UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class GARY W. TAYLOR JR.
United States Air Force

ACM 34852

28 July 2003

Sentence adjudged 6 September 2001 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: Gregory E. Pavlik.

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Jeffrey A. Vires, and Major Patrick J. Dolan.

Appellate Counsel for the United States: Lieutentant Colonel Lance B. Sigmon and Captain Nurit Anderson.

Before

VAN ORSDOL, PRATT, and MALLOY
Appellate Military Judges

OPINION OF THE COURT

MALLOY, Judge:

The appellant was tried before a general court-martial composed of officer and enlisted members. Consistent with his pleas, he was convicted of one specification of wrongfully viewing sexually explicit material on a government computer and two specifications of willful dereliction of duty arising from his position as a respiratory technician at the base hospital, all in violation of Article 92, UCMJ, 10 U.S.C. § 892. He was acquitted of two specifications alleging wrongful distribution of methylenedioxymethamphetamine (ecstasy) in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The members sentenced him to a bad-conduct discharge and reduction to E-1. The convening authority approved the sentence as adjudged on 5 December 2001. The appellant now asserts that both the staff judge advocate (SJA) and the convening

authority were disqualified post-trial based on an article written by the assistant trial counsel and published in the base newspaper prior to the convening authority's action. After review of the record and the circumstances surrounding this article, we are satisfied that the appellant was not denied his right to a legally appropriate, individualized review of his sentence by an impartial convening authority and affirm.

Background

The appellant's complaint has its genesis in events that occurred during the sentencing phase in his case. The military judge sustained defense objections to several documents offered by the government from the appellant's unit personnel file because they had not been properly completed. In addition to problems with these administrative records, the government also experienced initial difficulty in establishing the admissibility of a record of nonjudicial punishment imposed on the appellant under Article 15, UCMJ, 10 USC. § 815, because it did not reflect that all administrative details concerning its processing were complete. Ultimately, however, the government was able to overcome this latter objection with the aid of the testimony of a paralegal assigned to the base legal office and the document was admitted.

In discussing the excluded documents, the military judge observed:

> But quite frankly, if the squadron can't comply with dates on when they issue letters, honestly, the only way that gets brought to their attention is if the judge says that kind of stuff is unacceptable. . . . [S]quadrons need to get the idea that, if this is going to be later used for some purpose, it ought to be done correctly.

Apparently prompted by this experience and the military judge's comments, the assistant trial counsel, a reservist assigned to the United States Air Force Judiciary's Western Circuit, wrote an article titled, *Documentation of disciplinary action can affect court-martial.* The article was published in the base newspaper on 14 September 2001, a little over a week after the conclusion of the appellant's court-martial. The article did not identify the appellant, nor did it discuss the specifics of his case. It did, however, inform readers of the importance of properly completing administrative matters and how the failure to do so could adversely affect the admissibility of such documents at future courts-martial, as evidenced by a recent case at the base. The article contained a discussion of the governing Air Force Instruction and admonished that "[s]upervisors at all levels should make sure they are familiar with this regulation and ensure any administrative actions comply." Besides this "how-to" lesson, the article contained the following comment concerning the recent case at the base to illustrate the importance of attention to detail:

> The interests of justice were clearly not met in the case referenced above. The members were not informed of the full measure of his Uniform Code of Military Justice involvement. Further, they were not informed that he was not a good candidate for rehabilitation as evidenced by his failure to properly respond to lesser forms of corrective measures. Justice was not served.

At the time of this article, the convening authority was apparently a member of the base newspaper's editorial board. Based on the article and the convening authority's official connection to the newspaper, the appellant unsuccessfully sought to disqualify both the SJA and the convening authority from fulfilling their post-trial responsibilities under the Uniform Code of Military Justice. He now renews this claim on appeal.

Discussion

A. SJA Disqualification

Despite the lack of identifying information, we have little doubt that this article was prompted by the appellant's court-martial and that those personally familiar with his case would recognize this fact. Nonetheless, we conclude that the appellant has failed to meet his burden of establishing a prima facie case that either the SJA or the convening authority were unable to fairly discharge their respective duties as a consequence of the assistant trial counsel's article. *See United States v. Wansley*, 46 M.J. 335 (1997) (The appellant bears the initial burden of establishing a prima facie case of disqualification).

