UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic NICHOLAS C. SHARPE
United States Air Force

ACM S31333

28 July 2008

Sentence adjudged 21 June 2007 by SPCM convened at Dyess Air Force Base, Texas. Military Judge: Maura T. McGowan (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 4 months.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Lieutenant Colonel Maria A. Fried, and Major Shannon A. Bennett.

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

Before

FRANCIS, BRAND, and HEIMANN
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

FRANCIS, Senior Judge:

Consistent with his plea, the appellant was convicted by a military judge, sitting as a Special Court-Martial, of one specification of wrongful use of methamphetamines, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The approved sentence consists of a bad-conduct discharge and four months confinement.

The appellant asserts the military judge abused her discretion when she refused to recuse herself despite the appearance of bias resulting from her service as the presiding military judge and sentencing authority in the appellant's earlier court-martial. Finding no error, we affirm.

Background

The appellant is a repeat offender. In March 2007, he was convicted by Special Court-Martial of wrongful use of methamphetamines during October 2006. His sentence for that offense included 30 days confinement, 45 days hard labor without confinement, forfeiture of $300 pay per month for two months, and reduction to E-1.* When processing into the confinement facility, he was required to undergo urinalysis testing. Unfortunately for the appellant, he had again used methamphetamines during the week preceding his first trial. As a result, his sample tested positive, ultimately resulting in his second court-martial, which is now before this Court for review. The same military judge presided over both trials and in both cases the appellant pled guilty, electing trial by judge alone.

During his second trial, the appellant challenged the military judge for cause under Rule for Courts-Martial (R.C.M.) 902(a), on the grounds that her "impartiality might reasonably be questioned" because of statements made by the appellant during his first trial. Specifically, the appellant, during the pre-sentencing proceedings at his first court-martial, made an unsworn statement in which he stated that his drug usage was the result of "an inexcusable momentary lapse of judgment." Such a statement could be viewed as an assertion that he had only used drugs one time, when in fact, he had also used drugs the week before his trial. As a result, according to the defense, one might reasonably question the military judge's ability to impartially preside over the second trial, believing that she might exact retribution from the appellant for lying to her at the first trial. After undergoing extensive voir dire by the defense, the judge declined to recuse herself. The appellant re-asserts the same issue on appeal.

Discussion

"An accused has a constitutional right to an impartial judge." *United States v. McIlwain*, 66 M.J. 312, 313 (C.A.A.F. 2008) (quoting *United States v. Wright*, 52 M.J. 136, 140 (C.A.A.F. 1999)). Pursuant to R.C.M. 902(a), "a military judge must recuse herself 'in any proceeding in which [her] impartiality might reasonably be questioned.'" *Id.*, at 313-14 (quoting *United States v. Wright*, 52 M.J. 136, 141 (C.A.A.F. 1999)). Whether the military judge in any given case should disqualify herself is viewed objectively, from the standpoint of a reasonable person with knowledge of all the relevant facts. *Id.* at 314. "Military judges should 'broadly construe' possible reasons for disqualification, but also should not recuse themselves 'unnecessarily.'" *Id.* (internal citations omitted). We review a military judge's decision on the issue of recusal for an abuse of discretion. *Id.*

We find no abuse of discretion here. In response to defense voir dire, the military judge acknowledged that the appellant, during his first trial, made the asserted "momentary lapse in judgment" statement. However, she did not take such statement to

* The appellant was an Airman First Class (E-3) at the time of his first court-martial.

mean that the appellant had only used drugs one time. Rather, the "mistake in judgment" comment, like the rest of his unsworn statement, was carefully tailored only to the use of drugs on a single occasion in October 2006, as charged at the first trial. The transcript of the appellant's first trial, which is included in the current record as an appellate exhibit, supports the military judge's interpretation. Thus, there was no basis for a reasonable person to conclude that the appellant lied about his drug usage during the first trial. Further, the military judge, in response to specific questioning by the defense, affirmatively stated that she could, in any event, "disregard anything [she] heard in the previous case and make [her] determination only on the evidence [admitted in the latter court] and in accordance with the law."

Although we view recusal issues using "an objective standard, the judge's statements concerning [her] intentions and the matters upon which [she would rely during the second trial] are not irrelevant to the inquiry." *Wright*, 52 M.J. at 141. We find no evidence in the record that the judge, contrary to her stated intent, failed to act impartially at any stage of the trial. "Where the military judge makes full disclosure on the record and affirmatively disclaims any impact on [her], where the defense has full opportunity to voir dire the military judge and to present evidence on the question, and where such record demonstrates that appellant obviously was not prejudiced by the military judge's not recusing [herself], the concerns of RCM 902(a) are fully met." *United States v. Campos*, 42 M.J. 253, 262 (C.A.A.F. 1995). Such is the case here.

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.

OFFICIAL

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