

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

**Before
C.L. REISMEIER, F.D. MITCHELL, R.E. BEAL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**TYRICE L. HAYES
HOSPITAL CORPSMAN THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 200600910
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 9 February 2005.
Military Judge: LtCol Jeffrey Meeks, USMC.
Convening Authority: Commanding General, Marine Corps
Base, Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: Col W.D.
Durrett, USMC.
For Appellant: Maj Jeffrey Liebenguth, USMC; LT Dillon
Ambrose, JAGC, USN.
For Appellee: Capt Robert Eckert, USMC.

28 October 2010

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE,
THIS OPINION DOES NOT SERVE AS PRECEDENT.**

REISMEIER, Chief Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of indecent acts with another, in violation of Article 134, Uniform Code of Military Justice 10 U.S.C. § 934. The military judge sentenced the appellant to confinement for 1 year, reduction to the pay grade of E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

This case is before us for the third time. The appellant originally assigned five errors: that he was

denied a fair trial because of the actions of the military judge in advising the Government on trial tactics and failing, *sua sponte*, to recuse himself;¹ that the convening authority breached the terms of the pretrial agreement through submission of evidence that contradicted the stipulation of fact; that he was denied effective assistance of counsel; that the sentence was inappropriately severe; and that unreasonable post-trial delay materially prejudiced his right to timely appellate review. This court affirmed the findings and sentence in an unpublished opinion dated 25 September 2007. The Court of Appeals for the Armed Forces noted that this court appeared to have used facts from the victim's summarized testimony from the Article 32, UCMJ, investigation, rather than from the evidence presented at trial, and returned the case to this court for a new Article 66(c), UCMJ, review.

On remand, the appellant submitted revised versions of his first 2 assignments of error, and resubmitted the remaining 3 without change. He also submitted a new assignment of error alleging that the military judge abused his discretion by allowing the appellant's consensual sex partner to testify as a victim. This court again affirmed the findings and sentence in an unpublished opinion dated 11 December 2008. Once again, the Court of Appeals for the Armed Forces set aside this court's decision and returned the case for a new Article 66(c), UCMJ, review, directing this court to obtain affidavits from the military judge and other appropriate parties regarding what, if anything, the military judge said concerning the appellant during a post-trial "Bridging the Gap" session with counsel.

By Order dated 19 August 2009, this court returned the record of trial to the Judge Advocate General for remand to an appropriate convening authority so that a hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), could be ordered to inquire into the comments allegedly made by the military judge following the appellant's trial. That hearing was conducted on 17 December 2009.

Following the *DuBay* hearing, the appellant assigned as an additional error that he was unfairly sentenced by the trial judge who was actually biased against him because of his homosexuality. We ordered oral argument as to whether the military judge was disqualified under an actual or apparent bias theory. Having considered the record of trial, the parties' various pleadings, the *DuBay* record and

¹ In his filings before this court, as well as in his clemency petition to the convening authority, the appellant claimed that the military trial judge made two comments in a post-trial "Bridging the Gap" session with counsel, saying words to the effect that Marines "should not be required to live in barracks with people like" the appellant, and that "homosexuality has no place in our Armed Forces."

oral argument, we find that the military judge's post-trial comments, taken in context of the entire record, would lead a reasonable person to question the military judge's impartiality. For the reasons expressed below, we set aside the sentence in our decretal paragraph and return the record to the Judge Advocate General with a rehearing authorized. Arts. 59(a) and 66(c), UCMJ.

I. Background

The appellant was charged with forcible sodomy, but, pursuant to a pretrial agreement, pleaded guilty to indecent acts with another based on sexual contact with another service member in the physical presence of a third party. The appellant, his partner, and the third party were all males.

II. Impartiality of the Military Judge

a. Facts

The following facts are supported by the record of trial and the *DuBay* hearing record:

1. The appellant was initially charged with forcible sodomy involving Corporal (Cpl) B. Charge Sheet.
2. Pursuant to a pretrial agreement, the appellant entered a plea of guilty to the offense of indecent act with another. Appellate Exhibit II.
3. After assembly of the court, the military judge summarized a pretrial conference he held with the parties. Record at 7. The military judge stated that prior to the hearing, he received a "brief" from the military judge that "had sat in this case when it had been referred to a general court-martial, wherein a number of hearings had been held, [and] I was aware that this case involved allegations of forcible sodomy."² *Id.* The military judge went on to say that he read the stipulation of fact (entered into by both parties as required by the pretrial agreement) and "became

