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

Before
J.R. PERLAK, M.D. MODZELEWSKI, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

KEVIN M. CHAMBERS
CORPORAL (E-4), U.S. MARINE CORPS

NMCCA 201200407
SPECIAL COURT-MARTIAL

Sentence Adjudged: 21 June 2012.
Military Judge: LtCol Robert G. Palmer, USMC.
Convening Authority: Commanding Officer, MALS-31, MAG-31, 2d MAW, Beaufort, SC.
Staff Judge Advocate's Recommendation: Maj H.J. Brezillac, USMC.
For Appellant: Maj Rolando R. Sanchez, USMCR.
For Appellee: LCDR Keith B. Lofland, JAGC, USN.

19 March 2013

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.

MODZELEWSKI, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of selling military property without authority and wrongful use of a controlled substance, in violation of Articles 108 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 908 and 912a. The military judge sentenced the appellant to confinement for 8 months, forfeiture of $950.00 pay per month for 8 months, reduction to pay grade E-1, and a bad-conduct discharge. The

convening authority (CA) approved the sentence as adjudged, suspending all confinement and forfeitures pursuant to a pretrial agreement.

The appellant raises two assignments of error: (1) that the military judge was disqualified by his inflexible attitudes about sentencing and by allowing his perceptions of what Congress and the Commandant of the Marine Corps expect from Marine Corps courts-martial to enter into his deliberations; and (2) that the CA's action contains a scrivener's error.

Having considered the record of trial and the parties' pleadings, we find that the military judge made comments shortly before sentencing the appellant that, in the context of this record, would lead a reasonable person to question the military judge's impartiality. For the reasons expressed below, we set aside the sentence in our decretal paragraph and return the record to the Judge Advocate General for remand to an appropriate CA with a rehearing on sentence authorized. Arts. 59(a) and 66(c), UCMJ.

Impartiality of the Military Judge

a. Facts

On the morning of 21 June 2012, the military judge provided Professional Military Education (PME) to five "summer funners," law students on active duty for the summer. He spoke to them regarding the practice of military justice in general and the role of a trial counsel in particular. Two of the officers who attended the PME provided written statements regarding the military judge's comments, which now form the basis for the appellant's first assigned error. Appellant's Brief of 5 Dec 2012 at Appendix A. One statement was typed and signed the same day of the remarks, which was the same day as the appellant's court-martial. The second statement was written the following day.

Reading the two statements in tandem, it appears that the military judge was urging these prospective judge advocates to be aggressive when assigned as trial counsel in charging and prosecuting their cases. He drew on his own experiences as a prosecutor and spoke with some emotion and passion about individuals whom he had prosecuted. One of the junior officers noted that he found some of the comments "odd" and "somewhat bothersome," but also believed some of the comments were made in

jest. *Id.* The other officer did not opine as to whether any of the comments were made in jest, but simply recited them.

Inter alia, the military judge made the following statements, captured in the statements provided by the two junior officers:

a. The Commandant is ordering us to be more strict on criminal cases. We need more convictions.

b. As trial counsel, we need to go after these scumbags with the "fullest veracity" (sic).

c. We need to crush these Marines and get them out.

d. The defendant is guilty. We wouldn't be at this stage in trial if he wasn't guilty. It is your job to prove he is guilty. You need to take him down.

e. In a child pornography case, if the accused is acquitted because of your incompetence, you will go to hell.[1]

f. Panel members are "knuckle-draggers" and "morons."

g. The military judge also referenced being haunted by a case he prosecuted in which the accused received a relatively light sentence after killing his infant daughter, and made an off-handed comment about killing the Marine himself when he gets out of jail.[2]

The training lasted two hours and concluded at about 10:00 a.m.

That afternoon, the military judge presided over Lance Corporal Chambers's case, at which the appellant pled guilty to wrongful use of two controlled substances (narcotic painkillers) and wrongfully selling military property to support his addiction. In his sentencing argument, trial counsel requested a sentence of 90 days confinement, reduction to pay grade E-1, and a bad-conduct discharge. Record at 69. Defense counsel requested a sentence of only thirty days confinement. *Id.* at

[1] Second Lieutenant (2ndLt) N believed that the military judge was attempting to be humorous with this comment.

[2] Again, 2ndLt N believed that this comment was a stab at humor.

71. The military judge sentenced the appellant to eight months confinement, forfeitures of $950.00 for eight months, reduction to pay grade of E-1, and a bad-conduct discharge.

