

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

BEFORE

C.L. CARVER

C.A. PRICE

D.O. VOLLENWEIDER

**Edwin L. LEON
Staff Sergeant (E-6), U. S. Marine Corps**

v.

UNITED STATES

NMCCA 200501632

Decided 6 January 2006

Decision on Petition for Extraordinary Relief in the Nature of a Writ of Mandamus.

LCDR JASON GROVER, JAGC, USN, Appellate Defense Counsel
Capt WILLIAM KIRBY, USMC, Trial Defense Counsel
Maj KAREN MORRISROE, USMC, Individual Military Counsel
Capt ROGER E. MATTIOLI, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PRICE, Senior Judge:

On 8 December 2005, the petitioner submitted a petition for extraordinary relief in the nature of a writ of mandamus and a supporting brief. He requested that we take the following action: (1) stay the proceedings of his pending general court-martial; and (2) order the military judge to grant a mistrial and reassemble a new panel of members or continue the trial proceedings until at least 22 December 2005 to allow time for his defense team to prepare for trial. That same day, we granted the petitioner's request for a stay until further order of this court. We also ordered the respondent to provide us with an authenticated transcript of the pertinent proceedings and to show cause as to why the petition should not be granted.

On 19 December 2005, the respondent¹ provided the authenticated transcript and an answer. The petitioner submitted a reply on 27 December 2005. Having considered the pleadings and the transcript, we conclude that, under the unusual facts of this

¹ That same date we granted the Government's request that the United States be substituted for the military judge as the respondent in this case.

case, the petitioner has demonstrated that he is entitled to the extraordinary relief requested. Accordingly, we will direct the military judge to declare a mistrial.

Background

The petitioner is charged with attempted rape, three specifications of violation of a general regulation, and indecent assault in violation of Articles 80, 92, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 892, and 934. The general court-martial was originally scheduled to begin on Monday, 5 December 2005.

At 0442 on Monday, 5 December 2005, the civilian defense counsel (CDC) sent an e-mail to the military judge. The CDC explained that, due to unexpected and serious family problems, he could not be prepared to begin the trial that day and requested that the trial be continued (without mentioning a specific date) or start no earlier than Tuesday, 6 December.

On 6 December, pleas of not guilty to all charges and specifications were entered, the members were seated, and the court-martial was assembled. On 7 December, the court heard opening statements and the Government called nine witnesses out of an expected total of 17. Of those witnesses, the CDC failed to cross-examine the majority, including expert witnesses and the alleged victim of the attempted rape and indecent assault.

On the morning of 8 December, the military judge held an Article 39(a), UCMJ, session. The petitioner advised the military judge that he wished to release the CDC because he felt the CDC was incompetent. The petitioner specifically cited the failure to cross-examine prosecution witnesses. Both he and the trial defense counsel (TDC) contended that the members noticed that failure while the Government presented "at least 80 percent, of its case in chief." Transcript at 4. The TDC then moved for a mistrial, arguing that "it's impossible to go back in time and to correct the perception of members." *Id.* The military judge stated he had not been concerned with the competence of the CDC, but "[h]aving said that, certainly one thing I did notice was that the victim was not cross-examined." *Id.* at 9. The military judge explained that he could see a tactical reason for not cross-examining her, but never explained what he had in mind, nor did he elaborate on his finding that the CDC was competent.

After the military judge denied the motion for a mistrial, the TDC then moved for a continuance. That motion was also denied. We note that the CDC and the detailed military defense counsel (TDC) had agreed that the CDC would bear the brunt of the responsibility for all aspects of the case except for sentencing, should that become necessary. After a brief recess, the court reconvened in an Article 39(a), UCMJ, session and the petitioner advised the military judge that he had requested the assignment of an individual military counsel (IMC). That request was later

granted by the Senior Defense Counsel, Marine Corps Base, Quantico.

In the afternoon of 8 December, the IMC appeared before the military judge. As soon as she introduced herself on the record, the military judge informed her that he would not grant a continuance and ordered that the TDC remain on the defense team. The IMC immediately moved for a mistrial, explaining that she was not prepared, having just been appointed that day. The military judge again denied the motion for mistrial. The IMC moved for a two-week continuance. That was denied. She moved for one-week continuance. That was denied.

