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

Before
D.E. O'TOOLE, V.S. COUCH, D.O. HARRIS
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ISAAC DOMINGUEZ
PRIVATE (E-1), U.S. MARINE CORPS

NMCCA 200601385
SPECIAL COURT-MARTIAL

Sentence Adjudged: 9 March 2006.
Military Judge: LtCol D.M. Jones, USMC.
Convening Authority: Commanding Officer, Marine Attack Squadron 211, 3d Marine Aircraft Wing, MarForPac, Yuma, AZ.
Staff Judge Advocate's Recommendation: Col K.J. Brubaker, USMC.
For Appellant: LCDR Luis P. Leme, JAGC, USN.
For Appellee: LCDR Jason A. Lien, JAGC, USN; LT Jessica Hudson, JAGC, USN.

30 June 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HARRIS, Judge:

A special court-martial composed of a military judge alone convicted the appellant, pursuant to his pleas, of willful disobedience of a superior commissioned officer, aggravated assault, and drunk and disorderly conduct in violation of Articles 90, 128, and 134 of the Uniform Code of Military Justice, 10 U.S.C. §§ 890, 928, and 934. The appellant was sentenced to confinement for 11 months and a bad-conduct discharge. The convening authority approved the sentence as adjudged, but suspended all confinement in excess of 209 days.

This case was originally docketed with this court on 13 November 2006. After receiving briefs from counsel, the Government moved to remand the case in order to correct an error in the authentication process. *See* Government Motion to Remand of 12 Feb 2007. We granted that motion on 23 February 2007. Following authentication, a new post-trial recommendation and action were prepared, and the convening authority disapproved all confinement in excess of the 240 day limitation in the pretrial agreement.[1] *See* Special Court-Martial Order No. 17-08(M) of 9 February 2009. The case was returned to this court and docketed on 14 April 2009. There is no explanation in the record for why the Government required more than two years to correct the authentication error. On remand, the appellant has raised no additional issues, standing on his earlier brief.

In his sole assignment of error, the appellant asserts that the convening authority in the case was an accuser.[2] *See* Art. 23(b), UCMJ; *United States v. Gordon*, 2 C.M.R. 161 (C.M.A. 1952); RULE FOR COURTS-MARTIAL 504(C)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). After carefully considering the record of trial, the appellant's brief and the Government's response, we conclude 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.

I. Background

The appellant pled guilty to assaulting his wife at the couple's home onboard base housing at Marine Corps Air Station Yuma, Arizona. After drinking heavily during the evening, the couple began arguing. At approximately 0100 the next morning, the altercation turned physical, and the appellant admitted to choking his wife for a period of approximately 10 seconds, during which time she was unable to breathe. Record at 28, 31. After this assault, the appellant's wife pushed the appellant out of a second story window and locked him out of the house. The drunk and disorderly charge stemmed from the appellant's loud and profane screams as he tried to get back into the house.

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[1] Since the appellant was released from confinement prior to the date of the first CA's action, we see no prejudice to the appellant in the second action not suspending all confinement in excess of 209 days as was done in the original action. Accordingly, no corrective action is required.

[2] "WAS THE CONVENING AUTHORITY AN ACCUSER AND THEREFORE DISQUALIFIED FROM ACTING AS CONVENING AUTHORITY FOR APPELLANT'S COURT-MARTIAL." Appellant's Brief at 1.

Immediately following this incident, the appellant was placed in pretrial confinement. That same day, he was also issued a standard Military Protective Order (MPO), prohibiting him from initiating any contact with his wife, directly or through a third party. *Id.* at 40; Prosecution Exhibit 3 at 1-2. The appellant's commanding officer, Lieutenant Colonel (LtCol) Gering, signed the MPO, which was relayed to the appellant by Sergeant Major Bemis. Record at 40; PE 3 at 1-2. The appellant admitted calling his wife's parents on several occasions, attempting to reach his wife through them. Record at 39. On at least one occasion, he was able to speak to his wife. *Id.* The appellant also sent his wife several letters from the brig. *Id.* At no time during the court-martial did the appellant challenge LtCol Gering's qualifications to serve as convening authority.

II. Disqualification of the Convening Authority

The appellant maintains that LtCol Gering was an accuser and thus disqualified from convening the court-martial. We disagree.