The record suggests that, on the afternoon of the trial, trial defense counsel was not yet aware of the military judge's comments from the morning training session. Within the week, however, the military judge was *voir dired* and challenged in an unrelated case based upon the comments, and shortly thereafter was reassigned from the trial judiciary upon his request. Defense Clemency Request of 31 Aug 2012. In his clemency request, trial defense counsel referenced these developments and asserted legal error based upon the judge's comments: he requested that the bad-conduct discharge be suspended and that the appellant instead be separated administratively. *Id*. The CA complied with the pretrial agreement, but did not grant any other relief.

In several recent cases, we have reviewed this issue involving the same comments by the same military judge. *See United States v. Ellis*, No. 201200406, 2013 CCA LEXIS 115, unpublished op. (N.M.Ct.Crim.App. 21 Feb 2013) (per curiam); *United States v. Arnold*, No 201200382, 2013 CCA LEXIS 115, unpublished op. (N.M.Ct.Crim.App. 23 Jan 2013) (per curiam); *United States v. Batchelder*, No 201200180, 2013 CCA LEXIS 116, unpublished op. (N.M.Ct.Crim.App. 10 Jan 2013) (per curiam), *petition for rev. filed,* __ M.J. __ (C.A.A.F. Mar. 8, 2013); *United States v. Pacheco*, No. 201200366, 2012 CCA LEXIS 702, unpublished op. (N.M.Ct.Crim.App. 30 Nov 2012) (per curiam); *United States v. Tiger*, No. 201200284, 2012 CCA LEXIS 718, unpublished op. (N.M.Ct.Crim.App. 30 Nov 2012) (per curiam); *United States v. Harris*, No. 201200274, 2012 CCA LEXIS 629, unpublished op. (N.M.Ct.Crim.App. 30 Nov 2012) (per curiam); *United States v. Pearce*, No. 201100110, 2012 CCA LEXIS 449, unpublished op. (N.M.Ct.Crim.App. 28 Nov 2012), *rev. granted*, __ M.J. __ (C.A.A.F. Mar. 14, 2013); and *United States v. Sanders*, No. 201200202, 2012 CCA LEXIS 441, unpublished op. (N.M.Ct.Crim.App. 13 Nov 2012), *rev. granted,* __ M.J. __ (C.A.A.F. Mar. 14, 2013).

We held in all these previous cases that, although there was an appearance of bias, the appellants had failed to establish a nexus between the military judge's remarks and their individual cases. In each case, we also noted that other appellants remain free to show a prejudicial nexus to their own case. This is the first case we have reviewed in which the military judge sat in judgment and awarded punishment after he

presented the PME training, in this case the very same day. Here, we find that the appellant has established a sufficient nexus between the military judge's remarks and his case.[3]

b. Principles of Law

We review whether a military judge has acted appropriately *de novo*.[4] "'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).

There are two grounds for disqualification of a military judge: "specific circumstances connoting actual bias and the appearance of bias." *Quintanilla*, 56 M.J. at 44-45. "The appearance standard is designed to enhance public confidence in the integrity of the judicial system. . . . The rule also serves to reassure the parties as to the fairness of the proceedings . . . ." *Id*. at 45 (citations omitted). Disqualification of a military judge is required "when 'that military judge's impartiality might reasonably be questioned.'" *Id*. (quoting RULE FOR COURTS-MARTIAL 902(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.)

"[W]hen a military judge's impartiality is challenged on appeal . . . the test is whether, taken as a whole in the context of this trial, a court-martial's legality, fairness, and impartiality were put into doubt by the military judge's actions." *Martinez*, 70 M.J. at 158 (citations and internal quotation marks omitted). The appearance of impartiality is reviewed objectively and is tested under the standard set forth in *United States v. Kincheloe*, 14 M.J. 40, 50 (C.M.A. 1982): "Any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality

[3] Since we find apparent bias with a nexus to the appellant's case, we need not consider whether there was also actual bias.

[4] 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).

might reasonably be questioned is a basis for the judge's disqualification." (Citations and internal quotation marks omitted).

c. Discussion

In the hours immediately before he presided over the appellant's case, the military judge elected to provide training to junior officers on how to be an effective trial counsel. Drawing on his own experience as a prosecutor, the military judge apparently attempted to "fire up" these prosecutors-in-training to make them passionate about cases, victims, and convictions. The format, audience, and themes were ill-advised at best. But the use of derogatory terms such as "scumbags" to describe accused servicemembers, and the terms "morons" and "knuckledraggers" to describe panel members catapulted this problematic training session out of the realm of bad ideas and into the realm of apparent bias, as these comments depart markedly from the neutral and detached posture that trial judges must always maintain.