The members then returned to the courtroom. The military judge explained that there had been a change of defense counsel and instructed the members that they may not speculate as to the reasons for the absence of the CDC. The members acknowledged that instruction. The military judge further instructed the members that the CDC's absence could not be given any weight in considering the evidence during deliberations. The members also acknowledged this instruction. The prosecution called its next witness, then offered a prosecution exhibit. The IMC requested an Article 39(a), UCMJ, session, during which she requested a short continuance to litigate anew the admissibility of the exhibit. Upon denial of that request, the IMC requested a short continuance, "quite frankly, to call our bars." *Id.* at 35. The IMC reiterated her complete lack of preparation and expressed her deep discomfort in attempting to proceed further. Finally, the military judge recessed the proceedings until the following morning. During that recess, the defense team filed the instant petition and accompanying brief.

Writ of Mandamus

In *Ponder v. Stone*, 54 M.J. 613 (N.M.Ct.Crim.App. 2000), this court summarized the principles underlying a writ of mandamus:

A writ of mandamus is normally issued by a superior court to compel a lower court to perform mandatory or purely ministerial duties correctly. In other words, its purpose is to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.

The issuance of such a writ is a drastic remedy that should be used only in truly extraordinary situations. It is generally disfavored because it disrupts the normal process of orderly appellate review. For that reason, to justify reversal of a discretionary decision by mandamus, the judicial decision must amount to more than even gross error; it must amount to a judicial usurpation of power. The

petitioner, therefore, has the burden of showing that he has a clear and indisputable right to the extraordinary relief that he has requested.

54 M.J. at 616 (internal citations and quotation marks omitted).

Discussion

By our previous order, we granted the petitioner his requested stay of proceedings and continuance. The only remaining issue left to be resolved is that of mistrial. We must decide whether the petitioner has borne his burden to show that he has a clear and indisputable right to that remedy.

The President has provided the following rules governing mistrial:

The military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings. A mistrial may be declared as to some or all charges, and as to the entire proceedings or as to only the proceedings after findings.

RULE FOR COURTS-MARTIAL 915(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). The discussion of the rule adds this caution:

The power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons.

R.C.M. 915(a), Discussion.

Our superior court has recognized that a mistrial is an unusual and disfavored remedy. It should be applied only as a last resort to protect the guarantee of a fair trial. "Declaration of a mistrial is a drastic remedy, and such relief will be granted only to prevent manifest injustice against the accused. It is appropriate only whenever circumstances arise that cast substantial doubt upon the fairness or impartiality of the trial." *United States v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993) (internal citations and quotation marks omitted).

We now turn to what we believe is the substantive issue supporting the motion for mistrial and this petition for extraordinary relief: ineffective assistance of counsel. Under the Sixth Amendment, the petitioner enjoys the Constitutional guarantee of effective assistance of defense counsel at his court-martial. *Strickland v. Washington*, 466 U.S. 668 (1984);

United States v. Scott, 24 M.J. 186 (C.M.A. 1987). Under our system of criminal justice, after entry of not guilty pleas, such a guarantee is fulfilled only in the context of an actual contest:

The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

United States v. Cronin, 466 U.S. 648, 656-57 (1984)(footnotes omitted).

Based on the matters presented, we find that the petitioner's defense team, particularly the CDC, was deficient in failing to conduct meaningful cross-examination of prosecution witnesses. Given the absence of any strategic or tactical explanation, we are particularly concerned by the absence of any cross-examination of the alleged victim. While the military judge apparently found no reason to question the competence of the defense team, we are not persuaded by his cryptic comments that are devoid of any support in the record.

As noted above, a mistrial is a drastic remedy not favored in the law. Frequently, other measures such as curative instructions and voir dire of the members will suffice to ensure a fair trial. However, there are rare occasions when such less drastic measures are inadequate. This case is one such occasion.

Through no fault of the petitioner, one month has passed since the members heard the largely unrebutted testimony of nine prosecution witnesses, including experts and the alleged victim of the attempted rape and indecent assault. If the members had been properly instructed, accompanied by individual voir dire, the military judge might have avoided the impression that the testimony of these witnesses was unimpeachable. Unfortunately, all the members heard was that they should not speculate as to the reasons for the absence of the CDC and that they must disregard that fact. The net result is that for one month, the memory of the testimony of the prosecution witnesses has

lingered. We agree with the TDC that "it's impossible to go back in time and to correct the perception of members." Transcript at 4. In the vernacular of the courtroom, we cannot unring the bell.

We conclude that the only meaningful remedy is to start over. By ordering a mistrial, the charges shall be withdrawn from this court-martial and, if re-referred, must be referred to a new panel of members. R.C.M. 915(c). Thus, the petitioner shall have the opportunity for effective assistance of counsel in confronting the serious charges against him.

Conclusion

The stay of proceedings is hereby dissolved. The military judge is directed to declare a mistrial as to the entire proceedings.

Senior Judge CARVER and Judge VOLLENWEIDER concur.

For the Court

R.H. TROIDL
Clerk of Court