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

Before
C.L. REISMEIER, F.D. MITCHELL, J.R. PERLAK
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JOSHUA D. FRY
PRIVATE (E-1), U.S. MARINE CORPS

NMCCA 201000179
GENERAL COURT-MARTIAL

Sentence Adjudged: 20 July 2009.
Military Judge: Col John Ewers, USMC.
Convening Authority: Commanding General, Marine Corps Installation-West, Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: Col M.K. Jamison, USMC.
For Appellant: LCDR Brian Mizer, JAGC, USN.
For Appellee: Maj Jonathan Nelson, USMC.

27 January 2011

OPINION OF THE COURT

IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS OPINION DOES NOT SERVE AS PRECEDENT.

REISMEIER, Chief Judge

A military judge sitting as a general court-martial convicted the appellant, consistent with his pleas, of fraudulent enlistment, unauthorized absence, and possession of child pornography, in violation of Articles 83, 86, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 883, 886, and 934. The appellant was sentenced to confinement for four years, forfeiture of all pay and allowances, and a bad-conduct discharge. The convening authority approved the sentence as adjudged. In accordance with the pretrial agreement, the convening authority suspended all confinement in excess of twelve months for a period of twelve months from the date of trial.

The appellant has submitted one assignment of error. He contends that his enlistment in the Marine Corps was void *ab initio* and therefore the court-martial had no personal jurisdiction over him. For the reasons set out below, 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 was committed. Arts. 59(a) and 66(c), UCMJ.

Background

We accept the military judge's well-founded and detailed findings of fact and adopt them as our own.

The appellant had a long history of developmental and learning disability beginning as a toddler. In 2006, the appellant reached the age of majority upon turning 18 years old. Mindful of his health and educational history, the Superior Court of California took action on a petition and appointed Ms. Fry, the appellant's grandmother and adoptive mother, a "limited conservator" of the person of the appellant and ordered that the following legal and civil rights of the appellant be limited: (1) the right to fix his residence or specific dwelling; (2) the right to have access to his confidential records and papers; (3) the right to enter into contracts on his behalf; (4) the right to have exclusive authority to give or withhold consent to medical treatment; (5) the right to make decisions concerning his education. The conservatorship was predicated on the appellant's autism, obsessive compulsive symptoms, and impulsivity.

The California court found that the appellant was "developmentally disabled by (California) Probate Code Section 1420" and that he was unable to independently provide for his needs for physical health, clothing, food, and shelter. His rights were in part shared by the creation of a conservatorship that provided limited rights to the conservator as described in the California court order. The essence of the conservatorship was to permit the conservator to undertake actions at the behest of or on behalf of the conservatee without herself incurring personal debt or liability for having done so. The appellant's right to contract was not extinguished under California law.

Prior to the conservatorship, a Marine Corps recruiter met the appellant at a Young Marines function at Camp Pendleton when the appellant was 16 years old and not yet eligible to enlist. The recruiter contacted the appellant again as the appellant neared the window of eligibility, but the appellant was departing the state for school in Colorado. While the genesis of the appellant's move to Colorado is unknown, his move out of California placed him beyond the jurisdictional boundaries of the conservatorship. Similarly, because the appellant would be in a different state, the recruiter was longer be able to recruit

him.[1] When the appellant returned from Colorado, he was about 20 years old and contacted the recruiter to begin the enlistment process. Ms. Fry informed the recruiter that she did not want the appellant to join the Marine Corps, but that she could not stop him. Nonetheless, the appellant proceeded to apply for enlistment, passed the ASVAB test, and unremarkably passed through the Military Entrance Processing Station in Los Angeles, CA. Officials did not know of the appellant's autism, although evaluation for the condition is not within the normal battery of tests. The appellant ultimately signed an enlistment contract and shipped off to the Marine Corps Recruiting Depot, San Diego.

While at boot camp, the appellant was counseled numerous times for a range of behavioral issues, to include repeatedly stealing peanut butter packets from the galley and hiding them in his socks, refusing to eat chow, and urinating in his canteen (apparently he did not understand that he could ask the senior drill instructor if he could use the head). According to the senior drill instructor for the appellant's platoon, the appellant stood out, in part because he did not want to be there. He expressed his desire to leave "a lot more" than other recruits, and sometimes refused orders and to train. Without the benefit of knowing his full history, this behavior alone was not so abnormal as to alarm training officials. At one point during recruit training, the appellant notified a corpsman that he had asthma and autism. Despite medical receiving verbal confirmation as to the autism diagnosis from Ms. Fry, the appellant was returned to duty.

