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.

RONALD V. ROMERO
PRIVATE (E-1), U.S. MARINE CORPS

NMCCA 200800378
GENERAL COURT-MARTIAL

Sentence Adjudged: 19 October 2006.
Military Judge: LtCol E.H. Robinson, USMC.
Convening Authority: Commanding General, 3d Marine Aircraft Wing, MarForPac, MCAS Miramar, San Diego, CA.
Staff Judge Advocate's Recommendation: Col V.A. Ary, USMC.
For Appellant: Maj Brian Jackson, USMC.
For Appellee: Capt Geoffrey S. Shows, USMC.

28 May 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HARRIS, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, pursuant to his pleas, of unauthorized absence and negligent homicide in violation of Articles 86 and 134 of the Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 934. The appellant was sentenced to confinement for 540 days, forfeiture of all pay and allowances, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

In his sole assignment of error, the appellant asserts that the procedural rule precluding this court's review of a

challenge for cause against a member at trial is invalid.[1] *See* RULE FOR COURTS-MARTIAL 912(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 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, after staying awake for nearly 30 hours straight, fell asleep while driving alone on a rural highway. The appellant's vehicle crossed the road's center line and caused an accident, which tragically claimed the life of a young woman traveling in the opposite lane. There was never any allegation that the appellant was under the influence of drugs or alcohol at the time of the accident.

During *voir dire* one of the members, Captain (Capt) H, revealed that he had witnessed a fatal automobile accident in 1983. Record at 207. That accident was caused by an intoxicated driver and resulted in multiple deaths. *Id.* Although witnessing the 1983 accident had a "profound effect" on Capt H, he stated that he could separate the facts of that incident from the appellant's case, and that the earlier accident would not bias him against the appellant. *Id.* at 208-09.

The appellant challenged two members for cause, including Capt H. Record at 264-65. The military judge granted the defense challenge against the other member, but denied the challenge to Capt H, specifically noting the length of time that had elapsed since the 1983 accident. *Id.* at 265. The appellant then used his peremptory challenge against Capt H. *Id.* at 266. The Government did not challenge any member for cause, nor did it use its peremptory challenge. *Id.* at 264, 266.

II. Analysis

We begin our review of the assignment of error by first clarifying its scope. The appellant makes at least a passing reference to several constitutional provisions in his brief. Appellant's Brief of 14 Aug 2008 at 4. We do not believe that the appellant's constitutional rights are implicated on these facts. It is well-established that an accused in a federal civilian criminal trial has a Sixth

[1] "THE PRESIDENT OF THE UNITED STATES MAY NOT LAWFULLY PROMULGATE A REGULATION WHICH PRECLUDES CONSIDERATION UPON LATER REVIEW OF AN ERROR CALLING INTO SUBSTANTIAL DOUBT THE LEGALITY, FAIRNESS, AND IMPARTIALITY OF A COURT-MARTIAL." Appellant's Brief of 14 Aug 2008 at 1.

Amendment right to an impartial jury. *United States v. Lambert*, 55 M.J. 293, 295 (C.A.A.F. 2001); *United States v. Ai*, 49 M.J. 1, 4 (C.A.A.F. 1998)(citations omitted). Although the Sixth Amendment has "limited applicability" to military courts-martial, a servicemember does have, as a matter of fundamental fairness and Fifth Amendment due process, the right to impartial court members. *See United States v. Elfayoumi*, 66 M.J. 354, 356 (C.A.A.F. 2008); *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001)(citations omitted). But in this case, any possible error of constitutional dimension was cured by the appellant's timely exercise of his peremptory challenge against Capt H. *See United States v. Martinez-Salazar*, 528 U.S. 304, 311-14 (2000); *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988). The appellant successfully removed the two ostensibly biased members from the panel, so the military judge's denial of the challenge for cause did not affect any Fifth or Sixth Amendment right.

In addition to this constitutional right, however, both Congress and the President have established set procedures to peremptorily challenge a single member of a court-martial panel. *See* Art. 41, UCMJ; R.C.M. 912. This statutory or regulatory right to a peremptory challenge forms the central issue in this case; specifically, whether this court can review the denial of a challenge for cause if the accused chose to use his sole peremptory challenge against that same member. We hold that the timely use of a peremptory challenge against a member precludes appellate review of any denial of a challenge for cause against that member.

