IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

Charles Wm. DORMAN **C.L. SCOVEL** **J.F. FELTHAM**

UNITED STATES

v.

Jeffrey S. SUNZERI
Cryptologic Technician Maintenance Second Class (E-5), U. S. Navy

NMCCA 200202248 Decided 16 March 2006

Sentence adjudged 28 September 2004. Military Judge: D.M. Hinkley. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Hawaii, Pearl Harbor, HI.

LT COLIN KISOR, JAGC, USNR, Appellate Defense Counsel
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DORMAN, Chief Judge:

This is the second time this case has been before this court for review. At his general court-martial in June 2002, the appellant was convicted of possessing drug paraphernalia, use of marijuana, and use, possession, and distribution of methylenedioxymethamphetamine (ecstasy). The appellant's crimes violate Articles 92 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 912a. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 10 months, and reduction to pay grade E-1. The convening authority approved the sentence.

In his initial appeal to this court, the appellant successfully argued that he was entitled to a new sentencing hearing because a clause of his pretrial agreement had denied him a complete sentencing proceeding, in violation of RULE FOR COURTS-MARTIAL 705(c)(1)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). By our decision of 8 March 2004, we affirmed the findings, set

aside the sentence, and authorized a new sentencing hearing. *United States v. Sunzeri*, 59 M.J. 758, 762 (N.M.Ct.Crim.App. 2004). That hearing was conducted and, on 28 September 2004, a panel of officer members sentenced the appellant to confinement for 9 months, forfeiture of all pay and allowances, and a reduction to pay grade E-1. In taking his action, the convening authority approved that portion of the adjudged sentence extending to confinement for 9 months and a reduction to pay grade E-1.

The appellant now raises two assignments of error. First, he alleges that the military judge erred when he denied a challenge for cause against a court member. Second, he alleges that the military judge erred when he instructed the members that they were not to second-guess what happened at the appellant's first court-martial.

We have thoroughly examined the entire record of trial and have considered the appellant's assignments of error and the Government's response. Following that examination, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Challenge for Cause

At his rehearing for sentencing, the appellant raised a challenge for cause against Lieutenant Commander (LCDR) Tiernan. In making his challenge concerning that member, the trial defense counsel stated:

> . . . Lieutenant Commander Tiernan was not really willing to consider anything that Petty Officer Sunzeri had done since the original court-martial.
>
> He also shows an inflexible attitude towards sentencing in that it's fairly firm in his mind that a service member that commits these offenses should receive--should be discharged from the service; also believes that if a service member uses drugs more than once, because of them being addictive, they become an addict.
>
> For these three reasons defense challenges Lieutenant Commander Tiernan for cause.

Record at 190-91

In response to questioning during voir dire, LCDR Tiernan provided the following information. First, he did not believe that rehabilitation of the appellant was one of the principles that should be considered in arriving at an appropriate sentence. He did believe, however, that drug users could be rehabilitated through training, counseling and personal motivation. *Id*. at

114. Second, LCDR Tiernan did not think it was important to consider what the accused had done since the time of the offenses when determining an appropriate sentence. He stated that only the misconduct should be considered. *Id.* 115, 136. Third, he believed drugs are addictive, but that a person can stop using drugs and be rehabilitated. *Id*. at 134. Of the administrative separation boards on which he had served as a member, many involved drugs and, if the misconduct was substantiated, the member was discharged. In some cases, however, he voted to retain the member based on performance, recommendations by superiors, and circumstances of the case. *Id*. LCDR Tiernan recognized that while drug misconduct required processing for separation of a service member, that processing need not result in separation.

Upon further questioning, LCDR Tiernan also stated that he did not feel obligated to adjudge a discharge based solely on the offenses. He said that he could adjudge a sentence of no punishment, as well as consider the entire range of punishments available. *Id*. at 117. He also stated that he would follow the instructions from the military judge that would require him to consider the appellant's rehabilitation, as well as the appellant's conduct since his first trial. *Id*. at 130, 139, 193-95. He also acknowledged that he could consider all circumstances, to include evidence of mitigation and extenuation regardless of the time period, and that his understanding of what a drug addict is has no bearing on his ability to adjudge a fair, legal, or appropriate sentence.

The military judge denied the challenge for cause against LCDR Tiernan. In so doing, he stated that LCDR Tiernan demonstrated that he understood his obligation to follow the judge’s instructions on the law, including instructions to consider the accused’s post-trial conduct. He also found that LCDR Tiernan showed no evidence of having an inelastic or inflexible attitude toward any form of punishment, specifically any form of punitive discharge. He made these findings based upon LCDR Tiernan's "body language and the forthright way in which [he] explained his answers to the original questions," *id*. at 197. The military judge also noted that he knew that challenges for cause should be liberally granted. *Id*. Following the denial of the challenge, the appellant used his peremptory challenge to remove LCDR Tiernan and preserved this issue for appeal in accordance with R.C.M. 912(f)(4).

We turn now to the question of whether the military judge correctly denied the defense's challenge for cause against LCDR Tiernan. Our review of the voir dire suggests that the only possible basis for causal challenge here is R.C.M. 912(f)(1)(N), which provides that "[a] member shall be excused for cause whenever it appears that the member . . . [s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.”

Our superior court has outlined the law applicable to such situations and the appropriate application of this rule.

