procedural History

The appellant, a Lieutenant Colonel (LtCol) in the United States Marine Corps Reserve, serving on active duty, engaged in an adulterous affair with the wife of a Gunnery Sergeant, then compounded his trouble by lying to conceal the affair, and advising his paramour to do the same. As a result, he found himself facing charges at a general court-martial. Captain (Capt) S was detailed to defend the appellant. Since Capt S's defense experience was limited to one month, the appellant sought the services of more experienced counsel. While the appellant consulted with three civilian attorneys, Capt S asked the Regional Defense Counsel to assign a more senior, more experienced counsel to the case. Subsequently, the Chief Defense Counsel of the United States Marine Corps (USMC) detailed LtCol Jon Shelburne, USMCR, a reservist not on active

¹ I. APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL WHEN THE CONVENING AUTHORITY AND STAFF JUDGE ADVOCATE FAILED TO RECOGNIZE LIEUTENANT COLONEL SHELBURNE AS DETAILED DEFENSE COUNSEL.
II. THE FAILURE OF THE CONVENING AUTHORITY TO RECOGNIZE LIEUTENANT COLONEL SHELBURNE AS DETAILED DEFENSE COUNSEL AMOUNTED TO AN IMPROPER SEVERANCE OF THE ATTORNEY-CLIENT RELATIONSHIP WITHOUT GOOD CAUSE THAT DENIED APPELLANT THE RIGHT TO DUE PROCESS.
III. THE MILITARY JUDGE ERRED WHEN HE DID NOT FIND UNLAWFUL COMMAND INFLUENCE WHERE THE CONVENING AUTHORITY AND THE STAFF JUDGE ADVOCATE FAILED TO RECOGNIZE DETAILED DEFENSE COUNSEL AND PREJUDICED THE APPELLANT'S RIGHT TO COUNSEL.
IV. THE MILITARY JUDGE ERRED WHEN HE FAILED TO FIND UNLAWFUL COMMAND INFLUENCE WHEN CAPTAIN SNOW WAS REASSIGNED AS A LEGAL ASSISTANCE OFFICER PRIOR TO ACTION ON APPELLANT'S COURT-MARTIAL AND FOLLOWING CAPTAIN SNOW'S AFFIDAVIT WHEREIN HE CITES NUMEROUS INSTANCES OF UNLAWFUL COMMAND INFLUENCE.
V. APPELLANT WAS PREJUDICED WHEN THE CONVENING AUTHORITY AND STAFF JUDGE ADVOCATE DID NOT DISQUALIFY THEMSELVES FROM TAKING POST-TRIAL ACTION ON THIS CASE WHEN THEY COULD NOT RENDER A FAIR AND IMPARTIAL REVIEW OF APPELLANT'S CASE.

² Oral argument was heard on 6 June 2008 at the National Conference Center, Lansdowne, Virginia, in conjunction with the 2008 Judge Advocate General (JAG) Symposium.

duty, as the appellant's chief defense counsel on 10 July 2006. Appellate Exhibit II at 1.

Thereafter, a disagreement arose between the CA, his staff judge advocate (SJA), and the defense counsel regarding whether LtCol Shelburne was properly detailed to represent the appellant.³ When the parties could not come to an agreement regarding the matter, the appellant moved to have the court-martial recognize LtCol Shelburne as his detailed defense counsel. The military judge, after hearing testimony and argument, held that LtCol Shelburne was properly detailed, and granted the defense motion. Appellate Exhibit X. Thereafter, the SJA and CA recognized LtCol Shelburne as the appellant's detailed defense counsel.

Denial of the Right to Counsel

The appellant asserts that he was deprived of his counsel of choice throughout the pretrial proceedings, and claims the proper remedy is to overturn his conviction. We disagree.

The appellant's argument relies heavily on *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). In *Gonzalez-Lopez*, the defendant hired an attorney licensed in California to represent him at trial, although the case was being tried in Missouri. The attorney moved to be admitted in the Eastern District of Missouri, *pro hac vice*,⁴ but the district court denied the motion, forcing the defendant to proceed to trial with local counsel.

