

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,)	Misc. Dkt. No. 2010-05
Respondent)	
)	
v.)	
)	
Second Lieutenant (O-1))	ORDER
DAVID A. VALOIS,)	
USAF,)	
Petitioner – Pro se)	Panel No. 1

On 5 April 2010, the petitioner filed a *pro se* petition for extraordinary relief in the nature of a writ of habeas corpus. The petitioner requests that this Court set aside the findings and sentence or, alternatively, order a new review under Article 66, UCMJ, 10 U.S.C. § 866.

The petitioner asserts three grounds in support of his position: (1) The military judge was disqualified under Rule for Courts-Martial (R.C.M.) 902 where his statements indicate that he predetermined guilt in this judge-alone trial; (2) The military judge committed prejudicial error in omitting the required state of mind for Article 118(3), UCMJ, 10 U.S.C. § 918(3), by stating that the third element is not a mindset; and (3) The appellate judges of this Court abused their discretion in refusing to answer a request for disqualification specified in a timely motion for reconsideration.

The petitioner was charged with murder by engaging in an act inherently dangerous to another and evinced a wanton disregard of human life, in violation of Article 118(3), UCMJ. After pleading guilty to the lesser-included offense of involuntary manslaughter, in violation of Article 119, UCMJ, 10 U.S.C. § 919, a military judge, sitting alone, found the appellant guilty of the greater charged offense. The military judge sentenced the appellant to a dismissal, confinement for 50 years, and forfeiture of all pay and allowances. The convening authority approved the adjudged sentence but reduced the period of confinement to 25 years, which was consistent with the provisions of a pretrial agreement.

On appeal, this Court affirmed the approved findings and sentence. *United States v. Valois*, ACM 36841 (A.F. Ct. Crim. App. 31 Mar 2009) (unpub. op.). The petitioner’s motion for reconsideration of our opinion was denied on 30 April 2009. The petitioner’s appeal to the Court of Appeals for the Armed Forces was denied on 13 November 2009. *United States v. Valois*, __ M.J. __ No. 09-0646/AF (Daily Journal 13 Nov 2009). On 9

March 2010, our superior court denied the petitioner's motion for reconsideration. *United States v. Valois*, ___ M.J. ___ No. 09-0646/AF (Daily Journal 9 Mar 2010).

Writ of Habeas Corpus Jurisdiction

The All Writs Act authorizes “all courts established by Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdictions.” 28 U.S.C. § 1651. The Act requires two separate determinations: (1) whether the requested writ is “in aid of ‘its existing statutory jurisdiction;’” and (2) whether the requested writ is “necessary or appropriate.” *Denedo v. United States*, 66 M.J. 114, 120 (C.A.A.F. 2008) (citations omitted), *aff'd*, 129 S. Ct. 2213 (2009). A writ of habeas corpus is used to order the release of a person from confinement. *Moore v. Akins*, 30 M.J. 249, 254 (C.M.A. 1990). The standard of review for habeas corpus in military courts is whether the prior review: “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the [prior] proceeding.” *Loving v. United States*, 64 M.J. 132, 145 (C.A.A.F. 2006) (quoting 28 U.S.C. § 2254(d)).

In his initial appeal to this Court, the petitioner asserted three assignments of error: (1) The evidence was legally and factually insufficient to support the finding of guilty to murder; (2) The military judge abandoned an impartial role and should have recused himself under R.C.M. 902(b)(3) after making multiple statements reflecting that he determined guilt on an essential element before all of the evidence had been presented during findings; and (3) The military judge committed prejudicial error as a matter of law by refusing to consider leniency in determining a sentence. After carefully analyzing the petitioner's claims, this Court found that the evidence was legally and factually sufficient to sustain the conviction for murder, that the military judge did not abandon his role as an impartial judge and the petitioner received a fair trial, and that the military judge did not abuse his discretion in determining an appropriate sentence in the petitioner's case.

In the present writ of habeas corpus, the petitioner essentially reiterates the issues raised in his initial appeal to this Court, however, he presents no new evidence or basis justifying his position. He also takes exception to our previous decision claiming that several errors or omissions in our opinion created the appearance of impropriety justifying a request for disqualification because the military trial judge who heard his case is now an appellate judge for our Court. As before, we have carefully and fully reviewed the petitioner's case and we stand by our initial decision.* Furthermore, a writ of habeas corpus is not a proper substitute for an appeal. *Kaizo v. Henry*, 211 U.S. 146, 148 (1908); *Gragg v. United States*, 10 M.J. 732, 735 (N.C.M.R. 1980).

* We note that this Court has overruled the decisions of this trial judge while he has been assigned as an appellate judge to this Court.

Having considered the matters submitted, the petitioner has failed to demonstrate that extraordinary relief is warranted.

Accordingly, it is by the Court on this 30th day of June 2010,

ORDERED:

That the petition for extraordinary relief in the nature of a writ of habeas corpus is hereby **DENIED**.

FOR THE COURT

OFFICIAL



A handwritten signature in blue ink, appearing to read "S. Lucas", is written over the seal.

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