UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class HOGAN M. DAVID
United States Air Force

ACM S31478

10 February 2009

Sentence adjudged 14 March 2008 by SPCM convened at Charleston Air Force Base, South Carolina. Military Judge: Terry A. O'Brien (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 5 months, forfeiture of $898.00 pay per month for 5 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Maria A. Fried, Major Shannon A. Bennett, and Captain Tiaundra Sorrell.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain Coretta E. Gray.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

PER CURIAM:

Pursuant to the appellant's pleas, a military judge sitting as a special court-martial convicted him of one specification of wrongful divers use of cocaine and one specification of wrongful use of Oxymorphone, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged and approved sentence consists of a bad-conduct discharge, five months confinement, forfeitures of $898 pay per month for five months, and a reduction to E-1.[1] On appeal the appellant asks the Court to set aside the findings and the

[1] The appellant and the convening authority signed a pretrial agreement wherein the appellant agreed to plead guilty in return for the convening authority's promise not to approve confinement in excess of six months.

sentence. The basis for his request is that he opines the military judge abused her discretion by not recusing herself after disclosing that she had a family member who was an admitted drug addict.[2] We disagree; finding no error, we affirm.

Background

On the weekend of 5-7 October 2007, the appellant went home to Columbia, South Carolina. While there, he went to an acquaintance's home and was offered and snorted seven lines of cocaine. On 11 October 2007, the appellant was randomly selected for a urinalysis. The appellant provided a urine sample, which subsequently tested positive for benzoylecgonine (BZE), a cocaine metabolite, at 392 ng/mL. The Department of Defense (DOD) cutoff is 100 ng/mL. On the weekend of 11-13 January 2008, the appellant again went home to Columbia, South Carolina. While there, he went to a friend's home and was offered and snorted two lines of cocaine. On 14 January 2008, he was the subject of a unit sweep/inspection. The appellant provided a urine sample that subsequently tested positive for BZE at 158 ng/mL and Oxymorphone at 124 ng/mL. The DOD cutoff for Oxymorphone is also 100 ng/mL. On the weekend of 25-27 January 2008, while "bar hopping" with friends at home in Columbia, South Carolina, the appellant was offered and snorted cocaine. On 28 January 2008, the appellant was ordered to provide a urine sample. The appellant provided a urine sample that subsequently tested positive for BZE at 1217 ng/mL.

At trial, the assistant trial counsel asked the military judge if she was aware of any matter which might constitute a ground for challenge. The military judge responded: (1) she had a family member who is an admitted drug addict who has some legal problems and drug rehabilitation issues involving the addiction; (2) she is not aware of the specific details of the legal problems or the scope of the addiction; and (3) her feelings for her family member will have no bearing on her ability to fairly and impartially participate in the court-martial. After disclosing these facts, the military judge offered counsel the opportunity to question and challenge her, and counsel declined. After receiving advice on his forum rights, the appellant elected to be tried by the military judge.

Recusal

We review a military judge's refusal to recuse herself for an abuse of discretion. *United States v. Butcher,* 56 M.J. 87, 90 (C.A.A.F. 2001); *United States v. Wright,* 52 M.J. 136, 141 (C.A.A.F. 1999). "An accused has a constitutional right to an impartial judge." *Wright*, 52 M.J. at 140 (citing *Ward v. Village of Monroeville,* 409 U.S. 57 (1972); *Tumey v. Ohio,* 273 U.S. 510 (1927)). "There is a strong presumption that a military judge is impartial in the conduct of judicial proceedings." *United States v.*

[2] This issue is filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Foster, 64 M.J. 331, 333 (C.A.A.F. 2007). A military judge's disclaimer of partiality carries great weight. *United States v. Kratzenberg*, 20 M.J. 670, 672 (A.F.C.M.R. 1985).

Except where the parties have waived disqualification of the military judge after full disclosure of the basis for disqualification, a military judge must recuse herself "in any proceeding in which that military judge's impartiality might reasonably be questioned." Rule for Courts-Martial (R.C.M.) 902(a). This overriding concern with appearances stems from the recognized need for an unimpeachable judicial system in which the public has unwavering confidence; any question of a judge's impartiality threatens the purity of the judicial process and its institutions. *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980) (quoting *United States v. Columbia Broadcasting System, Inc.,* 497 F.2d 107, 109 (5th Cir. 1974)).

Additionally, a military judge shall disqualify herself "[w]here the military judge has a personal bias or prejudice concerning a party." R.C.M. 902(b). The term "personal" means the bias or prejudice "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *Kratzenberg*, 20 M.J. at 672 (quoting *United States v. Grinnell Corp.,* 384 U.S. 563, 586 (1966)).

Moreover, non-personal bias, that which does not stem from an extrajudicial source, will not require disqualification "unless it is so egregious as to destroy all semblance of fairness." *Wright,* 52 M.J. at 141 (quoting J. Shaman, S. Lubet, & J. Alfini, *Judicial Conduct and Ethics* § 4.05 at 102 (2d ed. 1995)). Lastly, when a military judge's impartiality is challenged on appeal, the test is whether the military judge's actions would cause a reasonable person observing the trial to question the court-martial's legality, fairness, and impartiality. *Foster*, 64 M.J. at 333 (citations omitted).

Addressing the issue of actual bias first, we find that there is no evidence of actual bias on part of the military judge. The military judge was candid in sua sponte disclosing her relative's drug addiction and nothing about the disclosure or the judge's comments evinces actual bias or prejudice. Second, the military judge's conduct does not evince actual bias. The military judge stated she could be fair and impartial, her disclaimer of impartiality carries great weight with this Court, and she conducted herself fairly and impartially.

Finally, with respect to any implied bias, we find that the military judge's disclosure, her conduct throughout the trial, and the fact that she has a relative who is an admitted drug addict will not cause a reasonable observer to question the court-martial's legality, fairness, and impartiality. Put simply, we find no actual or implied bias and find that the military judge did not abuse her discretion in not sua sponte recusing herself.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

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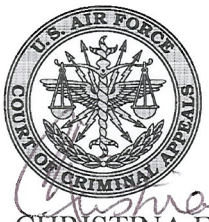

CHRISTINA E. PARSONS, TSgt, USAF
Deputy, Clerk of the Court