UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Major CHRISTOPHER D. DREW
United States Air Force

ACM 37067

06 January 2009

Sentence adjudged 18 June 2007 by GCM convened at Ramstein Air Base, Germany. Military Judge: Gordon R. Hammock (sitting alone).

Approved sentence: Dismissal and confinement for 20 days.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett and Captain Michael A. Burnat.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Matthew Ward, Lieutenant Colonel Nurit Anderson, Major Jeremy S. Weber, and Major Nicole P. Wishart.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

BRAND, Senior Judge:

In accordance with the appellant's pleas, a military judge sitting as a general court-martial convicted him of wrongful possession of cocaine and methylenedioxymethamphetamine (ecstasy), in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged and approved sentence consists of a dismissal and 20 days

confinement.[1] On appeal there are two issues, one raised by the appellant and one specified by this Court. The issues are whether the appellant's sentence is inappropriately severe,[2] and whether the military judge abused his discretion by failing to grant the appellant's recusal motion under Rule for Court-Martial (R.C.M.) 902. Finding no error, we affirm.

Background

On 27 April 2006, the appellant was on post-deployment leave in Switzerland. He and a friend were coordinating travel plans around Europe, and the appellant agreed to allow his friend to store a peppermint tin can and a small plastic bag in the appellant's luggage. At the time the appellant agreed to allow his friend to store the items in his luggage, the appellant knew that the tin can contained ecstasy and that the small plastic bag contained cocaine.

The appellant and his friend boarded a train to Germany from Switzerland and as they entered Germany, German police officers asked the appellant to consent to a search of his luggage. The appellant consented and the police officers discovered the ecstasy and the cocaine in the appellant's luggage. The German authorities arrested the appellant and turned him over to the United States military. After a proper rights advisement by Air Force Office of Special Investigations agents, the appellant waived his rights and confessed to carrying the drugs for his friend. At trial, the appellant unsuccessfully moved to recuse the military judge for implied bias. The basis for the appellant's recusal motion was that he opined the military judge had a personal relationship/friendship with Colonel (Col) WN, the appellant's commander/accuser and a prosecution sentencing witness, and that such a relationship would cause a reasonable member of the public to question the impartiality of the military judge and thus the fairness of the appellant's court-martial.

Discussion

Inappropriately Severe Sentence

The appellant avers his sentence to a dismissal is inappropriately severe. In support he points to: (1) the fact that he already faces severe consequences[3] for his misconduct; (2) his excellent duty performance; (3) the relatively less serious nature of the offenses of which he was convicted; and (4) his acceptance of responsibility by

[1] The appellant and the convening authority signed a pretrial agreement wherein the appellant agreed to plead guilty to the charge and specifications in return for the convening authority's promise not to approve confinement in excess of 100 days and not to approve a fine.

[2] The appellant raised this issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[3] The severe consequences come in the nature of losing his Drug Enforcement Agency (DEA) license to prescribe medicine and state license to practice medicine.

pleading guilty. Article 66(c), UCMJ, 10 U.S.C. § 866(c) provides that this Court "may affirm . . . the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Our superior court has concluded that the Courts of Criminal Appeals have the power to, "in the interests of justice, substantially lessen the rigor of a legal sentence." *United States v. Lanford*, 20 C.M.R. 87, 94 (C.M.A. 1955), *quoted in United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002).

Trafficking illegal drugs, albeit for a friend, is a serious offense, one which undoubtedly compromises the appellant's standing as a commissioned officer and a service member. Moreover, the fact that the appellant faces "severe consequences" for his actions is collateral to the issue of punishment. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offenses of which the appellant was found guilty, we do not find the appellant's sentence, as approved by the convening authority, inappropriately severe.

Recusal Motion

On appellate review, we will reverse a military judge's decision on the issue of recusal only 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. Vill. of Monroeville,* 409 U.S. 57 (1972); *Tumey v. Ohio,* 273 U.S. 510 (1927)). Except where the parties have waived disqualification of the military judge after full disclosure of the basis for disqualification, a military judge must recuse himself "in any proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M. 902(a).

