

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

**Before
J.R. PERLAK, J.K. CARBERRY, M.D. MODZELEWSKI
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**SAMUEL J. BOUDREAUX
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 201100606
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 19 August 2011.

Military Judge: Col Deborah McConnell, USMC.

Convening Authority: Commanding Officer, 2d Battalion, 9th
Marines, 2d Marine Division, Camp Lejeune, NC.

Staff Judge Advocate's Recommendation: Col T.M. Dunn,
USMCR.

For Appellant: Maj S. Babu Kaza, USMCR.

For Appellee: LT Benjamin J. Voce-Gardner, JAGC, USN.

29 March 2012

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 one specification of unauthorized absence, one specification of distributing Oxycodone on divers occasions, and one specification of using Oxycodone on divers occasions in violation of Articles 86 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 912a. The military judge

sentenced the appellant to 12 months confinement, forfeiture of \$978.00 pay per month for 12 months, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, in accordance with a pretrial agreement, suspended confinement in excess of 90 days.

In his sole assignment of error, the appellant reiterates the challenge he lodged against the military judge who heard his case, i.e., in light of her role as the supervisor of the trial counsel who prosecuted a companion case, the military judge was disqualified. We find that the military judge did not abuse her discretion by refusing to recuse herself from the appellant's trial. Furthermore, 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 has a constitutional right to an impartial judge." *United States v. Butcher*, 56 M.J. 87, 90 (C.A.A.F. 2001) (quoting *United States v. Wright*, 52 M.J. 136, 140 (C.A.A.F. 1999)). RULE FOR COURTS-MARTIAL 902(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) provides that "a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." The decision of a military judge on the issue of recusal is reviewed on appeal for abuse of discretion. *United States v. Norfleet*, 53 M.J. 262, 270 (C.A.A.F. 2000). In reviewing a military judge's ruling on a recusal motion, we consider the facts and circumstances under an objective standard. *Butcher*, 56 M.J. at 91. The test is whether there was "[a]ny conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned." *Id.* (quoting *United States v. Kincheloe*, 14 M.J. 40, 50 (C.M.A. 1982)).

Following the adjournment of the appellant's court-martial, trial defense counsel learned of grounds for a possible disqualification of the military judge and requested a post-trial Article 39(a) hearing. The facts developed at that proceeding indicate that, prior to her assignment as a military judge, Colonel (Col) McConnell served as the Staff Judge Advocate, Marine Corps Air Station, New River. In that capacity, she supervised and evaluated Captain T. Captain T prosecuted Lance Corporal (LCpl) Roberts, a companion case to that of the appellant's. LCpl Roberts, however, was not a member of a command to which Col McConnell provided any legal advice. Furthermore, in anticipation of her assignment as a

military judge, Col McConnell specifically removed herself from any discussions or involvement in the Roberts case. She took the extraordinary step of taking leave on the day that a formal brief was presented regarding the Roberts case and directed trial counsel not to speak to her about the case. Instead, Captain T was advised to seek guidance regarding the Roberts case from the responsible staff judge advocate. Col McConnell also noted that she had no discussions with counsel, investigators, convening authorities or other staff judge advocates regarding the Roberts case, any other companion case, or the appellant's case. Finally, although Col McConnell wrote Captain T's fitness report, she testified that she had no information regarding his performance relative to that case, other than Captain T following her direction to not involve her in discussions of the case.

Following questioning of the military judge by defense counsel and trial counsel at the post-trial Article 39(a) hearing, the military judge made findings of fact and conclusions of law regarding her impartiality. The military judge concluded that no reasonable basis existed that could lead a reasonable man, knowing all the circumstances, to question her impartiality and that no specific grounds under R.C.M. 902(b), warranted her disqualification.

In light of the actions taken by the military judge, we also conclude that 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