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

Before
J.R. PERLAK, M.D. MODZELEWSKI, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

DANIEL W. SANDERS
CORPORAL (E-4), U.S. MARINE CORPS

NMCCA 201200202
SPECIAL COURT-MARTIAL

Sentence Adjudged: 8 March 2012.
Military Judge: LtCol Robert G. Palmer, USMC.
Convening Authority: Commanding Officer, Headquarters and Service Battalion, Marine Corps Recruit Depot, Parris Island, SC.
Staff Judge Advocate's Recommendation: Col E.R. Kleis, USMC.
For Appellant: Maj Peter H. Griesch, USMCR.
For Appellee: LT Keith B. Lofland, JAGC, USN.

13 November 2012

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

JOYCE, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of knowingly using an interactive computer service in interstate commerce to transmit obscene matters in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The military judge sentenced the appellant to confinement for 12 months, reduction

to pay grade E-1, and a bad-conduct discharge. A pretrial agreement limited punishment to the jurisdictional maximum of a special court-martial and had no effect on the sentence adjudged. The convening authority (CA) approved the sentence as adjudged but, in an act of clemency, suspended confinement in excess of 10 months.

The appellant raises one assignment of error, averring that the military judge was disqualified by his inflexible attitudes about sentencing and by allowing his perceptions of what Congress and the Commandant of the Marine Corps expect from Marine Corps courts-martial to enter into his deliberations. Additionally, the assignment raises unlawful command influence.

After carefully considering the record of trial and the submissions of the parties, we are convinced 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.

Background

The assignment of error focuses on post-trial events. On 8 March 2012, the military judge sentenced the appellant. On 10 May 2012, the CA approved the sentence as adjudged and, in an act of clemency, suspended confinement in excess of 10 months. On 21 June 2012, the military judge spoke for two hours to five junior Marine Corps officers providing professional military education (PME) regarding the practice of military justice. These officers were law students assigned to various Marine Corps legal offices to work with judge advocates and participate in legal training during their summer recess from law school; some were working for defense, and some for the Government. Two of these officers provided written statements[1] summarizing their recollections of the military judge's comments, and these affidavits form the entire factual basis for the appellant's assigned error. Appellant's Brief of 16 Aug 2012 at Appendices I and II.

During the PME, the military judge made various statements not in keeping with standards of judicial decorum. Two of the law students in attendance were concerned with the military judge's comments and prepared statements reporting that the military judge referred to defendants as "scumbags," made statements that Congress and the Commandant of the Marine Corps

[1] One was an affidavit and the other a declaration under penalty of perjury.

wanted more convictions, and that trial counsel should assume the defendant is guilty. *Id.* Moreover, pertinent to the facts of this appeal, one law student wrote that the military judge, "said that if you are trial council [sic] and prosecuting a child pornography defendent [sic] and he gets off because of your incompetence you will go to hell;" but further adds that "I think he was trying to be humorous with this comment because he chuckled when he said it." *Id.*

Disqualification of a Military Judge

We review whether a military judge has acted appropriately *de novo*.[2] "'An accused has a constitutional right to an impartial judge.'" *United States v. Martinez*, 70 M.J. 154, 157 (C.A.A.F. 2011) (quoting *United States v. Butcher*, 56 M.J. 87, 90 (C.A.A.F. 2001)). The Rules for Courts-Martial provide that a military judge must disqualify himself if the military judge's impartiality might reasonably be questioned.[3] A specific ground for disqualification includes personal bias or prejudice concerning a party. R.C.M. 902(b)(1); *accord* 28 United States Code § 455(b)(1). A military judge's impartiality is crucial to the conduct of a legal and fair court-martial. *United States v. Quintanilla*, 56 M.J. 37, 43 (C.A.A.F. 2001).

"There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves actions taken in conjunction with judicial proceedings." *Id.* at 44. "The moving party has the burden of establishing a reasonable factual basis for disqualification. More than mere surmise or conjecture is required." *Wilson v. Ouellette*, 34 M.J. 798, 799 (N.M.C.M.R. 1991) (citing *United States v. Allen*, 31 M.J. 572, 601 (N.M.C.M.R. 1990), *aff'd,* 33 M.J. 209 (C.M.A. 1991)). Specifically, the appellant must prove that, from the standpoint

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[2] In applying a *de novo* standard, we follow the guidance of the Court of Appeals for the Armed Forces, which has applied the same standard when facing questions that the appellant could not reasonably have raised at trial. *See, e.g., United States v. Rose*, 71 M.J. 138, 143 (C.A.A.F. 2012) (reviewing *de novo* the deficient performance and prejudice aspects of an ineffective assistance of counsel claim); *United States v. Stefan*, 69 M.J. 256, 258 (C.A.A.F. 2010) (considering *de novo* the qualification of a staff judge advocate to make the post-trial recommendation).

[3] RULE FOR COURTS-MARTIAL 902(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) provides that disqualification is required "in any proceeding in which [the] military judge's impartiality might reasonably be questioned." Disqualification may be required even if the evidence does not establish actual bias. *United States v. Quintanilla*, 56 M.J. 37, 45 (C.A.A.F. 2001).

of a reasonable person observing the proceedings, "'a court-martial's legality, fairness, and impartiality were put into doubt by the military judge's actions.'" *Martinez*, 70 M.J. at 158 (quoting *United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000)). This is an objective test for actual or apparent bias. *Quintanilla,* 56 M.J. at 45, 78.

