

Thursday, 12 April 2012

1000 - 2 hours

United States v. Parker

Panel Two - J.A. MAKSYM, J.K. CARBERRY, M.D. MODZELEWSKI,  
Appellate Military Judges

For Appellant: Maj Kirk Sripinyo, USMC and Maj Jeffrey R.  
Liebenguth, USMC

For Appellee: Maj Paul Ervasti, USMC

A panel of officer members sitting as a general court-martial convicted the appellant, contrary to his pleas, of the following offenses:

Charge	Article	Spec.	Offense	Plea	Finding
I	81	1	Conspiracy to rob and murder LCpl Rodney Page, USMC on 26 March 1992.	NG	G
		2	Conspiracy to kidnap and murder LCpl Christopher James, USMC on 30 March 1992.	NG	G
II	92	1	Violate a lawful general order by possessing an unregistered firearm on base on 26 March 1992.	NG	G
		2	Violate a lawful general order by possessing an unregistered firearm on base on 30 March 1992.	NG	G
III	118	1	Premeditated murder of LCpl Page on 26 March 1992.	NG	G
		2	Felony murder of LCpl Page on 26 March 1992.	NG	G
		3	Premeditated murder of LCpl James on 30 March 1992.	NG	G
IV	122	1	Robbery of LCpl Page on 26 March 1992.	NG	G
V	134	1	Kidnapping of LCpl Page on 26 March 1992.	NG	G
		2	Kidnapping of LCpl James on 30 March 1992.	NG	G

The members sentenced the appellant to death, total forfeiture of all pay and allowances, and reduction to the pay grade of E-1.

The issues to be argued before the Court follow:

- I. A DANGEROUS SPILLOVER EFFECT PREJUDICED APPELLANT WHEN THE CHARGES AND SPECIFICATIONS FOR THE 26 MARCH 1992 MURDER OF LCPL PAGE AND THE CHARGES AND SPECIFICATIONS FOR THE 30 MARCH 1992 MURDER OF LCPL JAMES WERE MERGED AT A SINGLE COURT-MARTIAL.
- II. THE MILITARY JUDGE COMMITTED PLAIN ERROR BY FAILING TO GIVE A SPILLOVER INSTRUCTION *SUA SPONTE*, IN VIOLATION OF THE APPELLANT'S RIGHTS UNDER THE FIFTH AND EIGHTH AMENDMENTS TO THE U. S. CONSTITUTION AND ARTICLE 55, UNIFORM CODE OF MILITARY JUSTICE.
- III. APPELLANT WAS PREJUDICED WHEN THE MILITARY JUDGE ALLOWED TESTIMONY THAT APPELLANT CLAIMED TO HAVE SHOT AN AK-47 AT A PASSING CAR IN PHILADELPHIA AND THAT APPELLANT WAS OBSESSED WITH DRIVE-BY SHOOTINGS, INTO EVIDENCE OVER THE APPELLANT'S OBJECTIONS.
- IV. THE MILITARY JUDGE ABUSED HIS DISCRETION BY REFUSING TO GIVE A DEFENSE REQUESTED INSTRUCTION ON PREMEDITATION WHICH DEFINED PREMEDITATION IN TERMS OF REFLECTION WITH A COOL MIND.
- V. EACH ARTICLE 134 KIDNAPPING SPECIFICATION UNDER CHARGE V FAILS TO STATE AN OFFENSE BECAUSE NEITHER ALLEGES, EXPRESSLY OR BY NECESSARY IMPLICATION, THE TERMINAL ELEMENT.
- VI. THE MEMBERS WERE INSTRUCTED ON KIDNAPPING AS AN AGGRAVATING FACTOR BECAUSE OF DEFECTIVE ARTICLE 134 SPECIFICATIONS THAT MUST BE DISMISSED. THEREFORE, KIDNAPPING WAS NOT AN AGGRAVATING FACTOR AND APPELLANT'S DEATH SENTENCE SHOULD BE VACATED.
- VII. THE RESULTS OF THE COURT-ORDERED *DUBAY* HEARING INTO APPELLANT'S MENTAL CAPACITY ARE UNRELIABLE BECAUSE THEY WERE BASED ON THE UNRELIABLE APPLICATION OF SCIENCE, AND IT WOULD VIOLATE THE APPELLANT'S RIGHTS UNDER THE EIGHTH AND FIFTH AMENDMENTS TO THE U. S. CONSTITUTION, AND ARTICLE 55, UNIFORM CODE OF MILITARY JUSTICE, FOR THIS COURT TO USE THEM IN ITS DETERMINATION OF WHETHER THE APPELLANT IS ELIGIBLE FOR A SENTENCE OF DEATH.
- VIII. THE RESULTS OF THE COURT-ORDERED *DUBAY* HEARING ARE INVALID BECAUSE THE *DUBAY* JUDGE WAS NOT IMPARTIAL; AND THE SENTENCE OF DEATH SHOULD BE SET ASIDE BECAUSE THIS COURT CANNOT RELIABLY DETERMINE THE APPELLANT'S I.Q.
- IX. THE VARIABLE SIZE OF THE COURT-MARTIAL PANEL CONSTITUTED AN UNCONSTITUTIONAL CONDITION ON THE APPELLANT'S FUNDAMENTAL RIGHT TO CONDUCT VOIR DIRE AND PROMOTE AN IMPARTIAL MEMBERS PANEL.

