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

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

UNITED STATES OF AMERICA

v.

JUSTIN D. LOYA
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 201200436
SPECIAL COURT-MARTIAL

Sentence Adjudged: 6 June 2012.
Military Judge: LtCol Nicole K. Hudspeth, USMC.
Convening Authority: Commanding Officer, 1st Battalion, 6th Marines, 2d Marine Division, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: Maj J.N. Nelson, USMC.
For Appellant: Capt Jason R. Wareham, USMC.
For Appellee: LT Philip S. Reutlinger, JAGC, USN.

20 June 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.

JOYCE, Judge:

A panel of members with enlisted representation convicted the appellant, contrary to his plea, of one specification of wrongfully using marijuana while receiving special pay in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The members sentenced the appellant to forfeiture of $994.00 pay per month for two months, reduction to pay grade E-1, confinement for two months, and a bad-conduct

discharge. The convening authority (CA) approved the sentence and ordered it executed.[1]

The appellant assigns three errors:[2] first, that the military judge abused her discretion by denying the defense request to *voir dire* the members when they reached a guilty verdict after only eight minutes; second, that the military judge placed the fairness and impartiality of the court-martial into doubt when she guided the trial counsel in his attempts to admit evidence; and third, that the military judge abused her discretion by allowing the Government to reopen its case over a defense objection after both sides had rested.

With respect to the first and third assignments of error, we find no abuse of discretion. We also conclude that, taken as a whole, the military judge's conduct did not place the fairness and impartiality of this court-martial into doubt.

Background

In late 2011, the appellant was deployed to Afghanistan and submitted a urine sample as part of a unit-wide sweep. According to the testimony of the Substance Abuse Control Officer, the appellant appeared nervous when giving the sample. The sample was eventually tested at the Navy Drug Screening Laboratory (the lab), and at trial, a lab certifying official (the expert) reviewed the lab's report and opined that the

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[1] To the extent that the CA's action purports to execute the bad-conduct discharge, it is a legal nullity. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

[2] Though not raised as an error, the appellant did not enter pleas on the record. The "Pretrial Information Report" (PTIR), Appellate Exhibit I, which was signed by the trial and detailed defense counsel, reflects that the appellant's anticipated pleas were Not Guilty, and that the appellant would issue a written notice of pleas on a future date. At arraignment, he reserved entering pleas in accordance with the PTIR. AE I; Record at 8. There was no further discussion of the appellant's pleas until the military judge informed the members that the appellant had "entered a plea of not guilty" at an "earlier session." Record at 28. We conclude that the failure to record the appellant's pleas on the record constituted procedural error; however, no prejudice resulted and there is no reason to question the findings. *See United States v. Fuentes*, No. 201300006, 2013 CCA LEXIS __, unpublished op. (N.M.Ct.Crim.App. 13 Jun 2013) (citing *United States v. Jackson*, No. 200900427, 2010 CCA LEXIS 65, n.1, unpublished op. (N.M.Ct.Crim.App. 25 May 2010) (finding no error where pleas and forum selection were reserved at arraignment but never entered onto the record by the appellant), and *United States v. Gilchrist*, 61 M.J. 785, 787 n.2 (Army Ct.Crim.App. 2005) (finding no error where the court-martial proceeded as if no guilty plea had been entered)).

appellant's sample was confirmed positive for tetrahydrocannabinol (THC), the active ingredient in marijuana.

Leading up to the moment when the expert offered this opinion, the Government's presentation of its case was, in a word used by the military judge, "ugly." Record at 163. The trial counsel, a junior officer, struggled to overcome repeated foundational objections by the civilian defense counsel, most of which addressed hearsay aspects of the documentary evidence. The military judge sustained several of the objections, but she then allowed the trial counsel an opportunity to lay a foundation for the objected-to evidence, occasionally requiring more than the military rules of evidence required. As the trial progressed, the military judge became increasingly persistent and prescriptive and, following various defense objections, she provided direct guidance to the trial counsel at least ten times over the course of 50 pages of trial transcript.

Unfortunately, several of the military judge's comments likely confused counsel and possibly the members. For example, she summarily overruled the first defense hearsay objections to the sample bottle and a ledger bearing the appellant's name, only to reverse herself and "un-admit" those same items a short while later. *Id.* at 121; Prosecution Exhibits 2 and 4. She then told the members that she would "allow the government an opportunity to ask a few more questions to make them admissible." Record at 121.

