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

Before
E.E. GEISER, R.G. KELLY, L.T. BOOKER
Appellate Military Judges

UNITED STATES OF AMERICA

v.

MATTHEW T. BURK
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 200800146
GENERAL COURT-MARTIAL

Sentence Adjudged: 29 September 2007.
Military Judge: CAPT Brian Roberts, JAGC, USN.
Convening Authority: Commanding General, 2d Marine Aircraft Wing, Cherry Point, NC.
Staff Judge Advocate's Recommendation: Col D.J. Lecce, USMC.
For Appellant: LCDR Kristina Reeves, JAGC, USN.
For Appellee: LCDR Paul Bunge, JAGC, USN.

12 February 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

The Government requested *en banc* reconsideration of an earlier Panel decision in this case.[1] The court denied that request in an order dated 29 January 2009, but the Panel elected to reconsider its earlier decision. After Panel reconsideration,

[1] The basis for the reconsideration was that this court erroneously believed that one of the challenged members remained on the panel when in fact he had been excused through the use of a peremptory challenge, thus barring consideration of the unsuccessful challenge for cause against that member. The court acknowledges and regrets the error. The Government also maintains that the court mischaracterized the voir dire responses of a different member. That contention is addressed in the body of this opinion.

the findings and the sentence are set aside and a rehearing is authorized.

A general court-martial composed of officer and enlisted members[2] convicted the appellant, contrary to his pleas, of rape, indecent assault, and attempted rape, in violation of Articles 120, 134, and 80, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 934, and 880. The appellant's approved sentence was confinement for 6 months, forfeiture of $859.00 pay per month for 6 months, reduction to pay grade E-1, and a bad-conduct discharge.

The appellant claims that the military judge erred in denying several challenges for cause against members nominated to serve. He further claims that the evidence is legally and factually insufficient to sustain the findings. Finding merit in his first assignment of error, we will set aside the findings and the sentence and authorize a rehearing.[3]

During his trial on the merits, the appellant contested the consent and force aspects of all three offenses of which he was convicted. His strategy included rigorous cross-examination of all Government witnesses and presentation of defense witnesses who perceived the appellant's and the alleged victim's activity on the night in question. Lance Corporal (LCpl) D -- the prosecutrix of the rape, indecent assault, and attempted rape -- testified, and she acknowledged that she and the appellant were alone together in her barracks room for the critical period preceding initiation of intercourse and further attempts at intercourse. The Government also presented the testimony of several Marines who looked in on LCpl D and the appellant at various points, but none of them was privy to any conversation between LCpl D and the appellant. The Government introduced the appellant's statement to the Naval Criminal Investigative Service which acknowledged intercourse but denied force and lack of consent. The appellant did not testify.

The venire originally consisted of seven officer and six enlisted members. One enlisted member was excused immediately after assembly, and before voir dire, due to a family emergency. After group and individual voir dire, the military judge granted two Government challenges and denied a third, and he granted two defense challenges and denied four others. Both parties exercised their single peremptory challenge, the Government removing the member whom it had unsuccessfully challenged for cause, the defense removing one of the four whom it had

---

[2] The panel that convicted the appellant consisted of 3 officer members and 2 enlisted members. When jeopardy attached, the panel consisted of 4 officer members and 2 enlisted members, but during the testimony of one prosecution witness an officer member discovered a conflict and was excused.

[3] We have considered the appellant's second assignment of error and determined that it is without merit.

unsuccessfully challenged for cause. The resulting panel contained six members, four officers and two enlisted.

Our review of the voir dire proceedings leads us to conclude that the military judge abused his discretion in denying the defense's challenges. Our focus is particularly on Staff Sergeant (SSgt) M, who responded in group voir dire that she could not state with absolute certainty that she presumed the appellant to be innocent of the charges against him, but we note that SSgt M is just one of several members who had been vigorously questioned during the voir dire proceedings and the subject of defense challenge. She later revised her position, in individual voir dire by the trial counsel, to state that she was "neutral," adding that "if I have to go for innocent or guilty, sir, then yes, innocent until proven guilty". She also responded to the defense counsel that a Marine should testify when he says he is not guilty, stating "if it would be me, I'd want people to know I'm innocent and not leave any doubt in anyone's mind I didn't do something." She denied that that thought would be in the back of her mind during deliberations, but she did acknowledge she held the belief. Finally, in response to questions from the military judge, SSgt M stated that she understood the appellant's absolute right not to testify and would not hold it against him if he chose to exercise that right, and that she further understood the presumption of innocence and its application to the court-martial. Record at 190, 194-96.

SSgt R was the next member interviewed individually after SSgt M. He voiced his belief that "if you are getting charged for a crime, you should speak up and acknowledge that you are not guilty," adding that "you should defend yourself at all possible costs." He did remark that this was his own personal stance and that it could be logically consistent for a person charged with a crime to plead not guilty and stand on his right to remain silent. *Id.* at 204-05.

The defense challenged SSgt M on the basis of her profession that the appellant should testify and her difficulty grasping the presumption of innocence.[4] The defense challenged SSgt R on a similar basis. The military judge conducted a brief analysis of the challenges against SSgt M and SSgt R from an implied-bias standpoint, and concluded in each case that the individual member's circumstances did not do injury to the perception of appearance of fairness. Notably, the military judge analyzed each member's response to questioning and rehabilitative efforts, but he omitted any discussion of demeanor. *Id.* at 223-24. Such observations would have been particularly useful to us in determining whether the military judge abused his discretion, as we are not as deferential to the resolution of challenges based on implied bias as we are to the resolution of challenges based

[4] A third prong, that her mother had been sexually assaulted before SSgt M was born, was also raised and properly rejected by the military judge.

on actual bias. *See United States v. Terry*, 64 M.J. 298, 302 (C.A.A.F. 2007).

In ruling on the challenges against both SSgt M and SSgt R, the military judge did not mention the "liberal grant mandate" that should govern defense challenges. *See United States v. Townsend*, 65 M.J. 460, 463-64 (C.A.A.F. 2008). The "mandate" is tailored to the public's perception of the trial, *id*. at 463, and in this regard we note that the military judge's language with regard to SSgt R ("nothing in his answers that would lead one to believe . . .") can be read to address the public's perception. Record at 224. His language with regard to SSgt M, however, appears more subjective ("I believe that . . ."). *Id.* at 223. The military judge denied both challenges, and the defense used its sole peremptory challenge to excuse SSgt R.

While we do not assign any talismanic value to such words as "liberal grant mandate," they do serve the useful purpose of alerting us to the fact that the judge did consider all the implications of seating a particular member. Especially in a system where there is but one peremptory challenge available to each party, application of the principles of the mandate "helps to address questions that may linger in public perception." *Townsend*, 65 M.J. at 466 (Baker, J., concurring).

As noted above, the appellant and the prosecutrix were alone together at several critical points when the offenses are alleged to have occurred. There were only two eyewitnesses to the alleged crime, and one of them is cloaked with a constitutional right to remain silent and to require the Government to prove its case against him beyond a reasonable doubt. Because one of the seated panel members professed a belief that one accused of a crime should testify, our own perception of the fairness, and the apparent fairness, of the proceedings is significantly undermined, and we believe that the general public would have a like perception.

Conclusion

The findings and the sentence are set aside. A rehearing is authorized.

For the Court

R.H. TROIDL
Clerk of Court