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

Before
R.E. VINCENT, J.A. MAKSYM, J.R. PERLAK
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JONATHAN E. LEE
CAPTAIN (O-3), U.S. MARINE CORPS

NMCCA 200600543
GENERAL COURT-MARTIAL

Sentence Adjudged: 04 May 2005.
Military Judge: Col Steven Day, USMC.
Convening Authority: Commanding General, II Marine Expeditionary Force, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: LtCol M.A. Lawrence, USMC.
For Appellant: Eugene R. Fidell, Esq.; Matthew S. Freedus, Esq.; LtCol John G. Baker, USMC; LT Brian Korn, JAGC, USN.
For Appellee: Maj Elizabeth Harvey, USMC.

10 November 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VINCENT, Senior Judge:

The appellant was convicted, at a general court-martial, of three specifications of burglary, conduct unbecoming an officer, three specifications of fraternization, and five specifications of indecent assault, in violation of Articles 129, 133, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 929, 933, and 934. The appellant was sentenced to confinement for three years, forfeiture of all pay and

allowances, and a dismissal. The convening authority approved the sentence as adjudged.

We affirmed the appellant's conviction of three specifications of burglary, three specifications of fraternization, and four specifications of indecent assault and, after reassessment, affirmed the sentence. *United States v. Lee*, No. 200600543, 2007 CCA LEXIS 233, unpublished op. (N.M.Ct.Crim.App. 26 Jun 2007).

The Court of Appeals for the Armed Forces (CAAF) granted review of the appellant's assigned issue: "whether his detailed defense counsel's failure to disclose a conflict of interest resulted in an uninformed selection of counsel." *United States v. Lee*, 66 M.J. 387, 388 (C.A.A.F. 2008). On 13 June 2008, CAAF returned the record of trial to the Judge Advocate General of the Navy for remand to an appropriate convening authority to order a factfinding hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967). The court delineated nine factual issues requiring resolution in order to address the conflict of counsel issues raised in its opinion.[1]

A *DuBay* hearing was conducted on 12-13 January and 13 February 2009. Both prior to, and during, the *DuBay* hearing, Lieutenant Colonel (LtCol) R. Q. Ward, USMC, the presiding military judge, denied the appellant's request that he recuse himself. Appellate Exhibit XXII; Record at 538-43, 663-65. After the *DuBay* hearing, the military judge issued written essential findings of fact and conclusions of law on 9 April 2009. AE XLIV. After considering the evidence adduced at the *DuBay* hearing, the military judge concluded that the appellant's trial defense counsel was not ineffective and that the appellant made a knowing waiver of any conflict posed by the reassignment of his trial defense counsel. AE XLIV at 13-14.

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[1] The issues delineated by CAAF consisted of the following:

1. What are the circumstances surrounding the assignment of detailed counsel as a trial counsel, including the date such duties were to begin?
2. What consideration was given to the fact that counsel still had active defense cases?
3. What "need" arose for the reassignment?
4. What was the full scope of detailed counsel's actions as a trial counsel during counsel's representation of the accused?
5. Was there, in fact, a supervisory relationship between trial counsel and detailed counsel during counsel's representation of the accused?
6. What was the exact nature of any disclosures made to the accused?
7. What was the accused's understanding regarding these disclosures?
8. What was civilian counsel's role in the matter?
9. What effects on the representation can the accused point to resulting from any claimed conflicts of interest on the part of his detailed defense counsel?

The appellant filed a Motion for a New *DuBay* Hearing and Remand on 14 May 2009. On 28 May 2009, the court denied the motion without prejudice. The appellant filed his Additional Brief and Assignment of Errors on 19 June 2009 and the Government filed its response on 20 July 2009. The appellant filed a reply brief on 5 August 2009 and oral argument was conducted on 15 September 2009.

The appellant raises two assignments of error.[2] First, he asserts that LtCol Ward was disqualified from serving as the military judge at the *DuBay* hearing and, accordingly, requests a new *DuBay* hearing before a different military judge. Second, he contends that the appellant's election of counsel was ineffective because it was not a knowing election.

We have carefully examined the record of trial, the appellant's brief, the Government's answer, the appellant's reply, and considered the oral argument by the parties. Initially, we conclude that the military judge's findings are incomplete as to CAAF's fourth factual issue:

> What was the full scope of detailed counsel's actions as a trial counsel during counsel's representation of the accused?

Lee, 66 M.J. at 390.

