

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

**Before
J.A. MAKSYM, L.T. BOOKER, R.E. BEAL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JAMES E. MCCOY
STAFF SERGEANT (E-6), U.S. MARINE CORPS**

**NMCCA 201100080
GENERAL COURT-MARTIAL**

Sentence Adjudged: 24 August 2010.

Military Judge: CAPT Moira Modzelewski, JAGC, USN.

Convening Authority: Commanding General, II Marine Expeditionary Force, Camp Lejeune, NC.

Staff Judge Advocate's Recommendation: Col C.K. Joyce, USMC.

For Appellant: Maj Jeffrey Liebenguth, USMC.

For Appellee: Capt Paul Ervasti, USMC.

11 August 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 general court-martial convicted the appellant, in accordance with his pleas, of 17 specifications of maltreating subordinates and 1 specification of disorderly conduct, respectively violations of Articles 93 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 893 and 934. The convening authority (CA) approved the adjudged sentence of confinement for 12 months, reduction to pay grade E-1, and a bad-conduct discharge from the U.S. Marine Corps.

The appellant alleges before us that the military judge abused her discretion in denying him a continuance, thus depriving him of a civilian counsel of choice. We disagree and find that no error materially prejudicial to the substantial rights of the appellant occurred. We therefore affirm the findings and the approved sentence. Arts. 59(a) and 66(c), UCMJ.

Proceedings in the Court-Martial

The record indicates that the appellant was notified of the charges in December 2009. At the initial Article 39(a), UCMJ, session in his case, in May 2010, the appellant acknowledged his right to detailed and retained counsel and told the military judge that he wished to be represented only by detailed counsel. Record at 7-8. After the appellant withheld entering pleas and motions, the court set a date for motions in July and a date for trial on the merits to begin on 9 August and last for at least a week. The military judge advised the appellant of the possibility of trial *in absentia* if he were not present for the scheduled trial date. *Id.* at 11-12. See RULE FOR COURTS-MARTIAL 804(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). The appellant acknowledged the warning and said he understood it. Record at 12.

The July motion session occurred as scheduled, and at that session, the appellant was still represented only by detailed counsel. He did not express any desire to retain civilian counsel. Trial on the merits was still set for Monday, 9 August.

On the Thursday preceding trial on the merits, the parties were again in court, as scheduled, to handle last-minute preparations. On that day, the appellant's counsel notified the military judge that the appellant was hoping to retain a local civilian attorney; this was the first mention of such a desire. Record at 80. When the military judge and the counsel for both the appellant and the United States contacted the attorney, he stated that he had not yet been hired, and that he would need a continuance to prepare. He also stated that his trial calendar was such that he would not be able to set aside sufficient time for the trial until November. *Id.* at 84-85. The military judge stated her intention to recess the proceedings until the next day, Friday, to enable the appellant to search for available civilian counsel. *Id.* at 87.

After some further discussion on the record, the military judge, noting the uncertainty, decided to recess the proceedings further, so as not to have members show up on Monday only to be sent home. The military judge then fixed a new trial date of 23 August. The military judge then re-read the *in absentia* warning tailored to the new trial date. The appellant once again voiced his understanding. *Id.* at 89-92.

The military judge held another Article 39(a) session on 9 August, the originally scheduled date, to determine what progress the appellant had made over the weekend regarding civilian counsel. The appellant told her that he had been unable to engage civilian counsel and that he wished to be represented only by his two detailed counsel. *Id.* at 95. The military judge then recessed trial on the merits until the newly scheduled date, 23 August, with the understanding that further motions sessions could be accommodated before the trial. *Id.* at 97.

Between the last Article 39(a) session and the new trial date, the parties entered into a pretrial agreement. The appellant pleaded guilty pursuant to the agreement and was sentenced on 24 August 2010. He was represented by only his two detailed defense counsel, and he voiced his satisfaction with their services. *Id.* at 170.

Before taking action on the case, the CA ordered a post-trial Article 39(a) session to resolve some allegations raised to the Inspector General. The military judge did not receive any further evidence on the issue of the appellant's attempt to employ a civilian counsel in August 2010, her and the parties' views being that the record of the August proceedings sufficed.

Discussion

A military judge's decision to grant or deny a continuance is entrusted to her broad discretion. When the request for a continuance involves time to retain counsel, "[i]t should . . . be an unusual case, balancing all the factors involved, when the judge denies an initial and timely request for a continuance in order to obtain civilian counsel, particularly after the judge has criticized appointed military counsel." *United States v. Wiest*, 59 M.J. 276, 279 (C.A.A.F. 2004) (citation omitted). That same court has noted that "[w]here a military judge denies a continuance request made for the purpose of obtaining civilian counsel, prejudice to the accused is likely." *United States v. Miller*, 47 M.J. 352, 359 (C.A.A.F. 1997). Citing a treatise, *Miller* examines a number of factors useful in determining whether a judge has abused her discretion; we do so as well, bearing in mind that "[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process." *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964).

First and foremost, the appellant did not have retained counsel in this case. During a colloquy with the military judge on 5 August, the appellant stated that he intended to retain the counsel that day, but that he was unsure whether the counsel would be available for trial the next day. Record at 82. The military judge then placed on the record a summary of a conference call that she and the counsel had with the civilian counsel in which the counsel noted that the proposed trial schedule "would not allow him to be retained in this case." The

military judge then granted a two-week continuance, *id.* at 86-89, to enable the appellant to try to find an available attorney.

The military judge did not, as was the case in *Wiest*, criticize the detailed counsel in this case. True, she did not grant all the relief that the counsel had requested in the voluminous motion practice, but she never intimated that counsel's lack of preparation or professionalism contributed to the rulings. If criticism can, as in *Wiest*, be tied to the "surprise" factor (the criticism came as a "surprise" to the cadet in *Wiest*) of *Miller*, compare 59 M.J. at 279 with 47 M.J. at 358, then this factor militates in favor of the military judge's exercise of her discretion.

Unlike in *Miller*, the appellant here has not identified any deficiency in his counsel's performance or been able to identify what a civilian counsel would have done differently. Indeed, at the post-trial Article 39(a) session, the appellant noted his satisfaction with his uniformed counsel's efforts at trial, going so far as to release a civilian attorney and a new detailed defense counsel from further representation. Post-Trial Record at 8, 12. The "impact on the verdict" factor thus militates in favor of the military judge's exercise of her discretion. The record contradicts the broad statement of *Miller* that prejudice to the appellant is likely when a continuance request to seek civilian counsel is denied.

A fair reading of the record suggests that there was no "unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay" See *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983) (citation and internal quotation marks omitted). A contested trial would involve coordinating the schedules not only of the veniremen but also dozens of fact witnesses. See Record at 88-89. The pretrial hearings were reasonably spaced out over time to allow the parties to develop their cases under the supervision of the trial court. The docket in the mid-Atlantic region was sufficiently busy that week-plus trials had to be carefully placed. See *id.* at 9, 89. In fact, the military judge did give the appellant another 2 weeks to locate and retain counsel.

Conclusion

Considering the circumstances of this case as a whole, including the large number of witnesses, the amount of time anticipated to be consumed on the docket, the long lead time between arraignment and trial on the merits, the eve-of-trial request for a continuance to engage civilian counsel, and the fact that no civilian counsel was actually retained, and considering further the appellant's statement of satisfaction with the performance of his counsel at trial and his release of newly hired and detailed counsel at the post-trial session, we conclude that the appellant has not met his burden of establishing that the military judge's denial of the requested

continuance was an abuse of discretion. The findings and approved sentence are therefore affirmed.

For the Court

R.H. TROIDL
Clerk of Court