

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
E.E. GEISER, R.G. KELLY, V.S. COUCH
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JASON M. BAGSTAD
STAFF SERGEANT (E-6), U.S. MARINE CORPS**

**NMCCA 200602454
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 8 September 2006.

Military Judge: LtCol P.J. Ware, USMC.

Convening Authority: Commanding Officer, Combat Service Support Group 3, 3d Marine Logistics Group, Marine Forces Pacific, MCBH, Kaneohe Bay, HI.

Staff Judge Advocate's Recommendation: LtCol K.M. McDonald, USMC.

For Appellant: Maj J.S. Stephens, USMC.

For Appellee: LCDR Paul D. Bunge, JAGC, USN.

31 October 2007

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

COUCH, Judge:

The appellant was convicted, contrary to his plea, by officers and enlisted members sitting as a special court-martial, of wrongful use of marijuana in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to a bad-conduct discharge. The convening authority approved the sentence as adjudged. After considering the record of trial, the appellant's two assignments of error,¹ and the Government's response, we conclude that the

¹ I. THE EVIDENCE WAS FACTUALLY INSUFFICIENT TO SUPPORT THE FINDINGS OF GUILTY TO A KNOWING, WRONGFUL USE OF MARIJUANA.

appellant's conviction and sentence must be set aside and remanded to the convening authority for rehearing or dismissal. Arts. 59(a) and 66(c), UCMJ.

Inadmissible Evidence in the Deliberation Room

This case involves a single specification of wrongful use of marijuana, with the sole source of incriminating evidence being a positive result from a urinalysis. At trial, the appellant presented a classic good military character defense highlighting his 14 years of service, Top Secret/Sensitive Compartmented Information (TS/SCI) clearance, and exemplary service record in the form of award citations and fitness reports. The appellant also presented the testimony of a warrant officer, a master sergeant, and a fellow staff sergeant who served with him in Iraq as part of a hand-selected Marine special operations detachment between the years 2003 and 2006. The appellant did not testify.

Approximately 45 minutes into deliberations, the senior member of the court-martial requested clarification from the military judge about Prosecution Exhibit 6 for identification.² Record at 200. The exhibit contained excerpts from the appellant's service record book that reflected three adverse counseling entries from 1993 and 2000 for underage alcohol consumption in the barracks, unauthorized absence, and financial irresponsibility during prior enlistments. The exhibit also contained two records of nonjudicial punishment (NJP), one for two authorized absences in 1993, and one for violating a Marine Corps Order by wearing earrings at a club in Oahu, Hawaii in 2000. The record reflects that these counseling entries and NJP records were mentioned by the Government as potential rebuttal evidence. PE 6 for identification was not admitted into evidence by the military judge when trial counsel first discussed them on the record. *Id.* at 173. There is no indication in the record that the Government trial counsel ever attempted to admit the documents, as the Government did not present a case in rebuttal. *Id.* at 176.

The military judge provided the following instruction:

For those of you who saw Prosecution Exhibit 6 for identification, you must disregard what you read in that document. You must act as if you never read it before. It has no relevance to this proceeding. And it is not admissible evidence in this proceeding. You must begin your

II. THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO DECLARE A MISTRIAL AFTER HIGHLY PREJUDICIAL INFORMATION RELATING TO APPELLANT'S INADMISSIBLE PRIOR NJPs MYSTERIOUSLY MADE ITS WAY TO THE MEMBERS' DELIBERATIONS ROOM PRIOR TO FINDINGS.

² We note that PE 6 for identification is appended as the last document in the record of trial, and was not re-marked as an appellate exhibit.

deliberations all over again and act as if you had never been exposed to Prosecution Exhibit 6 for identification.

Id. at 201. The military judge then conducted voir dire of all five members and determined that one of them had read the contents of PE 6 for identification to the others. Two of the members said they did not consider the adverse administrative remarks to be relevant to the case. *Id.* at 203, 206. In response to a series of leading questions by the military judge, all of the members stated they could follow the curative instruction and would not consider the evidence in their deliberations. The military judge found that PE 6 for identification was inadmissible because the documents contained therein were "not relevant to these proceedings." *Id.* at 200, 212-13.