In a 5-4 decision, the Supreme Court ruled that the defendant had been erroneously deprived of his counsel of choice, in violation of the Sixth Amendment. Distinguishing between "structural defects," which are not subject to a harmless-error analysis "because they affect the framework within which the trial proceeds," and "trial errors," which may be "quantitatively assessed in the context of other evidence presented to determine whether they were harmless beyond a

³ As a result, the CA refused to recognize LtCol Shelburne as properly detailed, would not deal with LtCol Shelburne directly, and refused to fund his travel to attend the Article 32, UCMJ, pretrial investigation. LtCol Shelburne received travel funding from an alternate source and did, in fact, represent the appellant at the pretrial investigation.

⁴ *Pro hac vice* is a Latin term meaning "this time only." It is a request from an attorney licensed out of state to appear in court for a particular trial even though the attorney is not licensed in the state where the trial is taking place. BLACKS LAW DICTIONARY 1248 (8th ed. 2004).

reasonable doubt," the Court said that deprivation of counsel of choice is a structural defect not subject to review for harmlessness. *Gonzalez-Lopez*, 548 U.S. at 148 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 307-08, 309-10 (1991)).

Gonzalez-Lopez, however, is inapplicable to the facts in this case. First and foremost, in the instant case the appellant was not denied his "counsel of choice," as that term is used in the Supreme Court's Sixth Amendment jurisprudence. "Counsel of choice" refers to a criminal defendant's Sixth Amendment right to hire the private attorney of his choice. This principle does not extend to choice of *appointed* counsel. Here, LtCol Shelburne was the appellant's appointed or, as referred to in military practice, detailed defense counsel. Since LtCol Shelburne was appointed, even if we were to consider the Government's conduct in refusing to recognize his appointment as denying the appellant of his services, that conduct does not amount to a denial of "counsel of choice."

In addition, LtCol Shelburne represented the appellant at the pretrial investigation pursuant to Article 32, UCMJ, and subsequently submitted four pages of comments and objections to the investigating officer. AE XVI at 17-20. LtCol Shelburne also corresponded with the CA pretrial in an attempt to dispose of the case through nonjudicial punishment (NJP). AE XVIII at 28-29. We find the appellant was not deprived of his Sixth Amendment right of "counsel of choice."

Improper Severance

The appellant also claims that his attorney-client relationship with LtCol Shelburne was improperly severed by the Government's refusal to recognize LtCol Shelburne as detailed defense counsel or consider matters submitted by him. We disagree.

An attorney-client relationship can only be severed by an express release from the accused, a judicial order, or for other good cause. *United States v. Allred*, 50 M.J. 795, 799 (N.M.Ct.Crim.App. 1999)(citing RULE FOR COURTS-MARTIAL, 505(d)(2)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) and *United States v. Acton*, 33 M.J. 536, 538 (A.F.C.M.R. 1991)).

Here, the appellant claims that the Government frustrated LtCol Shelburne's attempt to represent him, and in so doing denied him due process. To support his claim, the appellant cites *United States v. Eason*, 45 C.M.R. 109 (C.M.A. 1972), in

which our superior court found that the Government's frustration of the attorney-client relationship constituted a denial of due process. *Id.* at 112. In *Eason*, the detailed defense counsel was determined to have become unavailable when the situs of the court-martial changed from Vietnam to Quantico, Virginia. The court held that the Government's action had severed the attorney-client relationship. Further, because the defense counsel had established an attorney-client relationship with the accused, and had actively engaged in pretrial strategy and preparation of the case, the accused was prejudiced, even though he was represented by civilian counsel and substitute detailed military counsel at his court-martial in Virginia.

Here, it is not clear exactly when LtCol Shelburne established an attorney-client relationship with the appellant. It is clear, however, that an attorney-client relationship was established at least by the time of the pretrial investigation. Unlike *Eason*, here the attorney-client relationship continued through the court-martial, and was recognized by the Government, once the military judge determined LtCol Shelburne was properly detailed.

The Government's concerns regarding the detailing of LtCol Shelburne were legitimate from a funding and scheduling perspective. As well the Government's disagreement with the defense over how to interpret the detailing directives appears to have been in good faith. Nevertheless, it is also apparent that the CA's initial refusal to recognize LtCol Shelburne as detailed defense counsel burdened his ability to represent the appellant pretrial. These actions, however, were not so severe as to constitute a severance of the attorney-client relationship, nor did they rise to such a level as to deny the appellant due process.

