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

Before
B.L. PAYTON-O'BRIEN, R.Q. WARD, J.R. MCFARLANE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

CHAD J. BATCHELDER
STAFF SERGEANT (E-6), U.S. MARINE CORPS

NMCCA 201200180
GENERAL COURT-MARTIAL

Sentence Adjudged: 16 December 2011.
Military Judge: LtCol Robert Palmer, USMC.
Convening Authority: Commanding Officer, Marine Corps Air Station, Beaufort, SC.
Staff Judge Advocate's Recommendation: Maj V.C. Danyluk, USMC.
For Appellant: CAPT Diane Karr, JAGC, USN.
For Appellee: Maj Paul Ervasti, USMC.

10 January 2013

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.

PER CURIAM:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of two specifications of disobeying a lawful order, one specification of false official statement, one specification of aggravated assault, one specification of child endangerment, one specification of adultery, and one novel specification of disobeying a state restraining order, in violation of Articles 92, 107, 128, and 134, Uniform Code of Military Justice, 10

U.S.C. §§ 892, 907, 928, and 934. The military judge sentenced the appellant to confinement for 18 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged. In accordance with a pretrial agreement, automatic forfeitures were deferred and waived for the benefit of the appellant's dependants.

The appellant claims in his first assignment of error that the military judge failed to elicit sufficient facts from the appellant, as required by *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969), to support his guilty plea to violating a lawful general order prohibiting fraternization. The appellant also raises a supplemental assignment of error in which he claims that comments by the military judge to a group of law students six months after his plea in this case warrants sentencing relief.

After consideration of the pleadings of the parties and reviewing the entire record of trial, 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.

Adequacy of Providence Inquiry

The appellant claims that the military judge abused his discretion when he accepted the appellant's guilty plea to violating United States Navy General Regulation 1165 (1990), which prohibits relationships that do not respect the differences in rank or grade and are prejudicial to good order and discipline or service discrediting. Specifically, the appellant claims that the facts elicited during the providence inquiry did not support a finding that his relationship with a junior Marine was prejudicial to good order and discipline or service discrediting. We disagree.

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Inabinette,* 66 M.J. 320, 322 (C.A.A.F. 2008). The military judge has a duty to establish, on the record, the factual basis that establishes that "the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty." *Care*, 40 C.M.R. at 253. In the context of a guilty plea, the entire record is examined to determine whether facts which support [the appellant's] guilty plea have been established. *United States v. Gaston*, 62 M.J. 404, 406 (C.A.A.F. 2006).

The record in this case shows that the appellant, an E-6 and a married man, had an intimate relationship with Lance Corporal (LCpl) L, an E-3 and a married woman whose husband was deployed. They communicated privately on the phone, via text-message and via social media. They talked about each other's marital problems, which included sexual discussions. The appellant publicly interacted with LCpl L at a local bar, the local VFW, and gave her rides on his motorcycle. Outside of the workplace, they would dispense with traditional customs and courtesies, calling each other by nicknames or first names. During the providence inquiry, the appellant acknowledged that because of their relationship, LCpl L could have felt that she did not need to obey the appellant's direct orders. The appellant further acknowledged that the public in general would probably have lower esteem for the Marine Corps if they found out that he was having an intimate relationship with a subordinate. Based on this record, we do not find a substantial basis for questioning the appellant's guilty plea. *See Inabinette*, 66 M.J. at 322.

Disqualification of a Military Judge

The supplemental assignment of error focuses on post-trial comments made by the military judge. We have recently reviewed this issue involving the same comments by the same military judge in a number of other cases. See *United States v. Pacheco*, No. 201200366, unpublished op. (N.M.Ct.Crim.App. 30 Nov 2012) (per curiam); *United States v. Tiger*, No. 201200284, unpublished op. (N.M.Ct.Crim.App. 30 Nov 2012) (per curiam); *United States v. Harris*, No. 201200274, unpublished op. (N.M.Ct.Crim.App. 30 Nov 2012) (per curiam); *United States v. Sanders*, No. 201200202, 2012 CCA LEXIS 441, unpublished op. (N.M.Ct.Crim.App. 13 Nov 2012). Accordingly, we will apply the same legal analysis here.