On 11 April 2008 the appellant graduated from recruit training and, on 23 April 2008, reported to the School of Infantry for further training. The subject offenses occurred between 26 May 2008 and 26 July 2008.

At trial, the defense made a motion to dismiss for lack of personal jurisdiction claiming that, as a matter of law, the appellant had no capacity to contract and therefore his enlistment contract was void. The Government called a psychologist who stated that he determined that the appellant understood the effect of enlisting. In reaching this determination, the doctor hedged his responses somewhat by noting both that the appellant was not fully responsive and that he did not have access to the appellant's full history.[2] The assertion

[1] There is ample evidence in the record that the recruiter should have been suspicious that the appellant – even if statutorily eligible - was not a suitable candidate for the service. However, the appellant avoided disclosing anything that would clearly have indicated his ineligibility. Regardless, any insinuation of recruiter misconduct is irrelevant to the jurisdictional issue presented.

[2] The issue of whether the appellant had the capacity to stand trial was resolved at trial. An inquiry per RULE FOR COURTS-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), was conducted, finding the appellant capable of understanding the proceedings and cooperating in his defense. AE XIII.

of a complete incapacity to contract recurs in both the trial and appellate proceedings. Such a position was specifically advanced by the attorney for the conservatorship. Appellate Exhibit X. While we believe the arguments of counsel at both levels were made in good faith, the overstatements in AE X cannot be squared with California conservatorship law, which is purposefully much more limited. The military judge concluded that because the appellant could understand the significance of enlisting in the Marine Corps, and because the California court's findings and order were not binding for purposes of determining jurisdiction under Article 2, UCMJ, there was jurisdiction over the appellant. We agree.

Discussion

"When an accused contests personal jurisdiction on appeal, we review that question of law *de novo*, accepting the military judge's findings of historical facts unless they are clearly erroneous or unsupported in the record." *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000)(citation omitted). As noted above, we have adopted the military judge's findings of fact.

A valid enlistment contract is a creature of federal statute. By statute, the Secretary of the Navy may accept the original enlistment of "qualified, effective, and able-bodied persons" within certain age ranges. 10 U.S.C. § 505(a). Persons not qualified to enlist include anyone who is "insane, intoxicated, or a deserter from an armed force, or who has been convicted of a felony . . . ." 10 U.S.C. § 504(a). Article 2 of the Uniform Code of Military Justice, 10 U.S.C. § 802, states in pertinent part:

> (b) The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for the purposes of jurisdiction . . . and change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment.
>
> (c) Notwithstanding any other provision of law, a person serving with an armed force who-
>
> (1) submitted voluntarily to military authority;
> (2) met the mental competence and minimum age qualifications of sections 504 and 505 of [Title 10] at the time of voluntary submission to military authority;
> (3) received military pay and allowances; and
> (4) performed military duties;
>
> is subject to this chapter . . . .

When redrafting Article 2, UCMJ, Congress's stated "purpose [was] to . . . reaffirm[] the law as set forth by the Supreme Court in *In Re Grimley*, 137 U.S. 147, [11 S. Ct. 54, 34 L. Ed.

636] (1890)." 80 CIS H 2019 (Hearings before the Subcommittee on Military Personnel to consider S. 428, section 801 provisions to amend the Uniform Code of Military Justice). The Supreme Court in *In Re Grimley* explained that:

> By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged. He cannot of his own volition throw off the garments he has once put on, nor can he, the State not objecting, renounce his relations and destroy his status on the plea that, if he had disclosed truthfully the facts, the other party, the State, would not have entered into the new relations with him, or permitted him to change his status. Of course these considerations may not apply where there is insanity, idiocy, infancy, or any other disability which, in its nature, disables a party from changing his status or entering into new relations. But where a party is *sui juris*, without any disability to enter into the new relations, the rule generally applies as stated.

137 U.S. at 153. By passing a revised Article 2, UCMJ, Congress did not cede determination of the validity of an enlistment contract to a state court's conclusion as to "capacity" to contract, but rather retained the authority to set its own definition of "capacity" to enlist. We are not persuaded by the argument that a state has the legal authority to limit the right of a citizen to enlist in the armed forces by the creation of a limited conservatorship. We must, therefore, address whether the appellant met the mental standard for enlistment articulated in the federal jurisprudence: whether - despite his autism, compulsive disorder, and other behavioral issues - the appellant was sane under 10 U.S.C. § 504 and *sui jurus* under *Grimley*.[3]