The military judge also required the trial counsel to establish the machine-generated documents in the lab report as business records, even though they were not hearsay and thus required no hearsay exception. *See United States v. Blazier*, 69 M.J. 218, 224 (C.A.A.F. 2010). The trial counsel had trouble laying this same foundation earlier for a document that actually required it, and thus his ensuing efforts became tortuous. The military judge sustained a defense hearsay objection to the expert's opinion because, as she told the trial counsel, "You haven't laid the regular course of business stuff." Record at 150.

Soon after this exchange, in an Article 39(a), UCMJ, session, the civilian defense counsel stated more specific objections to most of the pages of the lab report that the trial counsel had offered as Prosecution Exhibit 5. Some of these pages were clearly testimonial hearsay under *United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011) and its predecessors, although it is unclear whether the trial counsel was aware of

that line of cases. For the pages that were not testimonial hearsay because they were machine-generated, the defense objected that the trial counsel had not laid a foundation as to how they were created. The military judge told the trial counsel that the defense's stated objections provided him "a cook book of what you need to fix."[3] Record at 153.

After the Article 39(a) session, the trial counsel struggled to "fix" his case and the military judge continued to emphasize unnecessary foundational elements. She acknowledged that she had "spoon fed" the trial counsel and then directed him again to "hit [the reliability of the tests] and . . . the business records exception. The routine use and printout of test number three." Record at 160-61. Ultimately, the expert offered his opinion that the appellant's sample was confirmed positive for THC, and five machine-generated pages were admitted as Prosecution Exhibit 5.[4]

After the Government rested its case, the defense rested without offering evidence and moved under RULE FOR COURTS-MARTIAL 917, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) for a finding of not guilty on the element of receiving special pay, since the Government had offered no evidence related to the appellant's pay. The trial counsel responded that the members could reasonably infer the receipt of special pay from testimony that the appellant was in Afghanistan when he submitted the urine sample, and the military judge denied the motion. However, the military judge asked the Government whether it could prove within 15 minutes that the appellant had actually received the special pay, and the trial counsel responded in the affirmative. The defense objected to the reopening of the Government's case, but the military judge allowed it, and an adjutant testified that he submitted paperwork for all Marines in the unit to receive special pay, and that the appellant never complained to him of not receiving it.

The adjutant was the final witness before the court-martial closed for deliberations. It reconvened 19 minutes later and the members rendered a guilty verdict on the sole charge and specification. The next day, the civilian defense counsel moved

[3] This is perhaps the most substantial guidance the military judge provided the trial counsel. The military judge also made these comments after eliciting a detailed basis for the objection from the civilian defense counsel. We discourage military judges from making such comments.

[4] There were originally 30 pages included in Prosecution Exhibit 5 for identification, but ultimately only 5 of the 30 pages were admitted into evidence. Record at 155.

for a mistrial based on his proffer[5] that the deliberations had lasted only eight minutes, raising in his view a reasonable inference that the members had not followed the military judge's instructions to conduct a secret ballot. In the alternative, the defense requested that counsel or the military judge *voir dire* the members to ensure that there was no unlawful influence in the deliberations. The military judge denied both requests. Record at 217-18.

Discussion

We first address the length of the members' deliberations and the reopening of the Government's case. Both decisions by the military judge are reviewed for an abuse of discretion. *United States v. Lambert*, 55 M.J. 293, 296 (C.A.A.F. 2001) (addressing inquiries into members' deliberations); *United States v. Ray*, 26 M.J. 468, 470 (C.M.A. 1988) (noting the "flexible standard" for reopening a party's case).

1. Members' Deliberations

Court-martial members are presumed to follow a military judge's instructions when conducting their deliberations, and MILITARY RULE OF EVIDENCE 606(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) imposes a "blanket prohibition" on subsequent judicial inquiry about what took place. *United States v. Loving*, 41 M.J. 213, 237 (C.A.A.F. 1994). It is a rare case where such inquiry is called for: only if the members were affected by extraneous information, unlawful command influence, or any other improper influence from outside the court-martial. MIL. R. EVID. 606(b).