² The military judge made no references prior to assembly to a "brief" he received from the judge who presided over the appellant's forcible sodomy case. The issue, therefore, was not discussed as a basis for a potential challenge to the military judge. Record at 6. Nor did he disclose the context or content of the "brief," except to say that he learned from that "brief" that the case involved allegations of forcible sodomy. That fact, however, is readily apparent from the face of the charge sheet. The military judge only noted his "briefing" after assembly, and relayed the briefing as a catalyst for inquiring as to whether the Government would be calling the "victim" to contradict the stipulation. *Id.* at 7. The record is silent as to what else, if anything, the military judge was told about the case, or why the brief he received prompted him to raise the issue of "victim" testimony that might conflict with the stipulation.

concerned that there may be some factual conflicts, especially if the government, in sentencing, were to call the accused to - excuse me, the victim to testify about the events in this particular case." *Id.*

4. Based on what the military judge learned about the case from the prior briefing and from the stipulation of fact he read that portrayed the interaction between the appellant and the complaining witness as consensual, the military judge asked the Government if they would be calling the complaining witness, "contradicting the stipulation of fact." *Id.* The military judge noted that "it became clear to [him] that the parties were both of a different understanding as to what it was the government could present in aggravation based on the stipulation." *Id.*

5. When further discussing with counsel the question of whether the Government would be permitted to exceed the facts contained within the proposed stipulation of fact during presentencing, the military judge stated: "I believe there's two different courses of conduct there, that make it indecent: Indecent act one would be the fact that he was fondling a male, and two would be the fact that it was in the presence of another person." *Id.* at 10.

6. After a lengthy discussion with counsel, the military judge instructed the trial counsel that "if you want these to be the facts in the case and to stipulate the facts in this case, I am not going to allow you to go beyond it" into allegations on sentencing that the conduct was actually non-consensual. *Id.* at 11. The Government withdrew from the stipulation of fact. *Id.* at 12. Following additional lengthy discussions, trial defense counsel stated that he wanted to ensure that the record was clear that "the stipulation of fact was presented to the government; they made their appropriate changes; both parties agreed; we signed it; the accused signed it; and it was not an issue on either side until prompted by the Court -". *Id.* at 18. At that point, the military judge cut off counsel by saying "The Court did notice that there was going to be a conflict and brought this issue. That is correct." *Id.*

7. Later, during the providence inquiry, the appellant stated that he did not believe the conduct at issue was service discrediting. The military judge responded to the appellant by saying, "So you don't believe that if members of the public became aware that a Marine corporal and a Navy corpsman, Petty Officer Third Class, were engaging in - two males were engaging in sexual relationships while on active duty in the barracks, you don't believe that would potentially lower the esteem that the Marine Corps and Navy are held in because of that conduct?" *Id.* at 37.

8. Evidence offered in aggravation, including the testimony of Cpl B, reflected a non-consensual sexual interaction between males in the barracks. Record at 56-69.

9. After completion of the trial, a "Bridging the Gap" session was held. In attendance were the trial judge, the trial defense counsel, and the trial counsel.³

10. During the discussion between the military trial judge, Maj B and Maj H following trial in this case, the military judge stated that "Marines should not be required to live in the barracks with people like Seaman Hayes," and that "homosexuality has no place in our Armed Forces." *DuBay Findings* at 6.

11. The post-trial discussion occurred in the context of the military judge noting that this case was very much like one might see in a sexual assault case involving an intoxicated female who is unable to resist being taken advantage of. He further noted that with two male service members, there were no policies in place to safeguard males, such as requirements that the doors be left ajar, orders that they not have sex in rooms, and "barriers" and protections in place "because of the nature of interactions between men and women." *DuBay Hearing Record* at 17.

12. The military judge also noted that in his experience, each year the Marines would have 3 or 4 of "these types" of cases where a Marine or Sailor would take advantage of an intoxicated Marine or Sailor and engage in homosexual conduct. *Id.*

13. In the course of that conversation, the military judge stated that in his experience, there was a rational basis for the "don't ask, don't tell" policy, and, "that homosexual acts are incompatible with the service." *Id.*

14. The military judge's reasoning for concluding that there was a rational basis for the "don't ask, don't tell", policy was that homosexual conduct presented leadership challenges, as males are not generally as cautious in

