

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

**Before
C.L. REISMEIER, J.K. CARBERRY, M.D. MODZELEWSKI
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JOSEPH M. MANCILLAS
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 200401950
GENERAL COURT-MARTIAL**

Sentence Adjudged: 6 November 2003.

Military Judge: LtCol Steven Immel, USMC.

Convening Authority: Commanding General, 1st Marine
Division (REIN), Marine, Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: Col W.D. Durrett,
Jr., USMC.

For Appellant: Capt Bow Bottomly, USMC; LT Kathleen Kadlec,
JAGC, USN.

For Appellee: Capt Robert E. Eckert, Jr., USMC; Mr. Brian
Keller, Esq.; LT Elliot Oxman, JAGC, USN.

17 April 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.**

REISMEIER, Chief Judge:

A general court-martial composed of a military judge alone convicted the appellant, pursuant to his pleas, of conspiracy to distribute marijuana, two specifications of unauthorized absence, two specifications of making false official statements, and wrongful distribution and use of marijuana, in violation of Articles 81, 86, 107, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 886, 907, and 912a. The military

CORRECTED OPINION

judge sentenced the appellant to confinement for seven years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged and, in accordance with the pretrial agreement, suspended all confinement in excess of six years for a period of 12 months from the date of the action.

Background

The lengthy procedural history of this case has been thoroughly discussed previously by this court, both in the Orders issued to address the appellant's ongoing mental health issues, and in this court's previous unpublished opinion. See *United States v. Mancillas*, No. 200401950, 2006 CCA LEXIS 339, unpublished op. (N.M.Ct.Crim.App. 18 Dec 2006). Rather than reciting the full procedural history yet again, we provide a synopsis to give context to today's decision.

The appellant has undergone multiple mental health evaluations during the pendency of this case. Prior to trial, three separate evaluations were conducted pursuant to RULE FOR COURTS-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). The initial evaluation concluded the appellant was competent to stand trial and was "accountable for his actions." The second evaluation, in 2002, found the appellant had the capacity to understand his actions at the time of the offenses, but was unable to determine whether the appellant was mentally competent to stand trial. The second evaluation recommended that the appellant be placed in a facility where he could be closely monitored to determine whether he was suffering from a major thought disorder, a decompensated personality disorder, or whether he was malingering. The inability of the second evaluation to reach a conclusion led to a third R.C.M. 706 evaluation. The third evaluation concluded that the appellant was not competent to stand trial as he lacked the requisite mental capacity to understand the nature of the proceedings and was unable to conduct himself or cooperate intelligently in his defense. The third evaluation was unable to reach a conclusion as to the appellant's mental responsibility for the actions that formed the basis of the charges against him.

After a hearing before a military judge on 5 February 2003, the appellant was transferred to the custody of the United States Attorney General for hospitalization and treatment. After several months of treatment at the Federal Medical Center, Butner, North Carolina ("FMC Butner"), the appellant was returned to military control on 27 August 2003. FMC Butner personnel certified that through treatment the appellant was

returned to mental competency. The court-martial was reconvened; the appellant was tried on the charges, convicted, and sentenced on 6 November 2003.

Initial Appellate Review

On 28 June 2006, while this case was pending initial appellate review, the appellant, through counsel, filed a motion seeking both a stay of the proceedings and another evaluation pursuant to R.C.M. 706 to determine if the appellant was then capable of assisting in his appeal. The one-page motion provided no detail or explanation as to why a new evaluation was necessary. In a separate simultaneous filing, the appellant submitted a motion to attach his own affidavit to supplement the pleading. Within the affidavit the appellant claimed that his civilian trial defense counsel was engaged in an ongoing plot against him. The affidavit claimed that his trial defense counsel was "conspiring" against him "from the beginning." The appellant further claimed that NCIS created a video showing him committing a sex crime, which the convening authority, judge, and trial lawyers all saw. The appellant argued that he was sentenced not on the crimes he was convicted of, but rather on the basis of the sex crime video. The appellant went on to claim that he experienced harassment and retaliation from the Appellate Defense Division. The affidavit focused almost exclusively on old items, pretrial and from the trial itself.