- X. THE APPELLANT'S SENTENCE OF DEATH IS AN OBVIOUS MISCARRIAGE OF JUSTICE AND/OR AN ABUSE OF DISCRETION BECAUSE HIS MORE CULPABLE CO-ACTOR IS SENTENCED TO LIFE IMPRISONMENT.
- XI. REQUIRING AGGRAVATING FACTORS ONLY TO "SUBSTANTIALLY OUTWEIGH" EXTENUATING AND MITIGATING CIRCUMSTANCES DENIED THE APPELLANT DUE PROCESS AND EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FIFTH AND EIGHTH AMENDMENTS TO THE U. S. CONSTITUTION IN THAT THE ONLY ACCEPTABLE STANDARD FOR A CRIMINAL JURY FINDING IS "BEYOND A REASONABLE DOUBT."
- XII. AS FOUND IN R.C.M. 1001(b)(4), THE STANDARD OF PROOF FOR AGGRAVATING CIRCUMSTANCES IN R.C.M. 1004(b)(4)(c) VIOLATES THE APPELLANT'S RIGHT TO DUE PROCESS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS TO THE U.S. CONSTITUTION BECAUSE THE FACTS FORM THE BASIS FOR A DETERMINATION THAT LEADS TO A DEATH SENTENCE, WHICH MUST BE DETERMINED BY THE MEMBERS BEYOND A REASONABLE DOUBT.
- XIII. THE APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLES 27 AND 55 OF THE UNIFORM CODE OF MILITARY JUSTICE.
- XIV. THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION AND THE U.S. SUPREME COURT'S HOLDING IN *ROPER V. SIMMONS*, 543 U.S. 551 (2005), PRESENT A CATEGORICAL BAR TO APPELLANT'S EXECUTION BECAUSE OF THE UNREBUTTED EVIDENCE THAT HE FUNCTIONS AS A FIFTEEN YEAR OLD.
- XV. THE MILITARY JUDGE ERRONEOUSLY INSTRUCTED THE MEMBERS THAT THEY COULD VOTE TO RECONSIDER AGGRAVATING FACTOR #1 IF A MAJORITY DESIRED TO RECONSIDER WITHOUT FIRST INQUIRING WHETHER THE INITIAL VOTE WAS UNANIMOUS, IN VIOLATION OF THE FIFTH AND EIGHTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE 55, UNIFORM CODE OF MILITARY JUSTICE.
- XVI. THE EVIDENCE WAS LEGALLY AND FACTUALLY INSUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION FOR THE PREMEDITATED MURDER OF LCPL JAMES.
- XVII. THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING APPELLANT'S MOTION FOR CHANGE OF PLACE OF TRIAL BECAUSE OF ADVERSE PRE-TRIAL PUBLICITY, IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS TO THE U.S. CONSTITUTION, ARTICLE 55, UNIFORM CODE OF MILITARY JUSTICE, AND R.C.M. 906(b)(11).