

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

BEFORE

D.A. WAGNER

R.E. VINCENT

E.B. STONE

UNITED STATES

v.

**Daniel C. RAMIREZ
Lance Corporal (E-3), U. S. Marine Corps**

NMCCA 200401005

Decided 27 February 2006

Sentence adjudged 4 March 2003. Military Judge: D.J. Daugherty. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, III MEF Headquarters Group, III MEF, MarForPac, Okinawa, Japan.

LT KYLE KNEESE, JAGC, USNR, Appellate Defense Counsel
LT ANTHONY S. YIM, JAGC, USNR, Appellate Defense Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel
LT IAN THORNHILL, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

STONE, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of attempted larceny, conspiracy to commit larceny, two specifications of dereliction of duty, making a false official statement, two specifications of larceny, receiving stolen money, and solicitation of another to commit an offense, in violation of Articles 80, 81, 92, 107, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 881, 892, 907, 921, and 934. The military judge sentenced the appellant to confinement for six months, a \$1,000 fine, reduction to pay grade E-1, and a bad-conduct discharge. The military judge also awarded additional confinement for 60 days if the fine was not paid. The convening authority approved the sentence as adjudged, however, all confinement in excess of 90 days and the bad-conduct discharge was suspended for 12 months from the date of trial in accordance with a pretrial agreement. Additionally, in an act of clemency, the convening authority suspended 45 more days of confinement and \$500 of the fine for twelve months from the date of trial.

We have examined the record of trial, the appellant's sole assignment of error, and the Government's response. We conclude that the finding 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.

Judicial Impartiality

The appellant claims that the military judge abandoned his impartial judicial role after the conclusion of trial and therefore assigns as error the military judge's failure to *sua sponte* disqualify himself as military judge pursuant to RULE FOR COURTS-MARTIAL 902, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). The appellant requests that this court either set aside the findings with prejudice, or in the alternative, order a hearing pursuant to *United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1967) to further investigate his claim.

In support of his claim, the appellant has attached to the record of trial three e-mails solicited by his trial defense attorney sometime after trial. Each of the e-mails purports to be the then-existing impression of a trial participant who appeared to have observed statements made by the military judge directed towards the appellant immediately after the conclusion of the trial. None of the e-mails contains the substance or a summary of what the military judge allegedly stated to the appellant. None of the e-mails are attested to by its purported author. Similarly, we observe that the appellant did not submit an affidavit in support of his claim stating either that the encounter actually occurred, what the alleged comments were, and or what prejudice he may have suffered as a result. Likewise, the trial defense counsel did not provide an affidavit in support of the claim. In sum, we have no judicially credible facts before us upon which to decide the allegation of judicial impartiality. We therefore decline to grant relief regarding the findings or the sentence. Additionally, given the dearth of evidence in support of the allegation, it is necessary to consider the appellant's second request, whether we should direct further investigation of the appellant's allegations in a *Dubay* proceeding.

"In determining whether a *Dubay* hearing is warranted to resolve a factual matter, the Courts of Criminal Appeals should be guided by the standard enunciated in *Ginn*." *United States v. Campbell*, 57 M.J. 134 (C.A.A.F. 2002)(referring to *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997)). In *Ginn*, our superior court held that an evidentiary hearing need not be ordered if an appellate court can conclude that the "the motion and the files and records of the case . . . conclusively show that [an appellant] is entitled to no relief." 47 M.J. at 244 (quoting *United States v. Giardino*, 797 F.2d. 30, 32 (1st Cir. 1986)(emphasis added). Additionally, our superior court further held that a hearing is unnecessary when the post-trial claim

"(1) is inadequate on its face, or (2) although facially adequate is conclusively refuted as to the alleged facts by the files and records of the case', i.e., 'they state conclusions instead of facts, contradict the record, or are 'inherently incredible.'" *Id.* (quoting *United States v. McGill*, 11 F.3d 223, 226 (1st Cir. 1993)). Critical to our analysis, both *Ginn* and *Campbell* dealt with the issue of whether *Dubay* hearings, requested on the *basis of affidavits*, were required. Here, there are no affidavits before the court upon which we may apply the applicable law set forth in both *Ginn* and *Campbell*. Not only are there no affidavits in the record, the appellant's brief does not contain any statement, summary, or otherwise, of what the appellant alleges the judge actually said to him after his trial. We therefore hold that the scant materials before us, consisting of three e-mails unsupported by affidavits, affirmations, or any other form of attestation, and lacking any substantive allegation of what was allegedly stated by the military judge, is an insufficient basis to compel this court to order a *Dubay* proceeding.

Conclusion

Accordingly, the findings of guilty and sentence, as approved by the convening authority, are affirmed.

Senior Judge Wagner and Judge Vincent concur.

For the Court

R.H. TROIDL
Clerk of Court