Nearly six months after the military judge sentenced the appellant,[1] he provided professional military education (PME) to several junior Marine Corps officers regarding the practice of military justice. During the course of the two hour PME, in what may have been an effort at humor, the military judge made several statements not in keeping with standards of judicial decorum. Those comments included referring to the accused as "scumbags," telling trial counsel that they should consider all

[1] The military judge sentenced the appellant on 16 December 2011. The convening authority approved the sentence as adjudged on 5 April 2012. The comments in issue in this case were made on 21 June 2012.

accused to be guilty, and telling trial counsel that they will "go to hell" if they allow anyone accused of child pornography to go free due to the trial counsel's incompetence. Two of the officers who attended the PME provided written statements regarding the military judge's comments, which now form the basis for the appellant's assigned error. Appellant's Non-Consent Motion to Attach of 24 Aug 2012 at Appendices I and II.

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)). 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).

RULE FOR COURTS-MARTIAL 902, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) divides the grounds for disqualification into two categories, one for actual and one for apparent bias, and applies a two-step analysis. *Quintanilla*, 56 M.J. at 45. The first step asks whether disqualification is required under the specific circumstances listed in R.C.M. 902(b). If not, then the second step asks whether the circumstances nonetheless warrant disqualification based upon a reasonable appearance of bias.[3]

"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,

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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] R.C.M. 902(a) 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. *Quintanilla*, 56 M.J. at 45.

601 (N.M.C.M.R. 1990)). With respect to the appearance of bias, the appellant must prove that, from the standpoint 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)).

In applying this analysis to the question of actual bias, we conclude that the appellant fails to demonstrate any actual bias under R.C.M. 902(b). He has made no showing that the military judge had a personal bias or prejudice concerning him or his case.

We turn next to whether there is any appearance of bias that would require disqualification under R.C.M. 902(a). 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 an apparent bias since the comments depart markedly from the neutral and detached posture that trial judges must always maintain. Assuming evidence of apparent bias, 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 nearly six 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*. The military judge spoke in a training environment that was unrelated to the appellant's trial. To the extent that he addressed particular types of cases, the military judge focused on trial strategy in cases of sexual assault, child abuse, and child pornography. He made no mention of offenses

committed by the appellant. Moreover, his comments were largely focused on the performance of Government counsel. Bias and antipathy toward an attorney are generally insufficient to disqualify a judge "'unless petitioners can show that such a 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, Inc. v. City of Orlando*, 949 F.2d 382, 385 (11th Cir. 1991)). Here the appellant has established no nexus between the military judge's June 2012 remarks and the appellant's case of heard in December of 2011.

Likewise, our finding of no prejudice in this case presents no risk of injustice in other cases. That nexus simply does not exist here. 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. The 18-month sentence to confinement that the military judge awarded in this case is not only far less than the nearly 13 years the appellant would have faced without a pretrial agreement, or even the five years that the trial counsel asked for, but it was also significantly less than the two-year cap on confinement that the appellant negotiated in his pretrial agreement.

One could only find prejudice in this case through the exercise of surmise and conjecture, as warned of in *Wilson.* 34 M.J. at 799.

Unlawful Command Influence

Finally, as part of his argument regarding the post-trial comments made by the military judge, the appellant raises the issue of unlawful command influence. 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. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)). Here, the appellant attempts to raise unlawful command influence based on a report that the military judge made 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 too attenuated from

the facts of the appellant's court-martial to support a retroactive finding of unfairness in the proceedings.

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. . . . [t]here 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." *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991) (citations, internal quotation marks, and footnote omitted).

Conclusion

We affirm the findings and the sentence as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court