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

Before
M.D. MODZELEWSKI, C.K. JOYCE, K.K. THOMPSON
Appellate Military Judges

UNITED STATES OF AMERICA

v.

SAMUEL PACHECO JR
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 201200366
SPECIAL COURT-MARTIAL

Sentence Adjudged: 26 April 2012.
Military Judge: LtCol Robert G. Palmer, USMC.
Convening Authority: Commander, 4th Marine Logistics Group, Marine Forces Reserve, New Orleans, LA.
Staff Judge Advocate's Recommendation: Col E.R. Kleis, USMC.
For Appellant: CAPT Stephen White, JAGC, USN.
For Appellee: LT Ann E. Dingle, JAGC, USN.

30 November 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 larceny of military property of a value greater than $500.00, in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. The military judge sentenced the appellant to confinement for six months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the adjudged sentence, and, except for the

punitive discharge, ordered the sentence executed. The pretrial agreement had no effect on the adjudged sentence.

The appellant raises two assignments of error: first, that certain comments attributed to the military judge during a training evolution reflect an arbitrary and inflexible attitude about what constitutes an appropriate sentence, and call into doubt the fairness and impartiality of the appellant's court-martial; and second, that a bad-conduct discharge is inappropriately severe given the facts of the appellant's case.

After carefully considering the record of trial and the submissions of the parties, we are convinced that the findings and the 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.

Background

On 26 April 2012, the military judge sentenced the appellant. On 1 August 2012, the CA approved the sentence as adjudged. However, in the period between trial and CA's action, the military judge, on 21 June 2012, spoke for two hours to five junior Marine Corps officers providing professional military education (PME) regarding the practice of military justice. These officers were law students assigned to various Marine Corps legal offices to work with judge advocates and participate in legal training during their summer recess from law school; some were working for defense, and some for the Government. Two of these officers provided statements[1] summarizing their recollection of the military judge's comments. Appellant's Non-Consent Motion to Attach of 18 Sep 2012 at Appendices 1 and 2.

During the PME, the military judge spoke on a wide range of topics and made various statements not in keeping with standards of judicial decorum. In discussing trial strategy, he encouraged the junior officers to aggressively charge and prosecute cases, stating that Congress and the Commandant of the Marine Corps wanted more convictions, and opined that trial counsel should assume the defendant is guilty. At one point he referred to defendants as "scumbags." *Id.* at Appendix 1. A fair read of one statement is that the law student thought the remarks were intended to be humorous. *Id.* at Appendix 2.

[1] One was an affidavit and the other a declaration under penalty of perjury.

On 25 June 2012, a former Marine Corps judge advocate[2] provided an affidavit on behalf of the Government regarding her experience as a first-tour defense counsel working for the military judge in Okinawa, Japan, in 2008. The military judge was then a major in the Marine Corps assigned as the Senior Defense Counsel. This affidavit supports the premise that this military judge strongly encourages junior officers to aggressively both prosecute and defend cases, and reflects an engaged mentoring and training style similar to the one demonstrated by the military judge at the PME in April 2012. This officer's account as a defense counsel in Okinawa can be summed up as follows: "Every single one of my trial successes, during and since my tour in Okinawa, is directly attributable to [this military judge's] training and mentorship." Appellee's Non-Consent Motion to Attach of 18 Oct 2012.

Disqualification of a Military Judge

We review whether a military judge has acted appropriately *de novo*.[3] "'An accused has a constitutional right to an impartial judge.'" *United States v. Martinez*, 70 M.J. 154, 157 (C.A.A.F. 2011) (quoting *United States v. Butcher*, 56 M.J. 87, 90 (C.A.A.F. 2001)). A military judge's impartiality is crucial to the conduct of a legal and fair court-martial. *United States v. Quintanilla*, 56 M.J. 37, 43 (C.A.A.F. 2001).

RULE FOR COURTS-MARTIAL 902, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) divides the grounds for disqualification into two categories, one for actual and one for apparent bias, and applies a two-step analysis. *Quintanilla*, 56 M.J. at 45. The first step asks whether disqualification is required under the specific circumstances listed in R.C.M. 902(b). If not, then the second step asks whether the circumstances nonetheless warrant disqualification based upon a reasonable appearance of bias.[4]

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[2] This former Marine Corps judge advocate currently serves on active duty in the U.S. Navy as a lieutenant in the Judge Advocate General Corps.

[3] In applying a *de novo* standard, we follow the guidance of the Court of Appeals for the Armed Forces, which has applied the same standard when facing questions that the appellant could not reasonably have raised at trial. *See, e.g., United States v. Rose*, 71 M.J. 138, 143 (C.A.A.F. 2012) (reviewing *de novo* the deficient performance and prejudice aspects of an ineffective assistance of counsel claim); *United States v. Stefan*, 69 M.J. 256, 258 (C.A.A.F. 2010) (considering *de novo* the qualification of a staff judge advocate to make the post-trial recommendation).

[4] R.C.M. 902(a) provides that disqualification is required "in any proceeding in which [the] military judge's impartiality might reasonably be questioned."

