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

Before
B.L. PAYTON-O'BRIEN, R.Q. WARD, J.R. MCFARLANE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ERIK J. ELLIS
STAFF SERGEANT (E-6), U.S. MARINE CORPS

NMCCA 201200406
SPECIAL COURT-MARTIAL

Sentence Adjudged: 24 May 2012.
Military Judge: LtCol Robert Palmer, USMC.
Convening Authority: Commanding Officer, 4th Marine Corps District, New Cumberland, PA.
Staff Judge Advocate's Recommendation: Maj S.D. Manning, USMC.
For Appellant: Maj Rolando Sanchez, USMCR.
For Appellee: Maj William C. Kirby, USMC; LT Philip Reutlinger, JAGC, USN.

21 February 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.

PER CURIAM:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of two specifications each of violating a lawful general order and sodomy, in violation of Articles 92 and 125, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 925. The military judge sentenced the appellant to confinement for six months, reduction to pay grade E-1, forfeiture of $950.00 pay per month for six

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months, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged and, except for the discharge, ordered it executed. A pretrial agreement had no effect on the sentence.

In a sole assignment of error, the appellant argues that comments by the military judge subsequent to the appellant's trial displayed an inflexible attitude about sentencing and therefore the military judge was disqualified to preside at his trial. He urges us to either remand his case for resentencing by a different military judge or, in the alternative, approve a sentence no greater than that requested by his defense counsel at trial. Appellant's Brief of 29 Nov 2012 at 10-11.

After consideration of the pleadings of the parties and reviewing the entire record of trial, we are convinced 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.

Factual Background

The appellant, a 36-year-old recruiter assigned to rural Virginia, engaged in a sexual relationship with a 21-year-old female recruit applicant, LR, who he had recently contracted into the Marine Corps Delayed Entry Program (DEP). He carried on a sexual relationship with LR over the course of several months until she shipped out for recruit training. Their relationship included various instances of sexual intercourse and sodomy at either the appellant's residence or LR's family residence. Through their relationship, the appellant met LR's parents and her younger sister, AR.

Approximately one year later, the appellant contracted LR's younger sister, AR, now 17 years old and a high school student. He likewise initiated a sexual relationship with AR that similarly included instances of sexual intercourse and sodomy until she left for recruit training.[1] Their sexual liaisons occurred at the appellant's residence, his recruiting office, in his vehicle, and on one occasion at a public park.

[1] In both instances, the appellant pleaded guilty to violating Depot Order 1100.5A, dated 24 March 2005, which prohibited "engaging in, encouraging, soliciting, or otherwise seeking a nonprofessional personal relationship with . . . a prospective recruit applicant or member of the Delayed Entry Program." Charge Sheet; *see also* Prosecution Exhibit 2 at 1-2.

Disqualification of a Military Judge

We have reviewed this issue involving the same comments by the same military judge in a number of other cases. *See United States v. Munoz*, No. 201200185, 2013 CCA LEXIS 45, unpublished op. (N.M.Ct.Crim.App. 31 Jan 2013) (per curiam); *United States v. Arnold*, No. 201200382, 2013 CCA LEXIS 32, unpublished op. (N.M.Ct.Crim.App. 22 Jan 2013) (per curiam); *United States v. Batchelder*, No. 201200180, unpublished op. (N.M.Ct.Crim.App. 10 Jan 2013) (per curiam); *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), *petition for review filed*, __ M.J. __ (C.A.A.F. Jan. 22, 2013); *United States v. Sanders*, No. 201200202, 2012 CCA LEXIS 441, unpublished op. (N.M.Ct.Crim.App. 13 Nov 2012), *petition for review filed*, __ M.J. __ (C.A.A.F. Jan 11, 2013). Accordingly, we will apply the same legal analysis here.

Approximately one month after the appellant's trial,[2] he provided professional military education (PME) to several junior Marine Corps officers regarding the practice of military justice. During the course of the two-hour PME, in what may have been an effort at humor, the military judge made several statements not in keeping with standards of judicial decorum. Those comments included referring to the accused as "scumbags," telling trial counsel that they should consider all accused to be guilty, and telling trial counsel that they will "go to hell" if they allow anyone accused of child pornography to go free due to the trial counsel's incompetence. The military judge also commented that both Congress and the Commandant of the Marine Corps wanted more convictions and a tougher posture on crime. 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 assigned error. See Appellant's Brief at Appendix A.

[2] The military judge sentenced the appellant on 24 May 2012. The military judge made the comments that form the basis of the appellant's assigned error on 21 June 2012. The convening authority approved the sentence on 12 August 2012.

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 (2012 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]

"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 (citation omitted). "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, 605 (N.M.C.M.R. 1990)). 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)).

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

On the question of actual bias, we find that the appellant has failed to demonstrate any actual bias under R.C.M. 902(b). He offers no evidence, and we find none in the record, of a personal bias by this military judge concerning either the appellant or the appellant's case. We next turn to the question of an appearance of bias.

As we have said in previous cases, a reasonable person made aware of the military judge's comments may conclude that they reveal a bias since the comments depart markedly from the neutral and detached posture that trial judges must always maintain. Assuming evidence of apparent bias, we must decide whether "[this] 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).

After reviewing the record, we find that this error was not structural. Nothing in the record indicates that the appellant's trial was anything other than a fair and impartial proceeding. We next turn our attention to whether this apparent bias materially prejudiced the appellant's substantial rights, 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 of analysis: Article 59(a), UCMJ controls the first; *Liljeberg* the second. 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*. First, the military judge made his comments in a training environment wholly unrelated to the appellant's trial. There are no similarities between either the appellant or the facts of his case and any of the topics addressed by the military judge. As we have noted in the past, the judge's 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 not established any nexus between the military

judge's remarks and the appellant's case. Likewise, our finding of no prejudice in this case presents no risk of injustice in other cases. 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. The six-month sentence of confinement from the military judge was less than both the ten months requested by trial counsel and the eight-month confinement cap bargained for by the appellant and his counsel in the pretrial agreement.

A finding of prejudice in this case would be predicated simply on the comments themselves -- a conjecture cautioned against by *Wilson*. 34 M.J. at 799.

Unlawful Command Influence

Finally, as part of his argument regarding the post-trial comments made by the military judge, the appellant raises the issue of unlawful command influence (UCI). When raising this issue on appeal, the appellant must "'(1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that the unlawful command influence was the cause of the unfairness.'" *United States v. Dugan*, 58 M.J. 253, 258 (C.A.A.F. 2003) (quoting *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)). We review such allegations *de novo*. *Biagese*, 50 M.J. at 150.

The appellant bases this argument on the military judge's references to a desire from both Congress and the Commandant of the Marine Corps for more convictions in the military. He cites these comments as evidence of both actual and apparent UCI. Appellant's Brief at 9-10.

Assuming without deciding that the appellant has met his burden of showing facts which, if true, constitute UCI, he fails to meets his burden of demonstrating that his trial was unfair due to the presence of this UCI. *Dugan*, 58 M.J. at 258. The military judge's comments bore no factual relationship to the appellant's case. Most importantly, we find no evidence of any unfairness in the appellant's trial, particularly in light of the fact that the military judge awarded less punishment than that requested by the Government and bargained for by the appellant. These facts do not support any retroactive finding of UCI. We will not presume that a military judge has been influenced simply by the proximity of events which give the

appearance of command influence in the absence of a connection to the result of a particular trial. *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991).

Conclusion

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

For the Court

R.H. TROIDL
Clerk of Court