Prior to 2005, R.C.M. 912(f)(4) expressly allowed the defense to preserve review of a denied challenge for cause and still use its peremptory challenge against that member. *See United States v. Leonard*, 63 M.J. 398, 402-03 (C.A.A.F. 2006); *United States v. Eby*, 44 M.J. 425, 427 (C.A.A.F. 1996). Under the version of the Rules for Courts-Martial then in effect, the defense merely needed to state on the record that, but for denial of the challenge for cause, the defense would have used its peremptory challenge against another identified member of the panel. *Id.*

This procedural framework was more beneficial to an accused than was the corresponding process in civilian courts. Criminal defendants in federal court have a similar rule-based right to peremptory challenges. *See* FEDERAL RULE OF CRIMINAL PROCEDURE 24. In *Martinez-Salazar*, the Supreme Court held that a defendant's use of his peremptory challenge against a juror who should have been removed for cause did not violate the defendant's Due Process or regulatory rights to exercise his peremptory challenges. 528 U.S. at 317. Justice Ginsburg, writing for the majority, succinctly stated that "[a] hard choice is not the same as no choice." *Id.* at 315. The defendant in that case could

have stood upon his challenge for cause and subsequently attacked his conviction on Sixth Amendment grounds; instead, he utilized a peremptory challenge to remove the unwanted juror on the front end. *Id.* The Supreme Court held that the regulatory structure requiring that "hard choice" nonetheless fully complied with constitutional and statutory requirements. *Id.*

The distinction between civilian and military law at that time was discussed in detail by the U.S. Court of Appeals for the Armed Forces in *United States v. Armstrong*, 54 M.J. 51 (C.A.A.F. 2000). *See also Wiesen*, 57 M.J. at 177. In *Armstrong*, the Government argued that *Martinez-Salazar* overruled the military courts' previous interpretation of R.C.M. 912, and that a subsequent peremptory challenge eliminated any possible prejudice from the wrongful denial of a challenge for cause. 54 M.J. at 54. The court, in rejecting this assertion, held that the unique rights conferred by the President in the earlier version of R.C.M. 912(f)(4) are not mandated by the Constitution or statute, nor is there a federal civilian counterpart. *Id.* at 55. Notably, however, the court clearly recognized the possibility that such a right was subject to change in the future, stating:

> *Until RCM 912(f)(4) is modified or rescinded*, a military accused is entitled to its protection. It does not conflict with the Constitution or any applicable statute. *Martinez-Salazar* does not preclude the President from promulgating a rule saving an accused from the hard choice faced by defendants in federal district courts -- to let the challenged juror sit on the case and challenge the ruling on appeal or to use a peremptory challenge to remove the juror and ensure an impartial jury.

Id. (emphasis added).

In 2005, the President promulgated amendments to the Rules for Courts-Martial, which eliminated this regulatory right to preserve review of a challenge for cause.[2] *See* Exec. Order No. 13,387, 3 C.F.R. 178 (2006), *reprinted as*

[2] We note that the appellant's offenses occurred before the effective date of the Executive Order; however the appellant has not advanced any argument that the preceding version of this purely procedural rule remained applicable at the time of his trial on that basis. *See generally Taylor v. Garaffa* 57 M.J. 645 (N.M.Ct.Crim.App 2002). However, even if the earlier version of R.C.M. 912(f)(4) were applicable, the appellant's civilian defense counsel did not state which other member he would have peremptorily challenged but for the denial of the challenge for cause against Capt H. Record at 266. Accordingly, under either version of R.C.M. 912(f)(4), this issue was not properly preserved for appellate review. *See Eby*, 44 M.J. at 427.

amended in 10 U.S.C. § 801 app. at 801-946. The relevant text of the rule now reads:

> When a challenge for cause has been denied the successful use of a peremptory challenge by either party, excusing the challenged member from further participation in the court-martial, shall preclude further consideration of the challenge of that excused member upon later review.

R.C.M. 912(f)(4). The analysis to the amended rule makes clear that the President's intent was to conform military practice to federal practice, including the aforementioned "hard choice" of whether to use a peremptory challenge on a member unsuccessfully challenge for cause. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), App. 21 at A21-62. Another stated purpose of the amendment was to limit appellate litigation, and the analysis specifically references several cases from military appellate courts, including *Armstrong* and *Wiesen, supra*. *Id*.

The appellant contends that the President exceeded his authority by altering this procedural rule. We cannot agree. Congress has expressly granted the President authority to prescribe rules of trial procedure, so long as those rules are not contrary to other provisions in the Uniform Code of Military Justice. Art. 36(a), UCMJ. The court in *Armstrong* correctly identified the prior version of R.C.M. 912(f)(4) as creating an independent right, not based in the constitution or in statute. 54 M.J. at 55. It follows that what the President unilaterally once gave to military defendants, he can also take away. The appellant argues that the amended R.C.M. 912 denies him the right to his peremptory challenge under Article 41(b), UCMJ. That argument is essentially identical to the position explicitly rejected by the Supreme Court in *Martinez-Salazar*. The appellant was not denied his statutory right to a peremptory challenge; instead, he used that right to remove a member he unsuccessfully challenged for cause and whom he did not want to sit on the panel. In so doing, he foreclosed further appellate review of that issue. R.C.M. 912(f)(4).

III. Post-Trial Delay

In the course of our review of this case, we note unreasonable post-trial delay because it took the Government 588 days after trial to docket this case with 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 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