Whether the military judge should disqualify himself is viewed objectively, and is "assessed not in the mind of the military judge himself, but rather in the mind of a reasonable man . . . who has knowledge of all the facts." *Wright,* 52 M.J. at 141 (internal quotations omitted). While military judges are cautioned to broadly construe possible grounds for challenge, they should not leave a given case "unnecessarily." *United States v. McIlwain*, 66 M.J. 312, 314 (C.A.A.F. 2008) (citing *Wright*, 52 M.J. at 141).

In the case at hand, the trial counsel gave the military judge notice that they would be conducting voir dire of the military judge concerning his working relationship with Col WN. Col WN was the commander who preferred charges against the appellant. Additionally, he was the author of a Letter of Reprimand (LOR) previously given to the appellant, and was listed, and did in fact testify, as a prosecution sentencing witness regarding unit impact. During the initial Article 39(a), UCMJ, 10 U.S.C. § 839(a) session, both counsel conducted voir dire of the military judge.

During voir dire, the military judge revealed that he and Col WN had been stationed together at Incirlik Air Base (AB), Turkey, in the 2000-2002 timeframe. The military judge was the staff judge advocate and Col WN was assigned to the local medical facility. Their relationship was professional. After arriving at Ramstein AB, Germany, the military judge had encountered Col WN on several occasions. During those occasions, Col WN offered to take the military judge on a tour of the medical facilities for wounded airmen. Additionally, he mentioned that he had something that was in the "channels" which the military judge may see.

Upon completion of the initial voir dire, the trial defense counsel challenged the military judge not for actual bias, but for the potential of an unfavorable public perception. The military judge closed to deliberate and upon his return, he provided the counsel with several emails representing correspondence he had had with Col WN. Those emails were from February 2006, when the military judge requested assistance in getting his wife an appointment with a chiropractor, and from December 2006, when Col WN queried the military judge about a name of a former neighbor at Incirlik, AB, and offered him a tour of the medical facilities.

The military judge then denied the defense motion for recusal, specifically finding there was no actual bias, and explaining the he could impartially carry out his duties. Further, he found there was no substantial doubt as to the fairness of the proceedings based upon the limited contacts between the military judge and Col WN. After the military judge announced his ruling, the appellant elected to be tried by military judge alone in accordance with the pretrial agreement.

After announcement of the sentence, the military judge informed the court that he had not considered the LOR issued by Col WN because in order to consider it, it "would require the court to accept [Col WN]'s contentions in the LOR, and the court declines to do so for the reasons above,[4] and, in addition, in light of the earlier recusal motion."

The military judge was candid when questioned and thoroughly explained his limited professional relationship with Col WN. The relationship at Incirlik AB occurred five to seven years prior to the date of the trial. Although the military judge referred to Col WN in the emails as a "bud" and "old friend," their relationship was limited to that of professionals stationed at the same installations. Personal relationships between judges and witnesses and other participants do not necessarily require disqualification. *Butcher*, 56 M.J. at 91 (citing *United States v. Norfleet*, 53 M.J. 262, 269-70 (C.A.A.F. 2000)). Objectively, a reasonable person would not question the fairness of the military justice

[4] The subject offense of the Letter of Reprimand (LOR) was allegedly committed in April 2006, and the LOR was issued in February 2007. There was no testimony regarding the LOR. The LOR was lacking in details.

system, and the military judge did not abuse his discretion when he declined to recuse himself.

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; *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

JACKSON, Judge (concurring in part, dissenting in part):

While I concur with the majority's findings that the appellant's sentence is not inappropriately severe, I must depart from its finding that the military judge did not abuse his discretion in refusing to recuse himself. However, for the following reasons I would not set aside the findings and sentence.

Discussion

Except where the parties have waived disqualification of the military judge after full disclosure of the basis for disqualification, a military judge *shall* recuse himself "in any proceeding in which that military judge's impartiality might reasonably be questioned." Rule for Courts-Martial (R.C.M.) 902(a). The language in R.C.M. 902(a) is virtually identical to that found in 28 U.S.C. § 455(a), which calls for federal judges, magistrates, and justices to disqualify themselves "in any proceeding in which [their] impartiality might reasonably be questioned."