"There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves actions taken in conjunction with judicial proceedings." *Id.* at 44. "The moving party has the burden of establishing a reasonable factual basis for disqualification. More than mere surmise or conjecture is required." *Wilson v. Ouellette*, 34 M.J. 798, 799 (N.M.C.M.R. 1991) (citing *United States v. Allen*, 31 M.J. 572, 601 (N.M.C.M.R. 1990), *aff'd,* 33 M.J. 209 (C.M.A. 1991)). With respect to the appearance of bias, the appellant must prove that, from the standpoint of a reasonable person observing the proceedings, "'a court-martial's legality, fairness, and impartiality were put into doubt by the military judge's actions.'" *Martinez*, 70 M.J. at 158 (quoting *United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000)).

In applying this analysis to the question of actual bias, we conclude that the appellant fails to demonstrate any actual bias under R.C.M. 902(b). He has made no showing that the military judge had a personal bias or prejudice concerning him or his case.

We turn next to whether there is any appearance of bias that would require disqualification under R.C.M. 902(a). A reasonable person made aware of the post-trial comments by the military judge in this case may well conclude that they are indicative of an apparent bias since the comments depart markedly from the neutral and detached posture that trial judges must always maintain. Assuming evidence of apparent bias, we next determine "whether the error was structural in nature, and therefore inherently prejudicial, or in the alternative, determine whether the error was harmless under *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 . . . (1988)." *United States v. Roach*, 69 M.J. 17, 20 (C.A.A.F. 2010).

This error was not structural. The record shows that the appellant's court-martial was a fair and impartial proceeding, occurring two months before the military judge made the comments in question. Therefore, we focus on whether the military judge's appearance of bias materially prejudiced any substantial rights of the appellant, and whether reversal is otherwise warranted in this case. The Court of Appeals for the Armed Forces in *Martinez* treated these two questions as distinct lines

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Disqualification may be required even if the evidence does not establish actual bias. *Quintanilla*, 56 M.J. 37, 45.

of analysis: the first governed by Article 59(a), UCMJ, and the second by *Liljeberg*. 70 M.J. at 159. Under *Liljeberg,* we consider "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." 486 U.S. at 864.

We do not find prejudice under either Article 59(a) or *Liljeberg,* and we find no risk of injustice to the appellant in this case. The military judge spoke in a training environment that was unrelated to the appellant's trial. To the extent that he addressed particular types of cases, the military judge focused on trial strategy in cases of sexual assault, child abuse, and child pornography. He made no mention of larceny cases, or anything that approaches those types of cases. Moreover, his comments were largely focused on the performance of Government counsel. Bias and antipathy toward an attorney are generally insufficient to disqualify a judge "unless petitioners can show that such a controversy would demonstrate a bias against the party itself." *United States v. Ettinger*, 36 M.J. 1171, 1174 (N.M.C.M.R. 1993) (quoting *Diversified Numismatics, Inc. v. City of Orlando*, 949 F.2d 382, 385 (11th Cir. 1991). Here the appellant has established no nexus between the military judge's June 2012 remarks and the appellant's case of theft of Government property heard in April 2012.

Likewise, our finding of no prejudice in this case presents no risk of injustice in other cases. That nexus simply does not exist here. Other appellants remain free to show a prejudicial nexus to their own case.

Finally, our decision will not undermine the public's confidence in the judicial process. This appellant made a provident plea of guilty, after freely negotiating a pretrial agreement with the Government and receiving protections for confinement and automatic forfeitures. He was sentenced to confinement for six months, well below the jurisdictional maximum.

One could only find prejudice in this case through the exercise of surmise and conjecture, as warned of in *Wilson.* 34 M.J. at 799. We decline to speculate, in the absence of any demonstrated prejudice, how comments made two months after a provident guilty plea could have affected this court-martial.

Sentence Appropriateness

The appellant asserts that the portion of the sentence extending to a bad-conduct discharge is inappropriately severe. Upon *de novo* review, we disagree and decline to grant relief.

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States* v. *Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). We independently determine the appropriateness of the sentence in each case we review. *See United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005).

There is nothing inappropriately severe about the punishment the appellant received after admitting that he, as a trusted noncommissioned officer and warehouseman, stole over $9,000.00 worth of military equipment from the warehouse over a six month period of time. Record at 21; Prosecution Exhibit 1 at 2-4. While there were other Marines from his command accused of committing similar crimes, the appellant was one of the more senior noncommissioned officers and was in charge of the shipping section of the warehouse. Record at 34, 73; Appellate Exhibit I at 4. Furthermore, the appellant benefited from his misconduct by trading the items on "Craigslist" in exchange for two shotguns and $200.00 cash. Record at 19, 21, 73-74.

We find that the approved sentence is appropriate for this offender and his offenses. Granting sentence relief at this point would be engaging in an act of clemency, a prerogative reserved to the CA, and we decline to do so. *Healy*, 26 M.J. at 395-96.

Conclusion

We affirm the findings and sentence as approved by the CA.

For the Court

R.H. TROIDL
Clerk of Court