In response to the efforts of the military judge, the detailed defense counsel moved for a mistrial, citing RULE FOR COURTS-MARTIAL 915, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).³ The defense counsel also requested that the charge and specification be dismissed with prejudice as a result of prosecutorial misconduct, citing R.C.M. 915(c)(2)(B). The military judge stated he was responsible for the mistake, and found that there was no indication the prosecution was at fault for the exhibit being introduced into the deliberation room. Record at 213. The military judge denied the appellant's motion for a mistrial and the members began their deliberations anew.⁴

The declaration of a mistrial is a drastic remedy and such relief is only appropriate when circumstances cast doubt on the impartiality of proceedings, and when necessary to prevent manifest injustice against the accused. *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003)(citing *United States v. Dancy*, 38 M.J 1 (C.M.A. 1993)). A mistrial may be appropriate when inadmissible matters so prejudicial that a curative instruction would be inadequate are brought to the attention of the members. R.C.M. 915, Discussion.

A curative instruction is the "preferred" remedy for correcting error when the court members have heard inadmissible evidence, as long as the instruction is adequate to avoid prejudice to the accused. *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000)(citations omitted). We assume that the members are able to follow a curative instruction in the absence

³ R.C.M. 915 states in part: "The military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings."

⁴ We note that during both the deliberations on findings and sentencing, at least one member asked for reconsideration of the verdict and sentence. *Id.* at 215, 257.

of evidence suggesting otherwise. *Id.* However, under some circumstances, an instruction followed by voir dire of the members may not cure the prejudice toward the accused and the judge must grant a mistrial. *Diaz*, 59 M.J. at 92. In such instances, the judge's failure to grant a mistrial is an abuse of discretion. *Id.* We will not reverse the military judge's decision not to declare a mistrial absent clear evidence of abuse of discretion. *Id.* at 90 (citing *Dancy*, 38 M.J. at 6 and *United States v. Rushatz*, 31 M.J. 450 (C.M.A. 1990)).

To determine whether the military judge abused his discretion in this case, our challenge is to determine the prejudicial impact of PE 6 for identification on the members' deliberations. *Diaz*, 59 M.J. at 91. The appellant's defense was based solely upon his good military character, emphasized by three witnesses who served with him in the years 2003 through 2006, and part of that time while deployed to Iraq.

We find that the appellant's good military character defense was irretrievably undercut when PE 6 for identification was inadvertently provided to the members, which revealed, among other things, that the appellant received NJP as a sergeant for wearing earrings in a club off base.⁵ As members of the only service that prohibits males from wearing earrings, Marines are known to have a visceral reaction to male Marines who violate this unique uniform regulation. While the conduct described in PE 6 for identification might seem insignificant to some, its prejudicial effect could tip the balance in favor of conviction by Marine members in a "naked urinalysis" case such as this one.⁶

While we commend the military judge for his curative instruction, and while we believe the members made an honest attempt to ignore PE 6 for identification in their deliberations, we still have "grave doubts" about the military judge's ability to "unring the bell." *Diaz*, 59 M.J. at 92-93 (citing *United States v. Armstrong*, 53 M.J. 76, 82 (C.A.A.F. 2000)). Given the extremely prejudicial nature of the inadmissible evidence within the context of a naked urinalysis case and a good military character defense, we cannot be confident that the error did not "substantially sway" the members in their decision to convict the appellant and adjudge a punitive discharge in his case. *United States v. Reyes*, 63 M.J. 265, 268 (C.A.A.F. 2006)(citations

⁵ We note that the misconduct described in PE 6 for identification was not fair game for cross-examination because it was beyond the scope of the good military character evidence provided by the defense.

⁶ Practitioners have used "naked" in the context of urinalysis prosecutions to identify drug cases in which the only evidence of drug use is the scientific laboratory report. LtCol Michael R. Stahlman, *New Developments on the Urinalysis Front: A Green Light in Naked Urinalysis Prosecutions?* (2002 *Army Law*. 14, 19 n.1)(citing Major Charlie Johnson-Wright, *Put Some Clothes on that Naked Urinalysis Case*, THE REPORTER, Sep 2001, at 29). See, e.g., *United States v. Fuller*, 63 M.J. 328, 329 (C.A.A.F. 2006)(Baker, J., dissenting).

omitted). Left with our own substantial doubt over the fairness of the proceedings, we conclude that the military judge's failure to grant the appellant's motion for a mistrial was an abuse of discretion.

Conclusion

The findings and the sentence are hereby set aside, and a rehearing is authorized. The appellant's remaining assignment of error is moot.

Senior Judge GEISER and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court