"The exhortation of the statute [and R.C.M. 902(a)] is designed to foster the appearance of justice within the judicial system." *United States v. Wright,* 52 M.J. 136, 141 (C.A.A.F. 1999) (citing *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1523 (11th Cir. 1988)). This overriding concern with appearances stems from the recognized need for an unimpeachable judicial system in which the public has unwavering confidence. *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980). "Any question of a judge's impartiality threatens the purity of the judicial process and its institutions." *Id.*

A military judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street. *See United States v. Kincheloe*, 14 M.J. 40, 50 (CMA 1982) (quoting E. Thode, *Reporter's Notes to Code of Judicial Conduct* 60 (1973)); *Wright*, 52 M.J. at 141. Disqualification should follow if the reasonable man, were he to know all the

circumstances, would question the military judge's impartiality. *Wright*, 52 M.J. at 141. However, while military judges are cautioned to broadly construe possible grounds for challenge, they should not leave a given case unnecessarily. *Id.*

In the case at hand, while I appreciate the military judge's candor once he was confronted with this issue, I note that it was trial counsel and defense counsel, not the military judge, who initially raised this issue. Thus, the military judge can hardly be viewed as making the type of disclosure that qualifies as a full disclosure and one that evinces sensitivity to public perceptions. Had counsel not raised this as an issue, it is questionable whether the military judge would have disclosed the nature of his relationship with Colonel (Col) WN. Additionally, Col WN was not an ordinary witness, but was the appellant's accuser/commander and a prosecution witness on the issue of unit impact. As such, his testimony was important on the issue of sentencing.

More importantly, while the military judge characterized his relationship with Col WN as "professional," the fact that the military judge: (1) initially described Col WN as a friend; (2) referred to Col WN as "old friend" or "bud"; (3) sought and obtained help from Col WN on a personal matter; and (4) received a lunch and office tour invitation from Col WN, all belie the notion that the relationship was strictly professional. There was definitely a social aspect of the relationship and, "[w]here association with a witness is concerned, a social relationship creates special concerns which a professional relationship does not." *Id.*

Put simply, the military judge had a social relationship with a key prosecution witness, or at least there was a perception of a social relationship, the subsequent denial of which creates, in the mind of the reasonable man, doubt about the military judge's impartiality. To be clear, while there was no actual bias, the aforementioned facts resulted in an appearance of bias that threatens to undermine public confidence in our judicial processes. I would thus find the military judge abused his discretion by not recusing himself.[5]

Having found that the military judge abused his discretion by denying the appellant's recusal motion, I next turn to whether relief is warranted. In making this determination I look to the factors set forth in *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988), a case in which the Supreme Court considered whether reversal was warranted where a judge had erroneously failed to recuse himself under the civilian equivalent of R.C.M. 902(a). The three *Liljeberg* factors are "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice

[5] Arguably if such a relationship existed between Colonel WN and a prospective court member, the prospective court member would have been challenged and removed under the liberal grant mandate. While a liberal mandate *does not* exist on the issue of recusal, such an inquiry might be helpful in discerning whether a recusal is required to preserve the appearance of impartiality and fairness.

in other cases, and the risk of undermining the public's confidence in the judicial process." *Id.* at 864.

Notwithstanding the fact that the events giving rise to the recusal motion were revealed at the beginning of trial and the fact that the military judge exercised considerable discretion in his role as the trier-of-fact, the risk of injustice to the appellant was diminished. The risk was diminished primarily because the military judge did not exercise his discretion, save his ruling on the recusal motion, adversely to the appellant. Additionally, with respect to the second *Liljeberg* factor, the risk is low. It is unnecessary to reverse the appellant's case to ensure military trial judges avoid such relationships in the future.

It is the third *Liljeberg* factor that is of most concern. On this point I note that the fact that the military judge had a social relationship with a key prosecution witness, a relationship which he disavowed as social yet one arguably confirmed by e-mails as social, could undermine the appearance of the basic fairness of the judicial process. However, on balance, in light of *Liljeberg* factors one and two, a reversal of appellant's conviction is not required. For these reasons, I must respectfully dissent.

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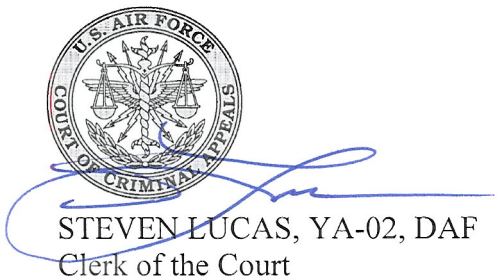

STEVEN LUCAS, YA-02, DAF
Clerk of the Court