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.

LEVON TYLER
STAFF SERGEANT (E-6), U.S. MARINE CORPS

NMCCA 201200327
GENERAL COURT-MARTIAL

Sentence Adjudged: 21 March 2012.
Military Judge: LtCol Robert Palmer, USMC.
Convening Authority: Commanding General, 2d Marine Aircraft Wing, Cherry Point, NC.
Staff Judge Advocate's Recommendation: Col S.C. Newman, USMC.
For Appellant: LT Robert E. Burk, JAGC, USN; LT Ryan Mattina, JAGC, USN.
For Appellee: Maj William Kirby, USMC; Maj Paul Ervasti, USMC.

21 March 2013

OPINION OF THE COURT

PAYTON O'BRIEN, Judge:

A panel of officer and enlisted members convicted the appellant at a general court-martial, contrary to his pleas, of one specification of violating a lawful general order (Government travel charge card program regulation), 45 specifications of larceny, and one specification of stealing mail, in violation of Articles 92, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 921, and 934. The appellant was sentenced to confinement for 10 months, reduction to pay

grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant has asserted four assignments of error[1]:

(1) The military judge's post-trial statements cast doubt upon the fairness and impartiality of the appellant's court-martial;

(2) The evidence is factually insufficient to sustain the appellant's convictions;

(3) The appellant's convictions for theft of a Government travel card and theft of mail are an unreasonable multiplication of charges; and

(4) The trial defense counsel was ineffective during trial on the merits and sentencing.[2]

Factual Background

In October 2008, the appellant was serving as the administrative chief in the S-1 department at Marine Fighter Attack Squadron (VMFA) 251, in Beaufort, South Carolina. As part of his military duties, he had been appointed by his commanding officer as the agency program coordinator (APC) for his command's Government travel charge card (GTCC) program. As the APC, he had various duties in his management of the GTCC program, including establishing new accounts, ordering new or replacement charge cards, activating or deactivating accounts, verifying balances and transactions, raising credit and cash advance limits, and speaking with bank customer service representatives. The appellant's role as APC allowed him access to GTCC account numbers and other personally identifiable information (PII) related to the GTCC program. The appellant's office was located within the S-1 spaces at VMFA-251.

In mid-to-late 2009, over $14,000.00 was stolen by utilizing GTCCs that had been issued to or in the names of former members of the command. Various Marines previously belonging to VMFA-251 who had left active duty from late-2008 to mid-2009 had turned in their cards to the appellant in his

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[1] Assignments of Error 3 and 4 are raised pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982).

[2] We find this assignment of error to be without merit. *United States v. Matias*, 25 M.J. 356 (C.M.A. 1987).

capacity as the APC prior to departing active duty. Other VFMA-251 Marines turned in their cards to the S-1 shop prior to departing from active duty; others still had never received a card despite having submitted an application while on active duty. In any event, the various former VMFA-251 Marines had left active duty with no money owed to the GTCC issuer (the bank).

A command investigation commenced when one of the former VMFA-251 Marines was contacted by the bank regarding the delinquent GTCC account in his name. The veteran Marine thereafter contacted the executive officer of Headquarters Squadron, Marine Aviation Group Three One (MAG-31) to report this contact.

The Government's primarily circumstantial case revealed that the appellant had taken advantage of his portion as APC by using the various cards not assigned to him mostly at automated teller machines (ATMs) to take cash advances, although there were a few card purchases of goods at gas stations. The credit limits were regularly increased, which enabled greater amounts of money to be withdrawn via ATM machines. The evidence revealed that the ATM machines utilized by the appellant were located in and around places close to his home of record as well as the home of his family members, to include locations where the appellant had used his own GTCC.

Additionally, bank records[3] indicated that the appellant's first and last name, the VMFA-251 administrative chief's telephone number, the appellant's verification password, and the command's five-digit hierarchy level number were used by the individual who contacted the bank to request increases in credit limits. A verification password is a number specifically established by an APC to be used as a means of identification when contacting the bank to conduct business over the telephone. The bank records were replete with instances in which an individual called using the appellant's first and last name and his verification password, a password which the appellant was required to establish for authentication purposes by the bank.

[3] Prosecution Exhibits 7, 9, 11, 13, and 15.

Military Judge's Post Trial Comments

The appellant's first assignment of error asserts that the post-trial comments created an appearance of bias and deprived him of a fair and impartial court-martial. We have recently reviewed this issue involving the same comments by the same military judge in a number of other cases.[4] Accordingly, we will apply the same legal analysis here. We do not countenance the comments made by the military judge; however, we are convinced that the appellant's court-martial was a fair and impartial proceeding.

Three months after the appellant's trial,[5] the military judge 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, he encouraged the junior officers to aggressively charge and to prosecute cases and referred to accused service members as "scumbags." The military judge described jury members as "morons," and additionally said he despised them.[6] Two of the officers provided written statements[7] summarizing their recollection of the military judge's comments. A fair

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[4] *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. Myrick*, No. 201200404, 2013 CCA LEXIS 102, unpublished op. (N.M.Ct.Crim.App. 19 Feb 2013) (per curiam); *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, 2013 CCA LEXIS 116, 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);; and *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).