Regrettably, the timing of the statements suggests that the military judge expressed these views within hours of presiding over this case. As we have noted in previous opinions regarding this same assigned error, the military judge focused his training on the performance of trial counsel, and the need for trial counsel to be more aggressive. He then walked into court that afternoon, heard a compelling sentencing case from the defense and without explanation adjudged a sentence significantly harsher than that requested by trial counsel.

A reasonable person who observed or had knowledge of the comments made during the morning's training session and the afternoon's court-martial would have a serious question as to the fairness and impartiality of the court. Said differently, such a person would have viewed the military judge quite differently during the afternoon's court-martial, and would surely have speculated whether the judge was truly neutral or instead harbored the sentiments that he publicly expressed just a few hours earlier. When the military judge then announced a sentence significantly harsher than that recommended by the trial counsel, an informed observer may well have concluded that the military judge was sending a message that the trial counsel was not aggressive enough, just as he had cautioned against earlier in the day. We find, therefore, not only an appearance of bias arising from the military judge's comments, but also a

nexus between the military judge's appearance of bias and this appellant's case.

Remedy

Neither R.C.M. 902(a) nor the applicable disqualification standards mandate a particular remedy in situations where a military judge should have recused or disqualified himself. As the Court of Appeals for the Armed Forces noted in *Quintanilla*:

> In *Liljeberg* [*v. Health Services Acquisition, Corp.*, 486 U.S. 847, 864 (1988)], the [Supreme] Court established a three-part test for determining whether reversal of a decision should be granted as a remedy when a judge has failed to recognize that his or her disqualification was required because the judge's impartiality might reasonably be questioned:
>
> We conclude that . . . it is appropriate to 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. We must continuously bear in mind that to perform its high function in the best way justice must satisfy the appearance of justice.

56 M.J. at 80-81 (internal citations and quotations omitted). Applying the *Liljeberg* analysis here, we find that the military judge's conduct warrants a remedy to vindicate the public's confidence in the military justice system.

First, the risk of injustice to the parties is high. Judges are invested with tremendous discretion during a trial. Even in the context of a guilty plea at a special court-martial, the military judge enjoys significant discretion, particularly in imposing a sentence. That discretion is called into question by the appearance of bias.

Secondly, while denial of relief in this case will not itself produce an injustice in other cases, granting relief will have the salutary effect of reinforcing the demand for judicial impartiality.

Thirdly, and most critically, we turn to the question of the public's confidence in our judicial process. It is

imperative that a sitting judge personify absolute neutrality in any litigation over which he presides. Because of his comments earlier in the day, a reasonable member of the public may well conclude that this military judge had shed his robe of judicial neutrality as he sat on the bench in the afternoon trial.

Unquestionably, this appellant pled providently after having negotiated a favorable pretrial agreement with the CA. Nevertheless, the appearance of bias in this case is such that it is not entirely ameliorated by the pretrial agreement or by the providence of the appellant's pleas. Moreover, we note that the defense counsel brought the matter to the CA's attention in his clemency request, and that the CA took no curative action. *Cf. Martinez*, 70 M.J. at 159. Viewed in the context of this particular case, the military judge's ill-considered commentary would trouble any observer and serves to undermine the essential faith of the general public in the military justice system.

Because this was a guilty plea, the fairness of the findings remains unquestioned. Therefore, setting aside the sentence alone will place the parties in a position to conduct a rehearing on sentence before a military judge whose appearance is not in question.

Conclusion

The findings are affirmed. The sentence is set aside. This action renders moot the appellant's other assignment of error. The record is returned to the Judge Advocate General of the Navy for remand to an appropriate CA who may order a sentence rehearing. If a rehearing as to the sentence is not ordered, the CA may approve a sentence of no punishment. The record will then be returned to the court for completion of appellate review. *Boudreaux v. United States Navy-Marine Corps Court of Military Review*, 28 M.J. 181 (C.M.A. 1989).

Chief Judge PERLAK and Judge JOYCE concur.

For the Court

R.H. TROIDL
Clerk of Court