For instance, the appellant claims the Government frustrated LtCol Shelburne's attempts to meet with the CA and suggest alternative dispositions of the case prior to referral. However, the appellant has no right to meet with the CA pretrial, and, in point of fact, LtCol Shelburne did submit suggested alternative dispositions. Thus, the appellant had the benefit of LtCol Shelburne's advice, and also had the services of Capt S as a conduit to the CA until LtCol Shelburne was recognized as the appellant's properly detailed attorney.

Unlawful Command Influence (UCI)

The appellant asserts that unlawful command influence occurred on two occasions: (1) when the CA and SJA failed to recognize LtCol Shelburne as detailed defense counsel and; (2) when Capt S was reassigned as a legal assistance officer after he filed an affidavit citing numerous instances of alleged UCI. We will address each allegation of UCI separately.

UCI by the CA and SJA.

"We review allegations of unlawful command influence *de novo*." *United States v. Villareal*, 52 M.J. 27, 30 (C.A.A.F. 1999)(citing *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994)). We review the factual findings of the military judge under a clearly erroneous standard. *Id*.

The appellant moved to dismiss the charges and specifications on the basis of the alleged unlawful command influence. AE XVIII. The military judge denied the motion. AE X; Record at 111, 207-09. The military judge's findings of fact are supported by the record, and we adopt them. On appeal, the appellant must: (1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that UCI was the cause of the unfairness. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999).

The appellant has not met his burden of showing facts, which, if true, constitute UCI. The Government's initial refusal to recognize or meet with LtCol Shelburne was in good faith, due to the novel detailing procedures in this case. The comments made by Government representatives disagreeing with the court's ruling on the detailing of defense counsel do not constitute unlawful command influence. No attempt to influence the military judge was made by the CA or SJA. No evidence was presented that the CA made comments in the presence of potential members or witnesses regarding specifics of the case, and, to the contrary, credible evidence was presented that the CA did not make such comments. No evidence was presented to suggest any witnesses changed their stories because of unlawful command influence. Record at 207-09.

UCI in reassigning Capt S as a legal assistance officer.

The appellant also asserts that the military judge erred when he ruled the reassignment of Capt S from defense to legal

assistance was not the result of unlawful command influence. We disagree.

Preliminarily, the military judge found some evidence to indicate that the reassignment of Capt S might be punitive. Record at 112; see *United States v. Ayala*, 43 M.J. 296, 300 (C.A.A.F. 1995). However, after taking evidence on the motion, the military judge determined beyond a reasonable doubt that the reassignment of Capt S was for legitimate reasons. Record at 209; see, *Biagase*, 50 M.J. at 151 (once an issue of UCI is raised, the Government must persuade the military judge and the appellate courts beyond a reasonable doubt that there was no UCI or that the UCI did not affect the findings and sentence). We agree with the military judge that the reassignment of Capt S did not constitute UCI.

The military judge determined that: (1) any pressure placed upon Capt S by either the Deputy SJA or the Legal Services Support Section (LSSS) Officer in Charge (OIC) was not inappropriate or overbearing, but rather amounted to frank advice and candid comments about results that might follow certain defense action or lack of action; (2) Capt S was a forceful and effective defense advocate, possessing the ability to resist any alleged pressure, including the pressure to submit a continuance; (3) the LSSS OIC consulted with the regional defense counsel concerning the reassignment of Capt Snow, as required by the Marine Corps Manual for Legal Administration, (LEGADMINMAN) and the regional defense counsel concurred with the reassignment. Record at 208-09; see also AE XX (affidavit of Capt S).

We conclude that unlawful command influence was not a factor in the reassignment of Capt S. The reassignment was necessitated solely by legitimate personnel considerations, and was sanctioned by Capt S's defense bar supervisors.

Finally, the appellant asserts that there exists, at a minimum, the appearance of UCI in this case. We disagree.

The appearance of UCI exists where an objective, disinterested observer, fully informed of all facts and circumstances, would harbor a significant doubt of the fairness of the proceedings. *United States v. Lewis*, 63 M.J. 415-16 (C.A.A.F. 2006).