In order to adequately answer this question, the military judge needed to ascertain the time frame that Captain Reh, the

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[2] In our first consideration of his case, the appellant raised the following assignments of error:

> I. WHETHER THE EQUAL PROTECTION COMPONENT OF FIFTH AMENDMENT DUE PROCESS WAS VIOLATED BELOW AND IS BEING VIOLATED AGAIN BECAUSE THE MILITARY JUDGE AND THE JUDGES OF THIS COURT SERVE WITHOUT THE PROTECTION OF A FIXED TERM OF OFFICE, WHEREAS THOSE IN THE ARMY AND COAST GUARD ENJOY SUCH PROTECTION BY REGULATION;
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> II. WHETHER THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT;
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> III. WHETHER CAPTAIN LEE'S SENTENCE TO THREE YEARS OF CONFINEMENT IS DISPROPORTIONATELY SEVERE IN LIGHT OF HIS COMBAT RECORD, THE EXTENUATING CIRCUMSTANCES SURROUNDING THE OFFENSES, AND THE ABSENCE OF LEGITIMATE PUNITIVE INTERESTS SERVED BY HIS CONTINUED CONFINEMENT;
>
> IV. WHETHER CAPTAIN REH'S FAILURE TO DISCLOSE HIS CONFLICT OF INTEREST RESULTED IN AN UNINFORMED AND INVALID ELECTION OF COUNSEL; AND
>
> V. WHETHER CHARGE II AND ITS SPECFICIATION ARE MULTIPLICIOUS WITH CHARGE I AND ITS SPECIFICATIONS AND CHARGE III AND ITS SPECIFICATIONS.

appellant's trial defense counsel, served as a trial counsel as well as the time frame that he was detailed as the appellant's trial defense counsel. If there was any overlap, the military judge was then required to detail Captain Reh's trial counsel actions while he continued to represent the appellant. We note that the military judge did not provide any finding of fact detailing when Captain Reh's legal representation of the appellant terminated. He did provide a finding of fact that Captain Reh served as a trial counsel from "approximately January 2005 until he deployed in June 2005." AE XLIV at 6.

To determine the full extent of the overlap between Captain Reh's trial and defense counsel responsibilities to the appellant, we reviewed the record of trial and focused on the following relevant procedural facts:

- Captain Reh was detailed as the appellant's trial defense counsel by at least June 2004. *See* Captain Reh Request for Continuance in the Article 32, UCMJ, Pretrial Investigation of Captain Lee of 23 Jun 2004;

- The appellant's trial concluded on 4 May 2005;

- In June 2005, Captain Reh executed temporary additional duty (TAD) orders from LSSS Camp Lejeune to a command in Afghanistan. *See* AE XXIV;

- The staff judge advocate's recommendation (SJAR) was completed on 22 August 2005;

- Major Philip Stackhouse, USMC, was detailed as the appellant's substitute defense counsel for post-trial matters on 8 September 2005;

- Captain Reh performed trial counsel functions while TAD in Afghanistan between 15 June and 15 December 2005. *See* AE XXIV at 25-31; AE XLII at 7-11.

Due to the unique nature of the military criminal justice system, the attorney-client relationship extends well-beyond the close of trial. *United States v. Palenius*, 2 M.J. 86 (C.M.A. 1977). Therefore, Captain Reh maintained an attorney-client relationship with the appellant at least until Major Stackhouse was appointed as a substitute defense counsel on 8 September 2005.[3] *Id.* at 93.

[3] Although the record of trial contains a letter indicating that Major Stackhouse was appointed as the appellant's substitute defense counsel on 8

The military judge's finding of fact that Captain Reh served as a trial counsel between January and June 2005 is both inaccurate and incomplete. Appellate Exhibits XXIV and XLII contain fitness reports that indicate (1) Captain Reh was performing trial counsel functions while TAD in Afghanistan between 15 June and 15 December 2005 and (2) his permanent duty station during his TAD assignment remained LSSS, Camp Lejeune.

Accordingly, the military judge should have provided findings of fact for the fourth factual issue to encompass the time frame from January 2005 through 8 September 2005. Under ordinary review, we would remand the case directing the military judge to provide additional findings of fact and conclusions of law necessary to answer the fourth factual issue. However, we have also concluded that, in accordance with RULE FOR COURTS-MARTIAL 902(B)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), LtCol Ward was disqualified from serving as the military judge for the *DuBay* hearing in that he possessed personal knowledge of evidentiary facts in dispute. We will take corrective action in our decretal paragraph. Because of our decision, we need not address the appellant's second assignment of error.