An "accuser" includes a "person who has an interest other than an official interest in the prosecution of the accused." Art. 1(9), UCMJ. By statute, an accuser may not convene a special court-martial. Art. 23(b), UCMJ; *see also United States v. Rockwood*, 52 M.J. 98, 103 (C.A.A.F. 1999); R.C.M. 504(c)(1). Whether a convening authority is an accuser within the meaning of Article 1(9), UCMJ, is a question of law that we review *de novo*. *United States v. Conn*, 6 M.J. 351, 354 (C.M.A. 1979).

The test for determining whether a convening authority is an accuser is whether he is "so closely connected to the offense that a reasonable person would conclude that he had a personal interest in the matter." *United States v. Voorhees*, 50 M.J. 494, 499 (C.A.A.F. 1999)(citations and internal quotation marks omitted). A personal interest can arise from matters affecting the convening authority's "ego, family, and personal property." *Id.* The prohibition against an accuser serving as convening authority was intended to protect an accused from a vindictive commander seeking to obtain a particular result because of reasons unrelated to his official function. *United States v. Jeter*, 35 M.J. 442, 446 (C.M.A. 1992).

The record contains no evidence to support the claim that LtCol Gering was an accuser. The order in this case was a "routine, administrative type of order that virtually automatically flowed from the fact of appellant's arrest" for domestic violence. *United States v. Tittel*, 53 M.J. 313, 315 (C.A.A.F. 2000)(Effron, J., concurring in part and in result). The order was signed by LtCol Gering but delivered through a third party. Record at 40. The order itself is

on a pre-printed form. PE 3 at 1-2. There is no suggestion that LtCol Gering had any connection to this case other than in his official capacity as the appellant's commanding officer.

In *Tittel*, our superior court addressed a very similar fact pattern. Following a conviction for shoplifting, the appellant's commanding officer issued a standard order barring him from all Navy Exchange facilities. 53 M.J. at 314. The court held that such an order did not render the commanding officer an accuser. *Id.* at 314-15. Similarly, in *United States v. Shiner*, 40 M.J. 155 (C.M.A. 1994), the court held that an order revoking liberty privileges did not disqualify a convening authority as an accuser. The order in this case is closely analogous to those in *Tittel* and *Shriner*. We find that no reasonable person would conclude that LtCol Gering had an other than official interest in this case due to his signature on the MPO. We hold *Tittel* and *Shriner* to be controlling authority and follow them here. *See also United States v. Robinson*, No. 200602201, 2007 CCA LEXIS 189, unpublished op. (N.M.Ct.Crim.App. 6 Jun 2007)(holding that a military protective order is a routine, administrative order that does not disqualify a convening authority as an accuser).

Moreover, the appellant was well-aware of LtCol Gering's signature on the MPO at the time of trial. Charge Sheet. This issue was not raised at trial, but asserted for the first time during a post-trial clemency petition. Detailed Defense Counsel letter dated 2 Jun 2006. Even assuming *arguendo* that LtCol Gering was an accuser, any resulting error is non-jurisdictional, and therefore waived by the appellant's failure to raise it at his court-martial. *Shriner*, 40 M.J. at 157; *see also United States v. Gudmundson*, 57 M.J. 493, 495 (C.A.A.F. 2002). To the extent that the appellant's clemency submission challenged LtCol Gering's ability to take post-trial action on the case, any error was cured by this court's subsequent remand to correct the authentication process, followed by a new post-trial recommendation and action by a different officer. Accordingly, we decline to grant relief.

III. Post-Trial Delay

In the course of our review of this case, we note unreasonable post-trial delay because it took the Government more than two years to correct an authentication error and return the case to this court. Assuming that the appellant was denied the due process right to speedy post-trial review and appeal, we proceed directly to the question of whether any error was harmless beyond a reasonable doubt. *United States v. Allison*, 63 M.J. 365, 370-71 (C.A.A.F. 2006). The appellant raises no meritorious issues on appeal and alleges no specific prejudice as a result of any post-trial delay.

In that the appellant has failed to provide any substantiated evidence of prejudice, we conclude that the assumed error was harmless beyond a reasonable doubt. *United States v. Allende*, 66 M.J. 142, 145 (C.A.A.F. 2008).

The post-trial delay does not affect the findings and sentence that should be approved in this case. *Toohey v. United States*, 60 M.J. 100, 101-02 (C.A.A.F. 2004); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc). We are aware of our authority to provide relief under Article 66, UCMJ, but decline to exercise it in this case.

IV. Conclusion

Accordingly, the findings and the approved sentence are affirmed.

Chief Judge O'TOOLE and Senior Judge COUCH concur.

For the Court

R.H. TROIDL
Clerk of Court