Before a convening authority can act post-trial, he or she must obtain and consider the written recommendation of his or her SJA or legal officer. Article 60(d), UCMJ, 10 U.S.C. § 860(d). This recommendation must be prepared by an officer who is not statutorily disqualified from doing so. Article 6(c), UCMJ, 10 U.S.C. § 806(c). An SJA is disqualified if he or she has served in any number of roles in the case, including as a court member, military judge, trial or assistant trial counsel, defense or assistant defense counsel or investigating officer. *Id*. Added to this list are circumstances in which the SJA reviews his own testimony, prefers charges, interrogates the accused or otherwise has a personal interest in the outcome of the case. *Wansley*; *United States v. Fernandez*, 24 M.J. 77 (C.M.A. 1987). Here, the appellant claims that based on nothing more than the article itself, the SJA had "other than official interest in the case" because it manifested his strong personal feelings about the appellant's case.

Wansley and *United States v. Bradley*, 51 M.J. 437 (1999), both involved claims similar to the one at hand and are thus instructive on resolution of the appellant's assertion that the SJA was disqualified as a result of this article. In *Wansley*, the appellant based his claim of disqualification on comments made by the wing legal office's chief of military justice that were quoted in an article about the appellant's recent

conviction published in the base newspaper. There, and unlike here, the quoted comments specifically referenced the appellant and his offenses, and the "extreme abuse of integrity and honor" those offenses reflected. *Wansley*, 46 M.J. at 336. The chief of military justice was further quoted as saying the "case sends a strong message of deterrence to people who prey on children . . . ." *Id.* Our superior court held that the appellant did not meet his burden of establishing these comments were disqualifying because the SJA had adequately rebutted any inference that the chief of military justice was speaking on behalf of command or was involved in the preparation of the SJA's recommendation. *Id.*

At issue in *Bradley* was an article written by the SJA of the special court-martial convening authority concerning the appellant's general court-martial that was then under review by the general court-martial convening authority (GCMCA). The appellant in *Bradley* claimed that the article resulted in unlawful command influence on the GCMCA. As in *Wansley*, the SJA to the GCMCA was able to dispel any notion that the article had any effect on either himself or the GCMCA. The Court noted the quotations ascribed to the subordinate SJA "were consistent with his law enforcement duties and were not directed to the clemency process." *Bradley*, 51 M.J. at 443.

Here, the circumstances supporting disqualification of the SJA are far less compelling than in either of the above cases. The article in this case never mentioned either the appellant or the specific circumstances of his case and it was not directed to the clemency process. In this regard, we accept the SJA's explanation that the purpose of the article was "to remind supervisors to properly complete administrative actions against airmen so personnel records will accurately reflect [their] military service." We agree that, "[t]his newspaper article was clearly about the court-martial process--not the outcome of the case."

Moreover, the reference to "justice" not being served does not change this conclusion. Absent evidence to the contrary--which the appellant has failed to produce--we accept the SJA's explanation that the point of this comment was not to impinge on the appellant's right to fair consideration of his case but to illustrate that justice is not well served when a court-martial is deprived of otherwise relevant information about an accused because a supervisor failed to correctly document the information. *See LaChance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000) (There is a presumption "that public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulation . . . ."). We see nothing in this case to support the conclusion that the SJA was unable or failed to correctly perform his duties in accordance with law. And, nothing in *Wansley* or *Bradley* dictates a contrary conclusion.

B. Convening Authority Disqualification

The appellant's assertion that the convening authority was also disqualified as a result of this article is even less compelling. In short, his membership on the editorial board of the base newspaper, in conjunction with his official duties as a commander, is simply insufficient to disqualify him from performing his duties as convening authority. Indeed, his post-trial affidavit makes manifest that he would not even been aware of the article in issue had defense counsel not brought the matter to his attention. However, even absent this affidavit, we would still reach the same conclusion under the circumstances of this case. Nothing about these circumstances suggests the convening authority had either a personal interest in the outcome of the matter or that he displayed an inelastic attitude toward the performance of his post-trial duties. *But see United States v. Davis*, 58 M.J. 100 (2003); *United States v. Walker*, 56 M.J. 617 (A.F. Ct. Crim. App. 2001). In both of those cases, the convening authorities made statements calling into question their ability to provide the impartial post-trial consideration that every accused is entitled to in our justice system and thereafter failed to dispel the presumption of unfairness created by their statements. In contrast to those cases, here there is nothing to suggest that this newspaper article foreclosed the appellant from receiving a full and fair post-trial review of his case. Accordingly, we hold that the appellant's assertions are without merit.

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 (2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court