A reasonable person made aware of the post-trial comments by the military judge in this case may well conclude that they are indicative of bias since they depart from the neutral and detached posture that trial judges must always maintain. Assuming, without deciding, that this post-trial bias existed, we next determine "whether the error was structural in nature, and therefore inherently prejudicial, or in the alternative, determine whether the error was harmless under *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 . . . (1988)." *United States v. Roach*, 69 M.J. 17, 20 (C.A.A.F. 2010).

This error was not structural. The record shows that the appellant's court-martial was a fair and impartial proceeding, occurring three months before the military judge made the comments in question. Therefore, we focus on whether the military judge's appearance of bias materially prejudiced any substantial rights of the appellant, and whether reversal is otherwise warranted in this case. The Court of Appeals for the Armed Forces in *Martinez* treated these two questions as distinct lines of analysis, the first governed by Article 59(a), UCMJ, and the second by *Liljeberg*. 70 M.J. at 159. Under *Liljeberg,* we consider "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." 486 U.S. at 864.

We do not find prejudice under either Article 59(a) or *Liljeberg*. There is no risk of injustice to the appellant in this case. The environment in which the military judge was speaking was unrelated to the appellant's trial. It was a training environment, consisting of young officers still attending law school.[4] While the comments are not what we would expect of a sitting judge (even if from the pleadings it appears to be pure embellishment), the statements made by the military judge occurred more than three months after the trial and more than one month after the CA's action. Moreover, the comments did not specifically reference the appellant or the appellant's case. They were directed more toward the performance of

[4] We find no basis to compel additional fact-finding at a *DuBay* hearing. *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

Government counsel than toward any other party, to include an accused. Bias and antipathy toward an attorney are generally insufficient to disqualify a judge "unless petitioners can show that such controversy would demonstrate a bias against the party itself." *United States v. Ettinger*, 36 M.J. 1171, 1174 (N.M.C.M.R. 1993) (quoting *Diversified Numismatics v. City of Orlando*, 949 F.2d 382, 385 (11th Cir. 1991)).

Even assuming the military judge's comments about a trial counsel's failure to successfully prosecute a child porn case demonstrates a bias against an accused, there is still no risk of injustice in his case. The fact that a judge has strong feelings about a particular crime does not automatically disqualify him from sentencing those who commit that crime. *Wilson*, 34 M.J. at 800 (citing *United States v. Borrero-Isaza*, 887 F.2d. 1349, 1357 (9th Cir. 1989)).

Likewise, our finding of no prejudice in this case presents no risk of injustice in other cases. That nexus simply does not exist here. We have held that the military judge's comments were error and evidence of an apparent bias. Other appellants remain free to show a prejudicial nexus to their own case.

Finally, our decision will not undermine the public's confidence in the judicial process. This appellant made a provident plea of guilty, after freely negotiating a pretrial agreement with the Government and receiving the jurisdictional protections of a lower forum. Furthermore, he received clemency from the CA, a highly discretionary act that shows the appellant was treated fairly.

One could only find prejudice in this case through the exercise of surmise and conjecture, as warned of in *Wilson*. *Id.* at 799. We decline to speculate, in the absence of evidence, how comments made three months after a provident guilty plea could have affected this court-martial.

Unlawful Command Influence

Furthermore, the appellant raises the issue of unlawful command influence. While "[t]here is no doubt that the appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial . . . there must be something more than an appearance of evil to justify action by an appellate court in a particular case. Proof of [command influence] in the air, so to speak, will not do. We will not presume that a military judge

has been influenced simply by the proximity of events which give the appearance of command influence in the absence of a connection to the result of a particular trial." *Allen*, 33 M.J. at 212 (citations, internal quotation marks, and footnote omitted).

When raising this issue on appeal, the appellant must "'(1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that the unlawful command influence was the cause of the unfairness.'" *United States v. Dugan*, 58 M.J. 253, 258 (C.A.A.F. 2003) (quoting *United States v. Biagese*, 50 M.J. 143, 150 (C.A.A.F. 1999)). Here, the appellant's attempt at raising unlawful command influence is based on two law students' written statements making reference to the military judge's purported comments that Congress and the Commandant of the Marine Corps want to see more convictions. Even if this were enough to satisfy the first prong, the appellant fails to show that his proceeding was unfair and that the unlawful command influence was the cause of the unfairness. The events are simply too remote in time and and sequenced in a manner which does not support a retroactive finding of unfairness in the proceedings.

Conclusion

The appellant asks this court to remand the case for resentencing, but fails to present evidence that the military judge had a bias against the appellant, or any of the parties to his trial. The appellant alleges that the military judge was influenced by Congress and the Commandant of the Marine Corps, but fails to meet his burden by establishing a reasonable factual basis for disqualification and showing a proximate causation between the military judge's comments and the outcome of his court-martial. *Dugan*, 58 M.J. at 258. While the military judge's comments at the PME were inappropriate and not in keeping with standards of judicial decorum, we are not persuaded that the timeline between the appellant's trial and the statements made by the military judge are such that the appellant was prejudiced, and that the military judge should be disqualified. Without more, we will not assume the military judge has been influenced by such authorities, and we are satisfied that reversal is not warranted under *Liljeberg*.

We affirm the findings and the sentence as approved by the CA.

Chief Judge PERLAK and Senior Judge MODZELEWSKI concur.

For the Court

R.H. TROIDL
Clerk of Court