The appellant was represented by two very competent counsel, with whom he expressed satisfaction on the record. His

counsel negotiated a beneficial pretrial agreement on his behalf. We are convinced that the results of this trial would leave a disinterested, objective observer, who knew the facts, with no doubt about its fairness.

Failure of the CA and SJA to disqualify themselves from taking post-trial action.

The appellant asserts the CA was incapable of conducting an unbiased review of the legal and factual issues raised by the appellant post-trial, and was incapable of fairly considering the appellant's clemency request. He further asserts the SJA should have disqualified himself from providing the required post-trial recommendation. We disagree with both of these assertions.

CA Disqualification.

The appellant submitted clemency matters on 3 May 2007 alleging UCI, and requesting that the findings and sentence be disapproved. The SJA's recommendation (SJAR) of 13 June 2007 noted the appellant's clemency request, and the alleged legal error, but advised the CA that corrective action was not necessary, and recommended denial of clemency. The CA's action of 25 June 2007 noted that the CA had considered the appellant's clemency request, and the SJAR, and denied the appellant's request for clemency.

Article 60, UCMJ, clearly contemplates that the CA will be fully capable of thoughtfully considering, and acting upon matters submitted by the appellant during the post-trial process. *United States v. Schweitzer*, No. 20000755, 2007 CCA LEXIS 164, at 36 (N.M.Ct.Crim.App. 10 May 2007). In this case, absent evidence or reason to the contrary, we have no reason to doubt the CA acted accordingly.

Here, the appellant provided evidence that the CA acted on a claim by the appellant that the CA himself had committed UCI. The appellant cites *United States v. Reed*, 2 M.J. 64, 68 (C.M.A. 1976) and *Schweitzer*, 2007 CCA LEXIS 164 to support his assertions. Both, however, are distinguishable. Unlike *Reed*, in this case, the CA did not testify about why he took a particular action, nor was his personal credibility called into question, as in *Schweitzer*. There is no evidence the CA's actions were of a personal, rather than an official, nature. *Reed*, 2 M.J. at 68. We have previously determined the CA's refusal to recognize LtCol Shelburne as detailed defense counsel

was supported by legitimate concerns over the interpretation of detailing directives. Once the military judge determined LtCol Shelburne was properly detailed, the CA abided by that decision. Thus, we see no reason the CA could not act fairly on post-trial submissions by the appellant. See *Schweitzer*, 2007 CCA LEXIS at 36.

SJA Disqualification.

The appellant next asserts the SJA should have disqualified himself from preparing the SJAR. The appellant claims the SJA's testimony during the UCI motion hearing shows a factual controversy involving the SJA, necessitating an independent post-trial review by a disinterested SJA.

Whether an SJA is disqualified from participating in the post-trial review is a question of law reviewed *de novo*. The defense "has the initial burden of making a *prima facie* case for disqualification." *United States v. Taylor*, 60 M.J. 190, 194 (C.A.A.F. 2004)(quoting *United States v. Wansley*, 46 M.J. 335, 337 (C.A.A.F. 1997)). The discussion to R.C.M. 1106(b) provides that the SJA *may* be disqualified if he testifies to a contested matter (unless the testimony is clearly uncontroverted). The test to be applied is "objective reasonableness," that is, "[i]f from his testimony, it appears that he (SJA) has a personal connection with the case, he may not act as reviewing authority. On the other hand, if his testimony is of an official or disinterested nature only, he may properly review the record." *United States v. Choice*, 49 C.M.R. 663, 665 (C.M.A. 1975)(quoting *United States v. McClenny*, 18 C.M.R. 131, 137 (C.M.A. 1955)).

In this instance, the defense has made a *prima facie* case, as the SJA did testify on the pretrial UCI motion. Nevertheless, we find the SJA's testimony demonstrates a merely official interest in the detailing of LtCol Shelburne and the UCI issue. The testimony was objective and straight forward, and did not require the SJA to weigh his own testimony against conflicting evidence.

Finally, as we have concluded that the appellant's allegations of legal error are without merit, we conclude that any error by the CA and SJA in failing to disqualify themselves was harmless.

Conclusion

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

Senior Judge FELTHAM and Senior Judge WHITE concur.

For the Court

R.H. TROIDL
Clerk of Court