[5] The appellant's trial concluded on 22 March 2012 and the military judge made the statements in issue on 21 June 2012.

[6] See Defense Clemency Request dated 27 Jun 2012 at Enclosures (4) and (5).

[7] One was an affidavit and the other a declaration under penalty of perjury.

read of one statement is that the officer had mixed thoughts as to whether the remarks were odd or intended to be humorous.[8]

We review whether a military judge has acted appropriately *de novo.*[9] "'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 (2008 ed.) provides for two categories of when a military judge may be disqualified: "specific circumstances connoting actual bias and the appearance of bias," and provides for a two-step analysis. *Quintanilla*, 56 M.J. 44-45. The first step asks whether disqualification is required under the specific circumstances listed in R.C.M. 902(b). If that question is answered in the negative, the second step asks whether the circumstances nonetheless warrant disqualification based upon a reasonable appearance of bias. *Id.* at 45. Disqualification is required "in any proceeding in which [the] military judge's impartiality might reasonably be questioned." R.C.M. 902(a). Disqualification may be required even if the evidence does not establish actual bias. *Quintanilla,* 56 M.J. at 45.

"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

[8] See Defense Clemency Request at Enclosure (5).

[9] 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).

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)).

1. Actual Bias

The appellant claims that the military judge's ruling on the Government's challenge for cause of Master Sergeant H demonstrates his actual bias. We disagree.

We review a military judge's excusal of a member due to actual bias for an abuse of discretion. *United States v. Nash,* 71 M.J. 83, 89 (C.A.A.F. 2012). A member may be removed for cause if it is shown that he or she should not sit "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." *United States v. Briggs*, 64 M.J. 285, 286 (C.A.A.F. 2007) (quoting R.C.M. 912(f)(1)(N)). The rule covers both actual and implied bias. The test for actual bias is whether any bias "'is such that it will not yield to the evidence presented and the judge's instructions.'" *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007) (quoting *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997)). Because a challenge based on actual bias involves judgments regarding credibility, and because "the military judge has an opportunity to observe the demeanor of court members and assess their credibility during *voir dire*," a military judge's ruling on actual bias is afforded great deference. *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996); *see also United States v. Warden*, 51 M.J. 78, 81 (C.A.A.F. 1999) (noting that actual bias is viewed "subjectively, 'through the eyes of the military judge or the court members'") (quoting *Napoleon*, 46 M.J. at 283).

The *voir dire* of Master Sergeant H displayed a clear bias in favor of the appellant. Master Sergeant H admitted he was friends with the appellant, having known him for over five years. Their interaction included working together at a recruiting command, working out at the gym, living in the same barracks, eating meals, and other social interactions. The appellant had even recounted his legal troubles to Master Sergeant H during conversations they had after the appellant was transferred out of his position at VMFA-251. Although trial defense counsel attempted to rehabilitate Master Sergeant H by asking questions regarding the limitations of his personal contact with the appellant, the fact remained that the appellant

and Master Sergeant H were friends, and the appellant confided in him concerning his legal troubles in this case.[10]

Military law recognizes that an accused "has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. James*, 61 M.J. 132, 138 (C.A.A.F. 2005) (citation and internal quotation marks omitted). However, a fair and impartial panel does not just mean "fair and impartial" to the accused. A member can be challenged by the Government for the same reasons he or she can be challenged by the defense. The Government bears the burden of establishing that grounds exist to support its challenge. R.C.M. 912(f)(3).

The military judge observed Master Sergeant H during individual *voir dire* and noticed that he appeared "genuinely fond" of the appellant, and without hesitation admitted to being friends with the appellant. We defer to the military judge on these observations. *Daulton*, 45 M.J. at 217. Additionally, although Master Sergeant H was not asked whether he had formed an opinion as to the guilt or innocence of the appellant, the answers he provided evince not a generalized notion of presumption of innocence, but a predisposition based upon a personal relationship with and favorable opinion of the appellant. Certainly, the general language of R.C.M. 912(f)(1)(n) stating that challenges should be granted "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality" applies in this situation. Furthermore, the discussion following R.C.M. 912(f)(1)(n) provides that grounds for challenge under this subsection may include that the member "has a decidedly *friendly* or hostile attitude toward a party." (Emphasis added). Allowing the appellant's friend to remain on the panel would cast substantial doubt as to fairness and impartiality of the court-martial.

We conclude that the military judge did not abuse his discretion in granting the Government's challenge for cause for actual bias[11] and that the appellant has failed to demonstrate

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[10] While Master Sergeant H may not have been a percipient witness to the offenses, his answers during the *voir dire* process made it also possible he could have been called as a rebuttal witness by the Government since the appellant had confided in him about his legal troubles. Master Sergeant H would then be legally disqualified, pursuant to Article 25, as a member due to his status as a witness.

