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

Before
M.D. MODZELEWSKI, R.G. KELLY, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

STEVEN W. MYRICK
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 201200404
SPECIAL COURT-MARTIAL

Sentence Adjudged: 1 June 2012.
Military Judge: LtCol Robert G. 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 R. Sanchez, USMCR.
For Appellee: Maj Paul M. Ervasti, USMC; LT Lindsay P. Geiselman, JAGC, USN.

19 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 violating a general order by engaging in inappropriate relationships with two potential recruits and making a false official statement, in violation of Articles 92 and 107, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 907. The military judge sentenced the appellant to confinement for five months, reduction to pay

grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.[1]

The appellant raises one assignment of error: 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. Additionally, the assignment alleges unlawful command influence.

After carefully considering the record of trial and the submissions of the parties, 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.

Disqualification of a Military Judge

The assignment of error focuses on post-trial comments made by the 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 *See United States v. Arnold*, No 201200382, 2013 CCA LEXIS 32, unpublished op. (N.M.Ct.Crim.App. 23 Jan 2013) (per curiam); *United States v. Batchelder*, No 201200180, unpublished op.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, unpublished op. (N.M.Ct.Crim.App. 30 Nov 2012) (per curiam); *United States v. Tiger*, No. 201200284, unpublished op. (N.M.Ct.Crim.App. 30 Nov 2012) (per curiam); *United States v. Harris*, No. 201200274, unpublished op. (N.M.Ct.Crim.App. 30 Nov 2012) (per curiam); and *United States v. Sanders*, No. 201200202, 2012 CCA LEXIS 441, unpublished op. (N.M.Ct.Crim.App. 13 Nov 2012). Accordingly, we will apply the same legal analysis here.

Approximately three weeks after the military judge sentenced the appellant,[2] he provided professional military education (PME) to several junior Marine Corps officers, who were law students at the time, regarding the practice of military justice in general, and the role of a trial counsel in particular. In discussing trial strategy, the military judge

[1] To the extent that the action purports to suspend all confinement in excess of six months, in accordance with the pretrial agreement, it is a nullity as there was no adjudged confinement over six months to suspend.

[2] The military judge sentenced the appellant on 1 June 2012 and made the statements in issue on 21 June 2012. The CA approved the sentence as adjudged on 10 September 2012.

encouraged the junior officers to aggressively charge and prosecute cases, referred to "crushing" the accused, stated that Congress and the Commandant of the Marine Corps wanted more convictions, and opined that trial counsel should assume the defendant is guilty. 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.[3] A fair read of one statement is that the law student found the military judge's comments "odd" and "somewhat bothersome," but also believed some of the comments were made in jest.

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).

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.[5]

"There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high

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[3] One of the officers who provided a statement was the assistant trial counsel in this case, but his statement is silent on the appellant's trial.

[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).

[5] 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.

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, 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)).

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. 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 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. 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 contested trials for sexual assault, child abuse, and child pornography. He made no mention of recruiter misconduct cases, or anything that remotely approached this appellant's type of case. 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 his case and the military judge's remarks.

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 provident pleas of guilty, after freely negotiating a pretrial agreement with the Government and receiving protection from all confinement in excess of six months. The military judge did not "crush" the appellant, but instead awarded a sentence of only five months, far below the jurisdictional maximum, in a case that involved two young potential recruits and lying to an investigating officer.

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. In the absence of any evidence, we decline to speculate how comments made in a training environment about very different types of cases could have affected this court-martial.

Unlawful Command Influence

As part of his argument regarding the post-trial comments made by the military judge, the appellant raises the issue of unlawful command influence. 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)). Here, the appellant attempts to raise unlawful command influence based on a report that the military judge made comments that Congress and the Commandant of the Marine Corps want to see more convictions. Even if this were enough to satisfy the first prong, the appellant fails to show that his proceeding was unfair and that the unlawful command influence was the cause of the unfairness. The events are simply too attenuated from the facts of the appellant's court-martial to support a retroactive finding of unfairness in the proceedings.

While "[t]here is no doubt that the appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial. . . . [t]here must be something more than an appearance of evil to justify action by an appellate court in a particular case. Proof of [command influence] in the air, so to speak, will not do. 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) (citations, internal quotation marks, and footnote omitted).

Conclusion

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

For the Court

R.H. TROIDL
Clerk of Court