This court granted the motion to attach the affidavit to the record and denied the defense motion for a stay and a new R.C.M. 706 evaluation. The record reflects that the appellant was hospitalized in late July 2006 and, on a date uncertain between the end of that hospitalization and 10 October 2006, was released from confinement and placed on appellate leave. On 18 December 2006, in an unpublished opinion, this court affirmed the findings and sentence as approved by the convening authority. The appellant subsequently filed a petition for review of this court's decision with the Court of Appeals for the Armed Forces, which petition was granted.

Remand for Consideration of Additional Issues

On 2 October 2007, the Court of Appeals for the Armed Forces remanded the record to this court for consideration of the following issues: (1) whether this court erred by not resolving whether the appellant had the mental capacity for the offenses charged; (2) whether this court abused its discretion by denying the appellant's request for a mental competence hearing and by finding him competent without proper

documentation; (3) whether this court erred by finding that the appellant's civilian trial defense counsel was effective as she did not "place on the record medical documentation of competency certification and did not ensure that appellant was mentally competent (sic) at the time the offenses were committed"; and (4) "such other issues as may be raised by Appellant concerning his mental condition, and for such action thereon as may be deemed appropriate by [this] court."

By Order dated 27 August 2008, this court returned the record of trial to the Judge Advocate General for delivery to an officer authorized to order an inquiry into the mental responsibility and capacity of the appellant. The court further directed that the Board "reconcile, to the extent possible, the findings of all the prior mental health evaluations" listed in the Order. The Government filed the results of the inquiry on 13 February 2009.

On 6 April 2009, the court returned the record of trial to the Judge Advocate General for delivery to an appropriate convening authority to order a *DuBay*¹ hearing. The military judge assigned to conduct the hearing was to make detailed findings of fact and conclusions of law related to the appellant's mental responsibility and capacity. Pursuant to the court's Order, a *DuBay* hearing was held during September and October 2009. The presiding military judge concluded that the appellant was both mentally responsible for his actions and competent to stand trial.

The record of trial was again docketed with the court on 24 March 2010. On 8 June and 29 June 2010, the court granted two motions from the appellant to attach documents reflecting additional mental health treatment records and evaluations of the appellant. The new records covered periods of time prior to the appellant's entry into active duty and had not been considered during any of the three 706 evaluations. The newly filed records undermined the conclusions reached from the first *DuBay* hearing. This court ordered the *DuBay* hearing reopened, again to reconcile, to the extent possible, the newly filed mental health treatment and evaluation records covering the appellant's pre-active duty time with the evaluation conducted during the pendency of this case.

On 16 December 2011, the military judge submitted findings of fact and conclusions of law for the reopened *DuBay* hearing.

¹ *United States v. DuBay*, 37 M.J. 411 (C.M.A. 1968).

Appellate Exhibit CLI. The military judge ultimately concluded that the appellant currently lacks the mental capacity to assist in his appeal. The appellant now seeks an order from this court setting aside the findings and sentence, or abating² or staying the proceedings. On 23 February 2012, the court temporarily stayed proceedings in this case pending resolution of the appellant's Motion to Set Aside or Abate. This resulted in the court not acting on a Motion for Enlargement of Time for the appellant to file supplemental pleadings.

Discussion

The appellant has the burden to establish by clear and convincing evidence that, as a result of a severe mental disease or defect, he was, at the time of the offenses, unable to appreciate the nature and quality or the wrongfulness of his acts. Regarding mental capacity, the appellant has the burden to establish, by a preponderance of the evidence, that at the time of trial, he was unable to understand the nature of the proceedings against him or to conduct or cooperate intelligently in his defense. Art. 50a(b), UCMJ; R.C.M. 909(b) and 916(k), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Likewise, the appellant has the burden to establish, by a preponderance of the evidence, that, as a result of a severe mental disease or defect, he was, on appeal, unable to understand the nature of the proceedings or to conduct or cooperate intelligently in his case. R.C.M. 1203(c)(5), MCM (2008 ed.).

We review a military judge's conclusions of law *de novo*. *United States v. Ellerbrock*, 70 M.J. 314, 317 (C.A.A.F. 2011). In conducting this *de novo* review, the court accepts the factual findings made by the military judge unless clearly erroneous. *United States v. Martin*, 56 M.J. 97, 106 (C.A.A.F. 2001) (explaining findings are clearly erroneous where there exists a "definite and firm conviction that a mistake has been committed") (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). Having reviewed the medical records, the trial records, the original record of trial, the affidavits of the various parties over the years, and the briefs, motions and answers of the parties, we find the factual findings made by the

² The appellant ultimately requests a stay, despite referring several times to an abatement of the proceedings. We interpret the defense request to be in accordance with R.C.M. 1203, which contemplates a "stay," or "other appropriate action." Appellant's Non-Consent Motion to Set Aside the Findings and Sentence or Abate the Proceedings of 14 Feb 2012.

final *DuBay* judge well-supported by the record.³ Accordingly we accept the factual findings⁴ for the *de novo* review of the conclusions of law.

