

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

**Before  
E.E. GEISER, V.S. COUCH, J.E. STOLASZ  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**TYRICE L. HAYES  
HOSPITAL CORPSMAN THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 200600910  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 9 February 2005.  
**Military Judge:** LtCol Jeffrey Meeks, USMC.  
**Convening Authority:** Commanding General, Marine Corps Base,  
Camp Pendleton, CA.  
**Staff Judge Advocate's Recommendation:** Col W.D. Durrett,  
Jr., USMC.  
**For Appellant:** LCDR Derek C. Hampton, JAGC, USN; LT Dillon  
Ambrose, JAGC, USN.  
**For Appellee:** Maj Elizabeth Harvey, USMC; Maj Wilbur Lee,  
USMC.

**11 December 2008**

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**OPINION OF THE COURT**  
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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

STOLASZ, Judge:

The appellant was convicted by a military judge sitting as a special court-martial, pursuant to his plea, of indecent acts in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to confinement for one year, reduction to pay grade E-1, and a bad-conduct discharge. The appellant's pretrial agreement had no effect on the sentence. The convening authority approved the sentence as adjudged.

During our first review of this case, the appellant asserted five assignments of error.<sup>1</sup> On 25 September 2007 we affirmed the findings and sentence in the appellant's case. Thereafter, the appellant filed a petition with the Court of Appeals for the Armed Forces (CAAF) which granted the petition on the following specified issue: "[w]hether [this court] failed to conduct a proper review under Article 66(c), UCMJ, 10 U.S.C. § 866 (c), where, in its rendition of the facts of the case, [this] court appears to have considered evidence from outside the record. See *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007)." *United States v. Hayes*, 66 M.J. 378 (C.A.A.F. 2008)(summary disposition). In that same opinion, CAAF summarily set aside our decision dated 25 September 2007 and returned the record "for a new review under Article 66(c), UCMJ." *Id.*

On remand, the appellant submitted revised versions of his first two former assignments of error,<sup>2</sup> reasserted without revision the remaining three former assignments of error, and raised one new assignment of error.<sup>3</sup>

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<sup>1</sup> I. APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE MILITARY JUDGE EXHIBITED PARTIALITY, ADVISED THE GOVERNMENT ON TRIAL TACTICS, AND FAILED TO *SUA SPONTE* DISQUALIFY HIMSELF FROM THIS CASE.

II. THE CONVENING AUTHORITY MATERIALLY BREACHED THE TERMS OF THE PRETRIAL AGREEMENT BY SUBMITTING EVIDENCE THAT CONTRADICTED THE STIPULATION OF FACT.

III. APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

IV. THE SENTENCE, CONSISTING OF CONFINEMENT FOR TWELVE (12) MONTHS, REDUCTION TO E-1, AND A BAD CONDUCT (SIC) DISCHARGE, IS INAPPROPRIATELY SEVERE GIVEN THE CIRCUMSTANCES.

V. WHETHER THE UNREASONABLE POST-TRIAL DELAY IN THE POST-TRIAL PROCESSING OF THIS CASE MATERIALLY PREJUDICED APPELLANT'S SUBSTANTIAL RIGHT TO SPEEDY POST-TRIAL REVIEW, AS WELL AS AFFECTS THE SENTENCE THIS COURT SHOULD APPROVE.

<sup>3</sup> I. MILITARY MEMBERS HAVE A CONSTITUTIONAL RIGHT TO AN IMPARTIAL JUDGE. THE MILITARY JUDGE REPEATEDLY WARNED THE TRIAL COUNSEL THAT SUBMITTING THE STIPULATION OF FACT INTO EVIDENCE WOULD PRECLUDE HER FROM LATER OFFERING KEY AGGRAVATING TESTIMONY. FURTHERMORE, IN A POSTTRIAL "BRIDGING THE GAP" SESSION, THE TRIAL JUDGE EXPRESSED A BIAS AGAINST HOMOSEXUALITY AND APPELLANT. WAS THE MILITARY JUDGE IMPARTIAL IN ADVISING THE TRIAL COUNSEL HOW TO PROCEED WITH HER CASE, AND COULD THE MILITARY JUDGE HAVE BEEN IMPARTIAL IN RENDERING A SENTENCE INVOLVING APPELLANT AND A HOMOSEXUAL ACT, GIVEN HIS PROFESSED BIAS?