In *Loving*, affidavits from the members themselves alleging irregularities were not "competent evidence" to trigger a MIL. R. EVID. 606(b) exception. 41 M.J. at 236. *A fortiori*, the proffer of counsel here, which relates only to the length of the deliberations and bears no nexus to their content, does not justify piercing MIL. R. EVID. 606(b)'s blanket prohibition. There is simply nothing in the record that indicates the presence of any improper influence: in the specific context of Article 52(a)(2), UCMJ, the short deliberations may be

[5] We call the eight-minute assertion a "proffer" because that time lapse was asserted in the defense motion and brief on appeal; the record reflects that the court was called to order 19 minutes after closing for deliberations. Record at 212. We also note the Government has not challenged the eight-minute deliberations assertion at trial or on appeal.

attributable to there being only one charge and specification, three witnesses, and a small number of exhibits.

2. Reopening of the Government's Case

We are also not convinced that the military judge abused her discretion by allowing the Government to reopen its case. R.C.M. 913(c)(5) makes this a "matter of discretion," and appellate courts have declined to draw any bright lines to cabin that discretion. *United States v. Masseria*, 13 M.J. 868, 870-71 (N.M.C.M.R. 1981). The appellant suggests that there is such a bright line, that the party seeking to reopen *must* proffer a "reasonable excuse" for doing so. In fact, that standard is dicta "impl[ied]" by federal analogues and stated in "should" form by the Court of Appeals for the Armed Forces. *See Ray*, 26 M.J. at 471. Thus, we decline to hold that a party must place its reason for reopening on the record, and we conclude from our review of this record that the military judge was within her discretion to allow a very brief reopening subject to defense cross-examination and surrebuttal.[6]

3. The Appearance of Impartiality

Finally, we consider the question of whether the military judge should have *sua sponte* disqualified herself because her conduct might cause one to reasonably question the fairness and impartiality of this court-martial. R.C.M. 902(a). The appellant argues that "the military judge's material assistance to the Government's case raises serious doubt about the fairness and impartiality of the proceedings." Appellant's Brief of 8 Jan 2013 at 11. We disagree.

We review a military judge's decision whether to disqualify herself for an abuse of discretion, and "the test is objective, judged from the standpoint of a reasonable person observing the proceedings." *United States v. Quintanilla*, 56 M.J. 37, 77-78 (C.A.A.F. 2001) (citation and internal quotation marks omitted).

[6] We also conclude that the appellant suffered no prejudice from the military judge's decision, because the Defense motion and her ruling addressed only the appellant's receipt of special pay. The receipt of special pay, if proven, increases a marijuana user's maximum sentence from 2 to 7 years, MCM, Part IV, ¶37.e, but the appellant's confinement was capped at one year by the jurisdictional limits of the special court-martial. Thus, the Government achieved no benefit, and the appellant suffered no prejudice, by proof of that element at trial. While it could have affected the appellant's sentence, the fact that the appellant was deployed and receiving special pay would have been proper evidence in aggravation even if not charged as a sentence-enhancer.

"When an appellant . . . does not raise the issue of disqualification until appeal, we examine the claim under the plain error standard of review." *United States v. Martinez*, 70 M.J. 154, 157 (C.A.A.F. 2011) (citation omitted). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice." *Id*. (citation omitted).

It is significant that, at trial, the civilian trial defense counsel did not object to the military judge's comments or move the military judge to disqualify herself. *United States v. Cooper*, 51 M.J. 247, 250 (C.A.A.F. 1999) (failure to object to the military judge's questions or to move to disqualify the military judge "strongly suggests that the defense did not believe these questions caused the military judge to lose his impartiality or his appearance of impartiality on this basis"). When those in the room do not question the judge's impartiality, it becomes more difficult to overcome the "high hurdle" of proving that the military judge was partial or appeared to be so despite our "strong presumption" to the contrary. *Quintanilla*, 56 M.J. at 44; *United States v. Foster,* 64 M.J. 331, 333 (C.A.A.F. 2007) ("Failure to object at trial . . . may present an inference that the defense believed that the military judge remained impartial.").