Standard of Review for Disqualification

We review a military judge's ruling on the motion of a party requesting his or her disqualification for an abuse of discretion. *See United States v. Rivers*, 49 M.J. 434, 444 (C.A.A.F. 1998)(citing *United States v. Cornett*, 47 M.J. 128, 131 (C.A.A.F. 1997)).

Disqualification

"A judge is presumed to be qualified and so the burden placed upon the party seeking disqualification is substantial in proving otherwise." *United States v. Allen*, 31 M.J. 572, 601 (N.M.C.M.R. 1990)(citations omitted), *aff'd*, 33 M.J. 209 (C.M.A. 1991). A military judge shall disqualify himself when he has "personal knowledge of disputed evidentiary facts concerning the proceeding." R.C.M. 902(b)(1). However, not all personal knowledge is disqualifying and "[f]acts learned by a judge in his judicial capacity cannot serve as the basis for disqualification." *Allen*, 31 M.J. at 603 (citing *United States v. Patrick*, 542 F.2d 381 (7th Cir. 1976)). We identify the following matters for resolution in determining if LtCol Ward should have disqualified himself in this case: (1) Did LtCol

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September 2005, the record is devoid of any documentation demonstrating if and when Captain Reh was officially relieved from representing the appellant.

Ward possess knowledge regarding this case? If so, (2) was LtCol Ward's knowledge obtained in a judicial or extra-judicial capacity? If so, (3) did LtCol Ward's knowledge extend to evidentiary facts in dispute?

Initially, we observe that "[t]he point of distinguishing between 'personal knowledge' and knowledge gained in a judicial capacity is that information from the latter source enters the record and may be controverted or tested by the tools of the adversary process." *Edgar v. K.L.*, 93 F.3d 256, 259 (7th Cir. 1996). Since military case law is not voluminous with regard to the personal knowledge aspect of R.C.M. 902(b)(1), we find guidance from federal courts because "'[t]he standard for deciding the Manual judicial-disqualification question is the same as that provided in the Federal judicial-disqualification statute ([28 U.S.C. § 455]) upon which it is based.'" *United States v. Miller*, 48 M.J. 790, 792 (N.M.Ct.Crim.App. 1998) (quoting *United States v. Mitchell*, 39 M.J. 131, 143 (C.M.A. 1994)).

Federal courts have determined that the gravamen of the personal knowledge analysis is the exclusivity of the knowledge held by the judge. For instance, a judge presiding over the trial of an accused gang member does not possess personal knowledge when he was merely a casual spectator at the trial of the accused's co-conspirator and details of that trial were available to the public-at-large. *In re Hatcher*, 150 F.3d 631, 635 (7th Cir. 1998). However, a judge has been considered to possess personal knowledge following an *ex parte* communication in chambers with experts likely to be called as witnesses. *Edgar*, 93 F.3d at 259-60.

On the facts before us, we find that LtCol Ward did indeed possess personal knowledge as to evidentiary facts in dispute during the *DuBay* hearing. First, the record of the *DuBay* hearing demonstrates that LtCol Ward assumed duties as the military justice officer of the LSSS Camp Lejeune on 25 June 2005. This was the command which was processing the appellant's case and to which Captain Reh was permanently assigned while deployed. Therefore, he was in a position to obtain detailed and exclusive knowledge of Captain Reh's trial counsel actions between 25 June and 8 September 2005.

Second, since LtCol Ward was not a military judge, much less detailed to the present case, at the time of his service as the military justice officer, any knowledge he possessed or obtained regarding Captain Reh's trial counsel actions between

25 June and 8 September 2005 was derived in a purely extra-judicial capacity.

Third, Captain Reh's trial counsel actions between 25 June and 8 September 2005 were, and remain, evidentiary facts in dispute at the *DuBay* hearing based on CAAF's broad fourth factual issue.

Therefore, we find that LtCol Ward was mandatorily disqualified from serving as the military judge at the *DuBay* hearing under R.C.M. 902(b)(1). *See Allen*, 31 M.J. at 602.

Conclusion

We return the record of trial back to the Judge Advocate General of the Navy for remand to an appropriate convening authority to order a new *DuBay* hearing pursuant to *Lee*, 66 M.J. at 390. We further direct that LtCol Ward not serve as the military judge at the *DuBay* hearing and that the successor military judge not consider the record of the prior *DuBay* hearing.

Judge MAKSYM and Judge PERLAK concur.

For the Court

R.H. TROIDL
Clerk of Court