> R.C.M. 912(f)(1)(N) encompasses "both actual bias and implied bias." R.C.M. 912(f)(3) provides: "The burden of establishing that grounds for a challenge exist is upon the party making the challenge." Military judges should be "liberal in granting challenges for cause."
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> "The test for actual bias [in each case] is whether any bias 'is such that it will not yield to the evidence presented and the judge's instructions.'" "Actual bias is reviewed" subjectively, "through the eyes of the military judge or the court members."
>
> Actual bias is a question of fact. Accordingly, the military judge is given great deference on issues of actual bias, recognizing that he or she "has observed the demeanor of the" challenged party. "We will not overturn the military judge's" denial of a challenge unless there is "a clear abuse of discretion in applying the liberal-grant mandate."
>
> On the other hand, implied bias is "viewed through the eyes of the public." "The focus 'is on the perception or appearance of fairness of the military justice system.'" There is implied bias "when 'most people in the same position would be prejudiced.'" We give the military judge less deference on questions of implied bias. On the other hand, we recognize that, when there is no actual bias, "implied bias should be invoked rarely."

United States v. Warden, 51 M.J. 78, 81-82 (C.A.A.F. 1999) (citations and footnote omitted)(alteration in original); *see also United States v. Wiesen*, 56 M.J. 172 (C.A.A.F. 2001).

In resolving the issue before us, we must first determine whether the challenge is based upon actual or implied bias. Actual bias is a credibility issue and great deference is given to the determination of the military judge. *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996). "The test for actual bias is whether any bias 'is such that it will not yield to the evidence presented and the judge's instructions.'" *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997)(quoting *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987)). Implied bias, however, is viewed objectively, through the eyes of the public. *Id*. The focus is on the appearance of fairness. *Id.* Given the responses of LCDR Tiernan during voir dire, we see no issue of actual bias in this case. We will, therefore, apply the

more demanding objective standard concerning implied bias. We recognize that "[t]he burden of establishing that grounds for a challenge exist is upon the party making the challenge." R.C.M. 912(f)(3).

In applying the more demanding standard--affording the military judge less deference than we would in a case of actual bias--we have reviewed the findings of the military judge and adopt them as our own. We conclude that the military judge did not err in denying the appellant's causal challenge against LCDR Tiernan. We reach this conclusion following our own review of the voir dire of LCDR Tiernan, and arrive at the same findings as did the trial judge. Record at 197-98. Accordingly, we reject the appellant's first assignment of error.

Instructions

In his second assignment of error, the appellant asserts that the military judge erred when he denied a defense-requested instruction concerning the possibility that the members might speculate about the sentence from the first trial. Appellant's Brief of 26 Jul 2005 at 7. The appellant did not specifically request instructions on this issue, rather he objected to an instruction proposed--and given--by the military judge. Appellate Exhibit XL; Record at 334, 363. The relevant portion of the instruction is as follows.

> Reference has been made [to] the prior sentence of the accused. You are instructed that the fact the accused was originally sentenced for these offenses is not evidence and it is not your function today to consider whether the original sentence was appropriate or not. As I told you before, you may not consider, for any reason, that earlier trial unless evidence therefrom has been admitted in this trial for your consideration. Keep in mind that you do not know all the facts and circumstances from the original trial and it is not your position to second guess what happened there.

Id. at 363. The appellant's objection concerns the last 12 words of this instruction.

A military judge is required to give the court-martial members "appropriate instructions" on sentence. R.C.M. 1005(a). This court examines a military judge's refusal to give a defense-requested instruction under a clear abuse of discretion standard. *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996)(citing *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993)). When determining whether a military judge properly exercised discretion in refusing to give a defense-requested instruction, we "examine the instructions as a whole to determine if they sufficiently cover the issues in the case and focus on the facts presented by the evidence." *Maxwell*, 45 M.J. at 424

(quoting *United States v. Snow*, 82 F.3d 935, 938-39 (10th Cir. 1996)). The question of whether a court-martial was properly instructed is a question of law, which we review *de novo*. *Id*. This court's standard for the adequacy of instructions is "whether the instructions as a whole provide meaningful legal principles for the court-martial's consideration." *United States v. Peszynski*, 40 M.J. 874, 882 (N.M.C.M.R. 1994)(citing *United States v. Truman*, 42 C.M.R. 106, 109 (C.M.A. 1970)). Finally, our superior court has held that a military judge's denial of a defense-requested instruction is error where: "(1) the requested instruction is correct; (2) 'it is not substantially covered in the main charge; and (3) it is on such a vital point in the case that the failure to give it deprived defendant of a defense or seriously impaired its effective presentation.'" *United States v. Poole*, 47 M.J. 17, 19 (C.A.A.F. 1997)(quoting *Damatta-Olivera*, 37 M.J. at 478). These same standards apply when the instructions deal only with sentencing issues. *United States v. Miller*, 58 M.J. 266, 270 (C.A.A.F. 2003).

Applying the above standards of review, we conclude that the military judge did not abuse his discretion in giving the instruction set out above. In this case, it was the appellant himself who informed the members that at his first trial he had received a bad-conduct discharge and confinement for 10 months. We conclude that the instruction placed the issue of the appellant's previous sentence in "the appropriate context for purposes of the[] decision-making process." *United States v. Tschip*, 58 M.J. 275, 275 (C.A.A.F. 2003). Furthermore, in light of the sentence adjudged by the members, we are convinced that the appellant was not prejudiced by the instruction. *Miller*, 58 M.J. at 271. According, even if there was instructional error, the error was harmless.

Conclusion

In our decision of 8 March 2004 we affirmed the findings. We now affirm the sentence, as approved by the convening authority in his action dated 28 April 2005.

Senior Judge SCOVEL and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court

Chief Judge DORMAN authored this opinion prior to commencing terminal leave.