[11] After reviewing the other pretrial and *voir dire* rulings cited by the appellant which he alleges demonstrates actual bias of the military judge, we find the military judge's rulings legally correct and not indicative of bias.

any actual bias under R.C.M. 902(b). He has failed to make any showing that the military judge had a personal bias or prejudice concerning him or his case.

2. Implied Bias

We next turn to whether there is any appearance of bias that would require disqualification under R.C.M. 902(a). 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, 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 occurring three months before the military judge's comments. We next focus 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. The comments did not specifically reference the appellant or the appellant's case. To the extent the military judge addressed particular types of cases, he made no mention of larceny cases or anything that approaches those types of cases. 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)). The appellant was convicted and sentenced by members, thus removing the determination of guilt and power of punishment from the hands of the military judge. The appellant has not established any 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. Other appellants remain free to show a prejudicial nexus to their own case.

Our decision today will not undermine the public's confidence in the judicial process. 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. Absent any evidence, we decline to speculate how comments made in a training environment about very different types of cases could have impacted this court-martial.

Factual Sufficiency

We next turn to the issue of factual sufficiency. In accordance with Article 66(c), UCMJ, this court reviews issues of factual sufficiency *de novo*. The test for factual sufficiency "is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [this court] are themselves convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Conviction can be had solely on circumstantial evidence. *United States v. Elmore*, 31 M.J. 678 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 387 (C.M.A. 1991). Proof beyond a reasonable doubt does not mean that the evidence must be free of conflict. *United States v. Rankin*, 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006), *aff'd*, 64 M.J. 348 (C.A.A.F. 2007).

The appellant asserts the evidence was circumstantial and did not conclusively prove he committed the offenses. We are convinced of the appellant's guilt beyond a reasonable doubt as to the offenses, although we will make minor modifications to the dates of certain offenses in our decretal paragraph.

The Government's case rested largely, although not entirely, on circumstantial evidence. Although there was no direct evidence regarding who used the GTCCs to withdraw funds from ATM machines or to make purchases of goods at gas stations,

we find the circumstantial evidence compelling. The appellant, as the APC, had access to the cards at issue and, given his job responsibilities, was the individual who was privy to the information needed to increase the credit limits with the bank. We find it extremely persuasive that the appellant's name and secret verification password was utilized each time with the bank's customer service to increase the credit limits, which enabled many, if not all, of the subsequent ATM withdrawals. Furthermore, the appellant had previously been involved with the misuse of his own GTCC and was court-martialed for the same. The Government demonstrated the appellant's motive for the larceny: the mismanagement of his own account that resulted in bounced checks and a balance that he was having trouble paying off.

After taking into consideration that we did not have the opportunity to see and hear the witnesses, we are convinced beyond a reasonable doubt that the appellant was the person who called the bank to request various increases on the Government charge cards, stole the same charge cards, and thereafter stole the money and goods. Based on this record, we are ourselves convinced beyond a reasonable doubt of the appellant's guilt on these specifications.

Although not raised as error, we do note a difference between the evidence introduced at trial and the commencement date of the offenses as charged in Specifications 41, 43, and 45. Each of the specifications charged the commencement date of the offenses as "on or about 1 January 2009." The evidence at trial, however, indicated the GTCCs were stolen at a later date, but still within the time frame alleged. We will make modifications to the findings in our decretal paragraph.

Unreasonable Multiplication of Charges

Applying the factors set forth in *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001), although he did not object at trial, we agree with the appellant that the convictions for stealing mail (sole specification of Charge II) and larceny of the Government credit card (Specification 44 of Charge I) are unreasonable multiplication of charges. We, therefore, set aside the findings of guilt and dismiss Specification 44 of Charge I.

Reassessment of Sentence

Because of our action on the findings, we will reassess the sentence in accordance with the principles set forth in *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), *United States v. Cook*, 48 M.J. 434, 438, (C.A.A.F. 1998), and *United States v. Sales*, 22 M.J. 305, 307-09 (C.M.A. 1986). A "'dramatic change in the penalty landscape' gravitates away from the ability to reassess" a sentence. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006) (quoting *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003)). In reassessing the sentence, we find that there has not been a dramatic change in the penalty landscape. We are confident that the members would have imposed and the convening authority would have approved the sentence actually imposed and approved.

Conclusion

The findings of guilty as to Specification 44 under Charge I are set aside.

The remaining findings are affirmed except that the following language is excepted and substituted as to Specifications 41, 43 and 45 of Charge I:

> Specification 41: Except the language "on or about 1 January 2009" and substituting therefor the words "on or about May 2009."
>
> Specification 43: Except the language "on or about 1 January 2009" and substituting therefor the words "on or about August 2009."
>
> Specification 44: Except the language "on or about 1 January 2009 to on or about 30 June 2009" and substituting therefor the words "on or about June 2009."

We are convinced that the findings, as modified, and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the

appellant remains. Arts. 59(a) and 66(c), UCMJ. The sentence is affirmed.

Judge WARD and Judge MCFARLANE concur.

For the Court

R.H. TROIDL
Clerk of Court