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

Before
R.Q. WARD, J.R. MCFARLANE, K.M. MCDONALD
Appellate Military Judges

UNITED STATES OF AMERICA

v.

WAYNE A. LEWIS, JR.
HOSPITALMAN CORPSMAN (E-3), U.S. NAVY

NMCCA 201300203
GENERAL COURT-MARTIAL

Sentence Adjudged: 3 March 2013.
Military Judge: LtCol Eugene Robinson, Jr., USMC.
Convening Authority: Commanding General, 3d Marine Logistics Group, Okinawa, Japan.
Staff Judge Advocate's Recommendation: Maj P.D. Sanchez, USMC.
For Appellant: CAPT Brent Filbert, JAGC, USN.
For Appellee: Capt Matthew Harris, USMC.

21 November 2013

OPINION OF THE COURT

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of one specification of possessing and one specification of receiving, child pornography, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The military judge sentenced the appellant to five years confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. Pursuant to a pretrial agreement (PTA), the convening authority (CA) approved the sentence as adjudged, but suspended all confinement in excess of 30 months. The appellant now assigns a single error: that the military judge erred by

failing to disqualify himself in accordance with RULE FOR COURTS-MARTIAL 902(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.).[1] We disagree and conclude the findings and sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant began downloading child pornography prior to enlisting into the Navy in May of 2009. He brought child pornography to his first duty assignment at Naval Station Great Lakes, Illinois, and to his subsequent assignment in Iwakuni, Japan. Between late 2011 and August of 2012, the appellant possessed approximately 3,300 still images and 120 videos containing child pornography. The appellant moved these images from his laptop, which he used to search for and download them, onto multiple electronic storage devices, to include a thumb drive. After the appellant lost that thumb drive, it was found by a fellow Sailor who discovered the child pornography and contacted law enforcement officials, leading to the appellant's arrest and prosecution.

The appellant, facing a maximum possible punishment that included confinement for 20 years, entered into a PTA with the CA wherein the appellant agreed to plead guilty in exchange for a 30 month cap on confinement. Prior to trial, the military judge was accidentally provided with both parts of the PTA, to include the sentence limitation portion (Part II). Upon realizing that he had Part II of the PTA, the military judge "immediately turned it over and [he] walked it straight to [his] shredder. . . ." Record at 7. Immediately after putting his qualifications on the record, the military judge notified both parties about this issue, explained to them that he had not read the actual limitations contained in Part II, and gave both sides an opportunity to *voir dire* or challenge him. Neither side asked the military judge any questions regarding Part II of the PTA, nor did either side offer any challenges. Shortly thereafter, the military judge explained forum selection to the appellant, who opted to be tried by military judge alone.

Discussion

[1] This assignment of error was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

R.C.M. 902(a) provides that "[e]xcept as provided in subsection (e) of this rule, a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." Further, a military judge may accept a waiver by the defense of any grounds for disqualification arising under R.C.M. 902(a), provided that the acceptance of the waiver is preceded by a "full disclosure on the record of the basis for disqualification." R.C.M. 902(e).

The appellant's argument in this case fails on several levels. First, the record is clear that the military judge did not read, and therefore had no knowledge of, the contents of Part II of the PTA. Absent such knowledge, the appellant has no reasonable basis to argue for his disqualification. Second, even if the military judge had seen the contents of Part II, that fact, in and of itself, would not lead to his disqualification. "A military judge, sitting alone, is presumed to consider only that which is proper when adjudging the sentence." *United States v. Key*, 55 M.J. 537, 541 (A.F.Ct.Crim.App. 2001), *aff'd*, 57 M.J. 246 (C.A.A.F. 2002) (citation and internal quotation marks omitted). Lastly, any issue that might have existed regarding the military judge having been provided with a copy of Part II of the PTA was constructively waived when the appellant's trial defense counsel declined to *voir dire* or challenge him on the issue, and then the appellant subsequently elected trial by judge alone under R.C.M. 903(a)(2). *See United States v. Campos*, 37 M.J. 894, 900 n.2 (A.C.M.R. 1993) (holding that knowledge of a judge's potential disqualification, failure to object, and subsequent election for trial by judge alone constituted constructive waiver under R.C.M. 902(e)), *aff'd*, 42 M.J. 253 (C.A.A.F. 1995).

Conclusion

The findings and the sentence as approved by the CA are affirmed.

For the Court

R.H. TROIDL
Clerk of Court