

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

**Before
L.T. BOOKER, J.K. CARBERRY, E.C. PRICE
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**CAYLENE A. PILLSBURY
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201000422
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 26 March 2010.

Military Judge: LtCol Thomas Sanzi, USMC.

Convening Authority: Commanding Officer, Marine Aerial Refueler Transport Squadron 352, MAG 11, 3d Marine Aircraft Wing, MarForPac, MCAS Miramar, San Diego, CA.

Staff Judge Advocate's Recommendation: Col K.J. Brubaker, USMC.

For Appellant: Capt Peter Griesch, USMCR.

For Appellee: LT Ritesh Srivastava, JAGC, USN.

16 November 2010

OPINION OF THE COURT

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

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to her pleas, of one specification of attempted distribution of a controlled substance and one specification of introduction of a controlled substance onto a Marine Corps installation, violations respectively of Articles 80 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 912a. The convening authority (CA) approved the adjudged sentence of confinement for 10 months, forfeiture of \$900.00 pay per month for 10 months, reduction to pay grade E-1,

and discharge from the U.S. Marine Corps with a bad-conduct discharge.

The appellant's sole assignment of error reiterates a challenge that she lodged against the military judge who heard her case. We find that the military judge did not abuse his discretion by refusing to recuse himself from presiding over the appellant's trial. We also note, however, that the CA used language in the "execution" section of his action that has been deemed to constitute a legal nullity. See *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009). No corrective action is necessary with respect to that nullity. 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 occurred. Arts. 59(a) and 66(c), UCMJ.

An accused service member has a constitutional right to an impartial judge. *United States v. Wright*, 52 M.J. 136, 140 (C.A.A.F. 1999). In the absence, as here, of actual bias, one looks for implied bias from the standpoint of a reasonable man who has knowledge of all the facts. *Id.* at 141. Military judges should interpret and apply bases for recusal broadly, but at the same time should not recuse themselves unnecessarily. *United States v. McIlwain*, 66 M.J. 312, 314 (C.A.A.F. 2008) (citing *Wright*, 52 M.J. at 141).

The facts that were developed on the record clearly militate in favor of the military judge's staying on the case. The military judge who sat on the appellant's case had previously presided over a related case, a general court-martial in which the accused service member was convicted of drug offenses. The appellant averred that the military judge had learned information at that prior trial that would affect his ability to adjudge a fair sentence in her case. Specifically, the appellant questioned whether the military judge would be able to ignore an implication from the earlier trial that the appellant was somehow involved in a romantic and homosexual relationship with the accused in the prior trial. Record at 5-9. This information was brought out in the context of a possible entrapment defense at the general court-martial and in sentencing evidence. *Id.* See also Appellate Exhibit IV at 81-89 *passim*. The appellant's counsel at trial invoked the service policy regarding retention of persons who had engaged in homosexual conduct, an invocation repeated by the appellant's counsel before us. Appellant's Brief of 9 Sep 2010 at 4.

In support of this challenge, the appellant's counsel offered the unauthenticated transcript of the earlier trial. That transcript appears in Appellate Exhibit IV of the appellant's trial, and the military judge did not question its contents. Record at 7. We have reviewed that entire transcript during the course of our review of this case, and we conclude that it presents no basis for recusal. While the accused in that general court-martial was portrayed by her counsel, her mother,

and herself as a homosexual, AE IV at 47, 48, 81, 82, 85, 87, 88, and 89, the appellant here was never identified by name nor described as engaged, romantically or sexually, with the accused in that trial. The military judge correctly observed, in response to the appellant's challenge here, that there was no evidence before him at the earlier trial that suggested that this appellant was in fact engaged in a homosexual relationship with the other accused, and he properly noted that his consideration of the appellant's case would be limited to the allegations on the charge sheet and evidence properly placed before him at the appellant's trial. Record at 8.

Military judges have been, perhaps unflatteringly, described as having "bathtub minds," that is, the ability to hear and discard as irrelevant volumes of information during the course of a trial. See *United States v. Winter*, 35 M.J. 93, 95 n.5 (C.M.A. 1992). Here, the limits of that capacity were not even approached, as no evidence about any sort of homosexual relationship was introduced, and the only mention of a possible relationship, unsubstantiated at the earlier proceeding and unsubstantiated here, was the defense counsel's mentioning it during voir dire proceedings. Record at 6-7. No reasonable observer, seized of the pertinent facts, could possibly conclude that this appellant did not receive a fair trial from an impartial judge.

The findings and the approved sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court