II. AN ACCUSED HAS A RIGHT TO PERFORMANCE OF PROMISES MADE WITHIN A PRETRIAL AGREEMENT. APPELLANT'S PRETRIAL AGREEMENT STATED THAT NEITHER SIDE COULD CONTRADICT THE FACTS FOUND WITHIN THE STIPULATION OF FACT. DESPITE THE FACT THAT THE STIPULATION OF FACT WAS NEVER INTRODUCED, DID THE GOVERNMENT, NONEHTHELESS, BREACH THE PRETRIAL AGREEMENT BY INTRODUCING EVIDENCE THAT CONTRADICTED THE FACTS WITHIN THE STIPULATION OF FACT?

<sup>3</sup> IV. VICTIMS ARE ALLOWED TO TESTIFY TO AGGRAVATING CIRCUMSTANCES IN SENTENCING. THE ONLY VICTIM IN THE CASE WAS A THIRD PARTY ROOMMATE WHO WAS PRESENT IN THE SAME ROOM WHEN A SEXUAL ACT OCCURRED BETWEEN APPELLANT AND A CONSENSUAL SEXUAL PARTNER. DID THE MILITARY JUDGE ABUSE HIS DISCRETION IN

Based upon our review of the evidence presented at trial, and of those matters considered by the convening authority in taking his action, we again conclude the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ. We note that in conducting our review we have considered only the evidence presented at trial as well as the brief and affidavit submitted by the appellant, and the Government's answer.

### **Impartiality of the Military Judge**

The appellant asserts that the military judge purportedly made comments during a post-trial "bridging the gap" session demonstrating his bias and predisposition against homosexuals in general. The appellant initially raised this issue in his clemency petition to the convening authority. Clemency Request of 15 Jul 2005. In our first opinion, we held that an unsworn allegation was not competent evidence absent an affidavit or declaration substantiating the claim. *Hayes*, 2007 CCA LEXIS 416 at 22. We further indicated that, even if the military judge made the comments, it was not necessarily indicative of bias. *Id.* at 24-25.

The appellant's trial defense counsel submitted an affidavit detailing the comments of the military judge. Affidavit of John M. Boucher, Jr. of 10 Jul 2008. The affidavit states that the military judge explained his feelings on homosexuality in the Marine Corps and the Armed Services, and during the discussion stated Marines should not be required to live in the barracks with "people like Seaman Hayes." *Id.* at ¶ 3. This occurred during the post-trial "bridging the gap" session. The Government trial counsel's affidavit stated she did not recall specific or general comments made by the military judge at the conclusion of the case, but also indicates that she may have been in Iraq when the case was adjudicated. Affidavit of Major Nicole Hudspeth, USMC, of 5 Aug 2008.

Since we are now provided with two affidavits, we look to the principles set forth in *United States v. Ginn*, 46 M.J. 236, 248 (C.A.A.F. 1997) to resolve the issue. Here, the first principle is pertinent, and we must determine if the appellant would be entitled to relief if the facts in dispute were resolved in his favor. *Id.*

"Judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases" may support a bias or partiality challenge "if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *United States*

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ALLOWING APPELLANT'S CONSENSUAL SEXUAL PARTNER TO TESTIFY AS A VICTIM, AND WAS THE TESTIMONY EVEN RELEVANT?

*v. Liteky*, 510 U.S. 540, 555 (1994). In *United States v. Miller*, 48 M.J. 790 (N.M.Ct.Crim.App. 1998), *aff'd*, 53 M.J. 128 (C.A.A.F. 2000), the military judge was accused of making derogatory comments directed at the appellant while still presiding over the court-martial. In dicta, a panel of this court held that the comments were inappropriate but, standing alone, did not suggest the military judge was not fair toward the appellant. *Id.* at 793.

In this case, our extensive review of the record reveals the military judge was fair and even-handed during the trial, with no hostility directed toward the appellant. We find the military judge's post-trial comments, standing alone, do not suggest he held such "deep-seated and unequivocal antagonism" towards the appellant as to make "fair judgment impossible." *Lietky*, 510 U.S. 556.

We discern no evidence of antagonism or favoritism from the military judge during the court-martial. We decline to find impartiality based solely on post-trial comments leading to speculation that the military judge was biased without any evidence to suggest the court-martial was somehow tainted. We find the appellant's assertion without merit.

#### **Aggravation Testimony of the Victim**

The appellant asserts the military judge abused his discretion by permitting Corporal (Cpl) B to testify in aggravation that the appellant committed forcible sodomy upon him. The appellant argues that Cpl B was not a victim but a willing participant to a consensual sexual act, and therefore his testimony is irrelevant. See RULE FOR COURTS-MARTIAL 1001(b)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES, (2000 ed.). The appellant emphasizes he pled guilty to an indecent act for fondling Cpl B's penis while a third party was present in the room. See *United States v. Izquierdo*, 51 M.J. 421 (C.A.A.F. 1999).

