

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

**Before
J.A. MAKSYM, J.R. PERLAK, R.E. BEAL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JONATHAN R. EGNASH
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201100171
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 15 December 2010.

Military Judge: LtCol Thomas Sanzi, USMC.

Convening Authority: Commanding Officer, Headquarters and Service Battalion, Marine Corps Recruit Depot, San Diego, CA.

Staff Judge Advocate's Recommendation: Maj Z.W. Keske, USMC.

For Appellant: LCDR Anthony Yim, JAGC, USN.

For Appellee: LT Ritesh Srivastava, JAGC, USN.

28 December 2011

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

PER CURIAM:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of dereliction of duty and larceny in violation of Articles 92 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 921. A panel of members with enlisted representation sentenced the appellant to confinement for 12 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the

sentence as adjudged, but suspended all confinement in excess of 6 months as an act of clemency.

The appellant assigns one error, that the court should order a post-trial *DuBay*¹ hearing to examine whether an enlisted member was a member of the appellant's unit within the meaning of Article 25, UCMJ. The appellant also asserts that a post-trial hearing is necessary to investigate the possibility of unlawful command influence. The Government acknowledges an ineligible member was empanelled and that a presumption of prejudice attaches to such an error. Nonetheless, the Government asks us to affirm the sentence because the record rebuts the presumption of prejudice, i.e., the member states in an affidavit that he did not know the appellant at the time of trial.

Background

The appellant worked as a military policeman assigned to the Provost Marshall's Section, Headquarters Company, Headquarters and Service Battalion, Marine Corps Recruit Depot, San Diego. One of the enlisted members of the appellant's special court-martial panel, Gunnery Sergeant (GySgt) Bolding, was also a member of Headquarters Company.

During *voir dire*, the military judge informed the enlisted members they would be disqualified to sit as a member if they were from the same "company" as the appellant. Record at 244. The military judge then specifically asked the enlisted members if any of them were assigned to Headquarters Company, the same unit as the appellant; Gysgt Bolding provided a negative response to the question. *Id.* In an affidavit attached to the record of trial, he explained he did not feel "obligated to raise [his] hand when asked because [he] was never associated with the Provost Marshal's [sic] Office or Headquarters Company, except for accountability and administrative reasons." First Sergeant Trace M. Bolding, USMC, Affidavit of 3 Jun 2011.

Article 25

Any enlisted member who is not a member of the same unit as the accused is eligible to serve on special courts-martial. Art. 25 (c)(1), UCMJ. "[U]nit' means any regularly organized body as defined by the Secretary concerned, but in no case may it be a body larger than a company, squadron, ship's crew, or body corresponding to one of them." Art. 25(c)(2), UCMJ. An

¹ *United States v. DuBay*, 17 C.M.R. 411 (C.M.A. 1967).

enlisted member is considered to be in the same unit as an accused for purposes of Article 25, UCMJ, even if he or she is assigned to that unit merely for administrative purposes. See *United States v. Wilson*, 21 M.J. 193, 195-96, (C.M.A. 1986). In this case, the appellant was sentenced by a panel of members with enlisted representation which included an ineligible member who was an enlisted member of the appellant's unit. Accordingly, we find that the appellant's rights under Article 25, UCMJ, were violated. *United States v. Lenoir*, 13 M.J. 452, 453 (C.M.A. 1982).

Denial of this right is presumed prejudicial. *Id.* "The reason prejudice is presumed from such an error of law is that [appellate courts have] no way to determine how the ineligible member voted or whether his vote may have controlled the sentence imposed by the court." *Id.* In this case, the appellant was denied his statutory right to have his sentence imposed by a court composed of eligible members because GySgt Bolding was from the appellant's unit, and thus ineligible to serve as a member. The military judge specifically informed GySgt Bolding that assignment to the same unit as the appellant was grounds for disqualification to serve as a member; nonetheless, when the military judge asked if any member was from the same unit as the appellant, GySgt Bolding provided an incorrect response. Under these circumstances we find the record does not rebut the presumption of prejudice arising from this error.

Conclusion

After careful examination of the record of trial, the pleadings of the parties, and the appellant's assignment of error, the findings are affirmed. Arts. 59(a) and 66(c), UCMJ. The sentence is set aside and the record returned to the Judge Advocate General for remand to an appropriate convening authority with a rehearing on sentence authorized.

For the Court

R.H. TROIDL
Clerk of Court