We are not convinced that the military judge appeared to be partial to the Government. Her actual comments before the members were often critical of the trial counsel and, if anything, revealed her frustration with trial counsel.[7] More importantly, her apparent objective fell squarely within the prerogative reserved for military judges under MIL. R. EVID. 611(a): to "exercise reasonable control over . . . interrogat[ion] of witness and present[ation] of evidence" to "avoid needless consumption of time" and to make the "presentation of the evidence effective for the ascertainment of the truth." Likewise, trial judges routinely ask foundational questions themselves, and doing so can be proper and efficient even if it benefits one party. *See, e.g., United States v. Ramos*, 42 M.J. 392, 396 (C.A.A.F. 1995) (approving of a military judge's inquiry into the foundation for a witness's opinion); *see also United States v. Acosta*, 49 M.J. 14, 17-18 (C.A.A.F. 1998) (describing a military judge's "wide latitude" to question

[7] For example, in front of the members, when the trial counsel began laying a foundation for documents that the defense had not objected to, instead of focusing on the objected-to documents, the military judge said: "Are you aware of your own exhibit, trial counsel? . . . That's because you weren't paying attention." Record at 156-57.

witnesses). If this military judge could have asked many of the foundational questions herself, despite the fact that they related to damaging evidence against the appellant, her direction that the trial counsel do so is not enough to create the appearance of partiality, particularly where she instructed the members to disregard any comment by her that could indicate her opinion on the accused's guilt or innocence. Record at 193; *cf. United States v. Cooper*, 51 M.J. 247, 251 (C.A.A.F. 1999) (finding no appearance problem in part due to the military judge's "unequivocal instructions to the members that they should not view his questions as indicating a pro-prosecution opinion . . . .")

The appellant urges us to distinguish this case from others because this military judge's involvement did not simply clarify factual matters for the benefit of the members, as has been approved in past cases. *See Ramos*, 42 M.J. at 396. Instead, the appellant contends that the military judge's repeated interventions enabled the Government to admit the linchpin of its case, Prosecution Exhibit 5 (a portion of the lab report), which it might have failed to do otherwise because of the trial counsel's incompetence. We again disagree.

Prosecution Exhibit 5 was not the linchpin of the Government's case. The five pages of machine-generated data admitted as Prosecution Exhibit 5 conveyed little to the fact finder on its own — its role was to form the basis for the expert's opinion about the appellant's level of THC. That *opinion* was the linchpin of the Government's case; indeed, the trial counsel need not have admitted Prosecution Exhibit 5 at all. Thus, a reasonable observer would have seen the military judge focus on a comparatively minor piece of evidence which, even if it was somehow credited by her attention to it (as the appellant argues), was indecipherable standing apart from the expert's testimony, over which the military judge exerted little to no influence. The record portrays a military judge who was frustrated, but not partisan, and certainly not one whose conduct presents a plain and obvious error.

Finally, we note that even if one concluded from this record that the military judge slipped off the "tightrope over which a trial judge must tread," *United States v. Shackelford*, 2 M.J. 17, 19 (C.M.A. 1976), reversal is not required for every judge's failure to recuse. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 862 (1988). We can identify no prejudice under either applicable standard: Article 59(a), UCMJ,

or the analysis set forth in *Liljeberg*. *Martinez*, 70 M.J. at 159.

Under Article 59(a), there was no material prejudice, because nothing the military judge did, including her comments or failure to disqualify herself, affected the state of the evidence. The documents ultimately admitted and considered by the members as Prosecution Exhibit 5 were legal and permissible evidence of the appellant's guilt. Moreover, we are confident that the trial counsel would have eventually been able to lay a proper foundation, absent any guidance from the military judge.

Applying *Liljeberg*, we have determined that the reversal is not otherwise warranted here in order to "vindicate public confidence in the military justice system." *Martinez*, 70 M.J. at 158. In doing so, we have evaluated "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." *Liljeberg*, 486 U.S. at 864.

When considering the risk of injustice to the appellant or any similarly situated accused, our analysis of this record is objective, conducted not from the appellant's perspective but from that of a disinterested, reasonable observer. *United Farm Workers of America, AFL-CIO v. Superior Court*, 170 Cal. App. 3d 97, 106 n.6 (1985). Surely, this appellant and others would prefer that military judges remain passive and foreclose a prosecutor's attempt to admit evidence after a single failure. But the reasonable observer understands that "[i]t is well-settled in military law that the military judge is more than a referee." *United States v. McIlwain*, 66 M.J. 312, 314 (C.A.A.F. 2008). A military judge is a "presiding authority" with "broad discretion" to ensure that a fair trial is conducted, which properly allows for a more active role with respect to evidentiary matters. *Quintanilla*, 56 M.J. at 41. The military judge may have played that role inelegantly here, but the end result is that admissible evidence was admitted. We thus perceive no risk of injustice.

Conclusion

The findings and the sentence, as approved by the CA, are correct in law and fact and are affirmed. Arts. 59(a) and 66(c), UCMJ.

Senior Judge MODZELEWSKI and Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court