During presentencing, Cpl B testified that after falling asleep he woke up with a sheet over his head, and "someone trying to ride [him] or have sex with [him]". Record at 61. He further testified that once the sheet was pulled off his head, he recognized the appellant as the perpetrator. *Id.* at 62. Cpl B also testified he felt awkward when undergoing a sexual assault exam, and noted the psychological effect the incident had on him. *Id.* at 63, 64.

#### **Law**

The standard of review on appeal for the admission or exclusion of evidence during sentencing is whether the "judge clearly abused his discretion." *United States v. Clemente*, 50 M.J. 36, 37 (C.A.A.F. 1999)(quoting *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995) and *United States v. Zakaria*, 38 M.J. 280, 283 (C.M.A. 1993)). R.C.M. 1001(b)(4) provides for

evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty including evidence of social, psychological, and medical impact or cost to any person who was the victim of an offense committed by the accused. "Whether a circumstance is 'directly related to or results from the offenses' calls for considered judgment by the military judge, and [an appellate court] will not overturn that judgment lightly." *United States v. Wilson*, 47 M.J. 152, 155 (C.A.A.F. 1997)(citing *United States v. Jones*, 44 M.J. 103, 104-05 (C.A.A.F. 1996)).

### **Analysis**

The testimony of Cpl B was proper aggravation evidence under R.C.M. 1001(b)(4) even though his description of what occurred differed from the appellant's assertion during providency that the encounter was consensual. Record at 34. Evidence which is otherwise admissible in sentencing is not dependent upon the facts appellant chooses to admit are true during providency. See *United States v. Glazier*, 26 M.J. 268, 270-71 (C.M.A. 1988)(citing *United States v. Martin*, 20 M.J. 227, 230 (C.M.A. 1985)).

In *United States v. Terlep*, 57 M.J. 344 (C.A.A.F. 2002), the accused, although charged with burglary and rape, pleaded guilty pursuant to a pretrial agreement to unlawful entry of a dwelling and assault consummated by a battery. During sentencing the Government called the victim, S, who testified she was raped by the accused. The Court of Appeals for the Armed Forces noted that the entrance of the Government and appellant in a plea agreement for a lesser charge than rape does not change the facts from the viewpoint of the victim. *Id.* at 350. Further, the plea agreement did not expressly bar the victim from giving her version of truth to the military judge at sentencing. *Id.* Absent an express provision in the pretrial agreement or rule of evidence or procedure barring such evidence the victim impact evidence was properly admitted. *Id.* (citing *United States v. Wilson*, 47 M.J. 152, 155-56 (C.A.A.F. 1997)).

Here, the appellant was charged with forcible sodomy and committing indecent acts with another. Pursuant to a pretrial agreement the appellant pleaded not guilty to the charge of forcible sodomy and guilty to the lesser included offense of indecent acts with another. Appellate Exhibit II. Our review of the pretrial agreement reveals no provisions limiting the testimony of Cpl B at the sentencing hearing, nor are we aware of any evidentiary or procedural rules which would otherwise limit his testimony. Thus, the pretrial agreement "did not expressly bar the victim in this case from giving [his] complete version of the truth, as [he] saw it, to the factfinder at the sentencing hearing." *Terlep*, 57 M.J. at 350. Cpl B was free to testify to his version of the incident as he recalled it.

Our review of the record satisfies us that the military judge clearly grasped the purpose of R.C.M. 1001(b)(4). He ruled that during sentencing the Government would not be allowed to argue forcible sodomy, but could argue the impact to the victim based on the conduct of the accused. The military judge further noted that the facts related by the accused during a providency inquiry, and the facts as other witnesses perceive them frequently contradict each other. Further, he stated that the court was not required to accept the facts related by the accused during the providency inquiry as the facts of the case, and the Government was permitted in aggravation to show that there is a more significant thing that occurred which would assist the military judge in arriving at an appropriate sentence. Record at 17.

We further find that the military judge, in admitting Cpl B's testimony, necessarily determined that the probative value of the testimony outweighed its prejudicial impact. See MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.).

#### **Remaining Assignments of Error**

We have considered anew the appellant's original third, fourth, and fifth assignments of error. For the reasons stated in our earlier decision, which we hereby incorporate by reference, we find no merit to these assignments of error. *United States v. Hayes*, No. 200600910, 2007 CCA LEXIS 416, unpublished op. (N.M.Ct.Crim.App. 25 Sep 2007).

#### **Conclusion**

Accordingly, we affirm the findings and the sentence.

Senior Judge GEISER and Senior Judge COUCH concur.

For the Court

R.H. TROIDL  
Clerk of Court