The findings can be summarized as follows. The appellant was first diagnosed with paranoid schizophrenia in 2007. Schizophrenia is a condition that develops over time, referred to as a process diagnosis. In the early stages of the process an individual will show milder symptoms, consistent with a delusional disorder. Over time, the condition will progress and the symptoms will become more severe, eventually reaching the level of full-fledged schizophrenia. The course of progression of the disease is different in each individual and symptoms of the condition commonly wax and wane over time for a variety of reasons.

Here, the appellant's condition has followed that progression. The appellant demonstrated an onset of symptoms sometime in 2002. In the 2002 to 2003 time frame the appellant did not present symptoms consistent with full-fledged schizophrenia; rather, he displayed the precursor symptoms. In late June 2006, his appellate defense counsel filed a motion with the court to order a new 706 evaluation to determine whether the appellant was capable of assisting in his own appeal. During that same time frame, the appellant filed with the court an affidavit containing some rather bizarre accusations. In late July 2006 the Brig sent the appellant to the Naval Medical Center San Diego for a fitness for duty determination which resulted in the appellant being hospitalized with the hospital's Mental Health Services. After being released from the hospital in August 2006, and then from confinement, and then commencing appellate leave on a date prior to 10 October 2006, the appellant's condition had progressed significantly. As the final *DuBay* judge found, regardless of precisely when full-fledged schizophrenia became present, the appellant's medical history demonstrates that during the later

³ Here, the final *DuBay* judge was asked to make sense of a terribly disjointed, disorganized, and voluminous record in a short time. The judge was asked to make findings of fact and conclusions of law regarding matters that spanned not only a decade of trial and post-trial events, but also pre-service evaluations of the appellant. We compliment the judge, Lieutenant Colonel C.J. Thielemann, USMC, for the quality and thoroughness of the findings and conclusions.

⁴ There were multiple *DuBay* hearings, and two sets of *DuBay* findings, the first of which had to be reconsidered in light of this court's last *DuBay* order. To be clear, we adopt both the 16 December 2011 findings by the last *DuBay* judge, and those of the prior judge adopted by the 16 December 2011 findings.

stages of his confinement and prior to this court's original opinion, the appellant evidenced delusions, hallucinations, and a reduced level of functioning. As concluded by the final *DuBay* judge, "the court finds that the appellant has met his burden to show that he became mentally incompetent at some point after he completed his sentence to confinement and returned home . . . on appellate leave." AE CLI at ¶ 3c1. Based on the entire record, the appellant established that he did not maintain the ability to assist in his appeal before this court. The court will set aside its opinion of 18 December 2006.

Since the appellant is presently unable to conduct or cooperate intelligently in his appeal, the court is not able to conduct an Article 66(c) review of his case at this time. The appellant has a poor prognosis for future recovery.

Disposition

For the reasons outlined above, the court's decision of 18 December 2006 is hereby vacated. Since the appellant presently lacks the mental capacity to understand and to conduct or cooperate intelligently in his appellate proceedings, the court cannot complete appellate review as the appellant has a right to participate in his appellate review. R.C.M. 1203(c)(5) (2008 ed.).

The proceedings are hereby stayed until the appellant regains the mental capacity to understand and to conduct or cooperate intelligently in his appeal.⁵ The record is returned to the Judge Advocate General who may remand the case to a convening authority who may (1) set aside and dismiss the findings of guilty and the sentence, or (2) resubmit the case for appellate review after competent medical authority determines that the appellant has the capacity to understand and to conduct or cooperate in his appeal.

Senior Judge CARBERRY and Judge MODZELEWSKI concur.

For the Court

R.H. TROIDL
Clerk of Court

⁵ Accordingly the Motion to Set Aside the findings and sentence and dismiss the charges is denied. The Motion to Stay Proceedings is granted. The Motion for Enlargement of Time is denied as moot.