³ At the *DuBay* hearing, the presiding judge heard the testimony of the military judge from the appellant's trial, the original trial defense counsel, Mr. J.B., Esq. (former Major, USMC), and the original trial counsel, Major N.H., USMC. The military judge detailed to conduct the *DuBay* hearing made written findings of fact and conclusions of law, and authenticated the record. The military judge detailed to conduct the *DuBay* hearing prefaced some of her findings with language which included the phrase "it is my opinion that." She also included opinions as to what she believed witnesses meant. *DuBay Hearing Record* at 6. Our Order directing the *DuBay* hearing stated that "[t]he hearing w[ould] be limited to 'determining whether statements were made by the military judge in the ['Bridging the Gap' session], and if so, what was said.'" We do not adopt the presiding military judge's opinions or conclusions drawn therefrom.

thinking about dangerous situations as females would be, providing homosexual males a continuing opportunity to take advantage of other males. *Id.* at 30.

b. Principles of Law

There are two grounds for disqualification of a military judge: "specific circumstances connoting actual bias and the appearance of bias." *United States v. Quintanilla*, 56 M.J. 37, 44-45 (C.A.A.F. 2001). "The appearance standard is designed to enhance public confidence in the integrity of the judicial system. . . . The rule also serves to reassure the parties as to the fairness of the proceedings" *Id.* at 45. (citations omitted). Disqualification of a military judge is required "when 'that military judge's impartiality might reasonably be questioned.'" *Id.* (quoting RULE FOR COURTS-MARTIAL 902(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed)).

In the absence of actual bias or prejudice, disqualification under R.C.M. 902(a) is considered under an objective standard:

"Any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's 'impartiality might reasonably be questioned' is a basis for the judge's disqualification." *United States v. Kincheloe*, 14 M.J. 40, 50 (C.M.A. 1982) (quoting E. Thode, *Reporter's Notes to Code of Judicial Conduct* 60 (1973)); [*United States v.*] *Wright*, 52 M.J. [136,] 141 [(C.A.A.F. 1999)]. . . . "When a military judge's impartiality is challenged on appeal, the test is whether, taken as a whole in the context of this trial, a court-martial's legality, fairness, and impartiality were put into doubt" by the military judge's actions. *United States v. Burton*, 52 M.J. 223, 226 [(C.A.A.F.) 2000] (citations and internal quotation marks omitted). On appeal, "the test is objective, judged from the standpoint of a reasonable person observing the proceedings." *Id.*

Quintanilla, 56 M.J. at 78. See also *United States v. Norfleet*, 53 M.J. 262, 270 (C.A.A.F. 2000).

c. Discussion

Appearance of Bias

In the case before us, during the post-trial debrief the military judge discussed his philosophical views of homosexuality, homosexual acts, the military's "don't ask, don't tell" policy, problems with sexual assaults in barracks facilities, and the leadership challenges presented when barracks spaces are shared by service members who might find other barracks residents sexually attractive. Accepting at face value the military judge's explanation, more than four years after the fact, as to what he intended to convey during his discussion with counsel, we cannot accept the impression of prejudice his language created.⁴

A reference to "people like Seaman Hayes" is, in best light, injudicious when uttered in the same conversation as a statement that "homosexuality has no place in our Armed Forces." Even if the reference to "people like Seaman Hayes" was intended to address sexual predators, it conveys to an impartial listener an entirely different meaning when followed by a reference to "homosexuality having no place in our Armed Forces." Indeed, the prominently-placed "our" in the second phrase has a tendency to create in the mind of a listener an image of a speaker who thinks that "people like" the appellant are not like "us," and that the service belongs to "us" and "our people," not to "people like" the appellant. Added to this impression is the military judge's apparent - and stated - belief that the inclusion in military barracks of Sailors and Marines who engage in homosexual acts will create a danger of an increased rate of sexual assaults therein -- a "leadership" challenge, as he put it. The statement of a jurist, during the context of a discussion about a specific case involving a homosexual act, that allowing homosexuals into the barracks would lead to increased instances of homosexual assaults, even if intended otherwise, conveys a belief that homosexuals pose a risk to sleeping heterosexuals who leave their doors unlocked.