---

[3] *Sui juris* is defined by Black's Law Dictionary, 1572 (9th Ed. 2009) as someone who has all of the rights to which a person is entitled, someone who is not under a legal disability or the power of another. Read broadly, this definition might suggest that one whose actions legally could be nullified by another is not *sui juris*, as a conservatorship or guardianship places in the hands of another some degree of legal power over another. That broad definition is inconsistent with precedent in the realm of enlistment contracts. Federal courts have concluded that the mere right of an adult to void a minor's enlistment contract – and hence, the mere fact that a minor is not *sui juris* – does not make an enlistment void. *See In re Morrissey*, 137 U.S. 157 (1890)(minors over the age of 16 were capable of entering military service, even if parental consent was required); *In re Miller*, 114 F. 838, 842 (5th Cir. 1902)(where a minor was eligible for enlistment with the consent of his parents, the fact that his parents might be able to "secure [the minor's] release from the contract to enlistment . . . is very different from obtaining release and immunity from prosecution for an offense committed against the law. [A] minor's contract of enlistment is voidable only, and not void.") We believe the same holds true here, and therefore reject the conclusion that

While Congress did not define "insane" or "insanity" within 10 U.S.C. § 504, 1 U.S.C. § 1 states, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'insane' and 'insane person' and 'lunatic' shall include every idiot, lunatic, insane person, and person *non compos mentis*." Non compos mentis means "insane" or "incompetent". Black's Law Dictionary, 1151 (9th Ed. 2009). It is the legal – not medical -- determination that one is mentally incapable of managing one's own affairs.

California did not determine that the appellant was incapable of managing his own affairs, incompetent, or insane. The appellant retained the right to contract even under California law, even if the conservator's right to seek revision or rescission of (e.g., void) such contract in the Probate Court stood to possibly limit his right. The California Probate Code, § 1801(d), provides that:

> (d) A limited conservator of the person or of the estate, or both, may be appointed for a developmentally disabled adult. A limited conservatorship may be utilized only as necessary to promote and protect the well-being of the individual, shall be designed to encourage the development of maximum self-reliance and independence of the individual, and shall be ordered only to the extent necessitated by the individual's proven mental and adaptive limitations. ***The conservatee of the limited conservator shall not be presumed to be incompetent and shall retain all legal and civil rights except those which by court order have been designated as legal disabilities and have been specifically granted to the limited conservator.*** The intent of the Legislature, as expressed in Section 4501 of the Welfare and Institutions Code, that developmentally disabled citizens of this state receive services resulting in more independent, productive, and normal lives is the underlying mandate of this division in its application to adults alleged to be developmentally disabled.

(emphasis added). In this case, the military judge concluded, rightly so, that the California court's issuance of a conservatorship did not mean that the appellant did not have the capacity to understand the significance of his enlistment. While the evidence before the military judge suggested in both the ongoing behavior of the appellant and in the psychologist's testimony that the appellant's developmental problems may have remained unresolved, his sanity, his capacity to understand the

---

the conservatorship made the appellant, an adult, *non sui juris* as contemplated by *Grimley*, and hence, unable to contract.

significance of a contract, and his civil liberties not specifically limited remained intact.[4] Thus, even under California law, the appellant was neither insane nor unable to contract.

Even if the California conservatorship created a federal right to void the enlistment contract --a conclusion we reject -- we see nothing which defeats jurisdiction in this case His contract was neither void *ab initio* as a result of the conservatorship, nor voided prior to his misconduct, despite the misgivings his conservator may have held prior to his enlistment.[5]

The appellant lived in an organized society. He passed his entrance exams (to include the ASVAB) and executed orders. He was found competent to understand the charges against him. He retained the civil liberties of a citizen not otherwise limited by the California conservatorship (including, notably, the rights to marry and vote (*see, e.g.,* California Probate Code §§ 810 and 1910). We cannot conclude, therefore, that the appellant was legally insane at any pertinent time which would serve to deny this court-martial of jurisdiction. He further satisfied every other requirement set forth in Article 2(b) & (c), UCMJ and therefore had, as a matter of law, the capacity to enter into an enlistment contract.

Conclusion

The findings and sentence, as approved by the convening authority, are affirmed.

Senior Judge MITCHELL and Judge PERLAK concur.

For the Court

R.H. TROIDL
Clerk of Court

[4] Notwithstanding the caveat the doctor placed on his answer regarding the appellant's ability to comprehend the significance of enlisting, the record as a whole demonstrates that the appellant did, in fact, possess that ability.

[5] To the extent the conservator was putatively required to agree to the pretrial agreement for a court-martial occurring in California (a contract), we note that Ms. Fry specifically concurred in the agreement. AE XIX.