More gravely, the timing of the statements suggests that the military judge held these views while presiding over this case and failed to compartmentalize them from his judicial conduct. The military judge testified at the *DuBay* hearing, in December 2009, that his intent during the post-trial debrief was to convey that homosexual conduct, not homosexuality in general, has no place in the Armed Forces. In the context of this entire record of trial, this explanation includes the unfortunate inference that he

⁴ We appreciate Government counsel's statement during oral argument that the Government neither condones, nor asks us to approve of, the military judge's comments when arguing that the record as a whole demonstrates that the military judge was fair and unbiased.

believed, at the time of trial and at the time of adjudging a punitive discharge, that homosexual conduct should lead to a discharge, even if that conclusion was not his actual intent. The perception that a military judge has pre-determined a certain punishment for a certain act or crime is, simply, unacceptable. We do not reach the question of whether the military judge was actually biased, as our conclusion would remain unchanged regardless of the conclusion we reached.⁵ His statements, in context,⁶ create in the mind of a reasonable person observing the proceedings a serious question as to the legality and fairness of the court.

Remedy

Neither R.C.M. 902(a) nor the applicable disqualification standards mandate a particular remedy in situations where a military judge should have recused or disqualified himself. As the Court of Appeals for the Armed Forces noted in *Quintanilla*:

In *Liljeberg [v. Health Services Acquisition, Corp.]*, 486 U.S. 847, 864], the [Supreme] Court established a three-part test for determining whether reversal of a decision should be granted as a remedy when a judge has failed to recognize that his or her disqualification was required because the judge's impartiality might reasonably be questioned:

We conclude that . . . it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process. We must continuously bear in mind that to perform its high function in the best way justice must satisfy the appearance of justice.

Quintanilla, 56 M.J. at 80-81 (internal citations and quotations omitted).

⁵ Appearance of bias can be waived. R.C.M. 902(e). However, the complete predicate for the appearance of bias only arose post-trial. We decline to apply waiver where the statements which gave meaning to the words and actions of the military judge at trial were not made until after adjournment.

⁶ While the military judge's statements on the record that sexual contact between two males, without more, is indecent might not create an appearance of bias, the statements become problematic when viewed in light of his post-trial statements.

First, the risk of injustice to the parties is exceedingly high. Judges are invested with considerable discretion to permit or deny activity at trial that has significant consequences for the parties. Each time the judge questioned the impact of the Government's agreement to the stipulation, asked questions of witnesses, ruled upon objections, questioned a line of argument by counsel, or imposed sentence, the judge exercised broad discretion, discretion called into question by the appearance of bias. However, because this was a guilty plea, the fairness of the findings remains unquestioned. Therefore, setting aside the sentence alone will place the parties in a position to conduct a pre-sentence hearing before a military judge whose appearance is not in question. And, while denial of relief in this case will not itself produce an injustice in other cases, granting relief will have the salutary effect of reinforcing the judicial demand for impartiality. Countenancing the appearance of the military judge's statements following his imposition of a sentence that, but for forfeitures, was the jurisdictional maximum, would serve to undermine the public's confidence in the court-martial process.⁷ Viewed in the entirety of this record of trial, the military judge's ill-considered commentary would trouble any observer and serves to undermine the essential faith of the general public in the military justice system of their Armed Forces. It is essential that a sitting judge embody absolute neutrality in any litigation over which he presides. No objective analysis of the military judge's conduct could prompt a listener to conclude that the words "neutral" or "detached" describe the appearance of the military judge's role in this case.

III. Post-Trial Delay

In his initial assignments of error, the appellant claimed that he was denied speedy post-trial review of his case, relying on the 503 days it took to originally docket the case with this court as proof of his claim. As this court did when this case was originally reviewed, we again note our displeasure that it took nearly 6 months to forward the record of trial to this court. However, assuming, without deciding, that the appellant was denied his due-process right to speedy review and appeal, we again conclude that any error caused by the delay was harmless beyond a reasonable doubt. Given the lack of any claim of specific prejudice caused by the delay and our action in setting aside the sentence, any delay in this case has no effect on the findings that should be affirmed.

⁷ The military judge closed court from 1119 to 1126 for deliberation - a total of 7 minutes - before imposing sentence. Record at 77. The scant amount of time taken by the military judge to review the 121 pages of documentary evidence admitted by the parties on sentencing also tends to detract from the public's confidence.

IV. Conclusion

The findings are affirmed. The sentence is set aside. This action renders moot the appellant's other assignments of error. The record is returned to the Judge Advocate General of the Navy for remand to an appropriate convening authority who may order a sentence rehearing. If a rehearing as to sentence is not ordered, the convening authority may approve a sentence of no punishment.

Senior Judge MITCHELL and Judge BEAL concur.

For the Court

R.H. TROIDL
Clerk of Court