IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES *Appellee*,

v.

RYAN G. URIBE Staff Sergeant (E-5), United States Air Force, *Appellant*.

USCA Dkt. No. 20-0267/AF

Crim. App. Dkt. No. 39559

BRIEF ON BEHALF OF APPELLANT

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INDEX

Issue Presented1
Statement of Statutory Jurisdiction1
Statement of the Case1
Statement of Facts
Judge Rosenow and Maj BJ's Relationship2
Motion to Recuse the Military Judge
Summary of Argument5
Argument
Judge Rosenow should have recused himself under R.C.M. 902(a) due to his close personal friendship with the senior trial counsel prosecuting the case, Maj BJ
Reversal is required because this error prejudiced SSgt Uribe and undermined public confidence in the judicial process
Conclusion

TABLE OF AUTHORITIES

Cases

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988)
Liteky v. United States, 510 U.S. 540 (1994)7
Hasan v. Gross, 71 M.J. 416 (C.A.A.F. 2012)
United States v. Berman, 28 M.J. 615 (C.A.A.F. 1989) passim
United States v. Butcher, 56 M.J. 87 (C.A.A.F. 2001) passim
United States v. McIlwain, 66 M.J. 312 (C.A.A.F. 2008)16, 17
United States v. Norfleet, 53 M.J. 262 (C.A.A.F. 2000)
United States v. Quintanilla, 56 M.J. 37 (C.A.A.F. 2001) 17
United States v. Sullivan, 74 M.J. 448 (C.A.A.F. 2015) passim
United States v. Cron, 73 M.J. 718 (A.F. Ct. Crim. App. 2014) 10

Statutes

10 U.S.C. § 920 (2012)

Other Authorities

R.C.M. 902(a) (2016)	6
R.C.M. 902(d), Discussion (2016)	7
Air Force Instruction (AFI) 51-110, Professional Responsibility	
Program, Attachment 8, The Air Force Uniform Code of Judicial	
Conduct (11 Dec. 2018)	8, 9

Issue Presented

WHETHER THE LOWER COURT ERRED IN FINDING THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING A JOINT MOTION TO RECUSE.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) had jurisdiction pursuant to Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1) (2018). This Honorable Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2018).

Statement of the Case

On February 2, 2018 and March 12-15, 2018, Staff Sergeant (SSgt) Uribe was tried by a general court-martial at Joint Base San Antonio-Lackland, Texas. (JA at 1). Contrary to his pleas, he was convicted by a military judge of one specification of sexual assault on divers occasions in violation of Article 120, UCMJ. 10 U.S.C. § 920 (2012). (JA at 72). The military judge sentenced SSgt Uribe to a dishonorable discharge, confinement for 20 months, reduction to the grade of E-1, and a reprimand. (JA at 73). The convening authority approved the adjudged sentence, deferred SSgt Uribe's reduction in grade and mandatory forfeitures until action, and waived the mandatory forfeitures for six months for the benefit of his dependent children. (JA at 117-18).

On April 16, 2020, the AFCCA affirmed SSgt Uribe's findings and sentence. (JA at 2). On June 10, 2020, SSgt Uribe petitioned this Court for review.

Statement of Facts

Judge Rosenow and Maj BJ's Relationship

Judge Rosenow served as the military judge in this case, while Maj BJ served as the senior trial counsel (STC) prosecuting the case. (JA at 9). Judge Rosenow and Maj BJ met each other in 2012. (JA at 33). Starting in the summer of 2012, they both served as STCs, with Judge Rosenow stationed at Randolph Air Force Base, Texas and Maj BJ stationed at Joint Base Andrews, Maryland. (*Id.*) In mid-2014, Judge Rosenow relocated to Joint Base Andrews, where he continued to serve as a STC and regularly prosecute cases. (JA at 33, 50). Judge Rosenow and Maj BJ were stationed together at Joint Base Andrews for approximately one year. (JA at 33). There, Judge Rosenow and Maj BJ saw each other in their shared office while in town, regularly discussed legal issues, and "hung out occasionally." (*Id.*) During this time, Judge Rosenow and Maj BJ became friends. (Id.) In April 2015, Maj BJ attended Judge Rosenow's bachelor party in New York City. (JA at 33, 50). Approximately 15-20 people attended the party, but Maj BJ did not remember if any other Air Force judge advocates were present. (JA at 33). In June 2015, Maj BJ attended Judge Rosenow's wedding. (Id.) In mid-2015, Maj BJ relocated to Travis Air Force Base, California, and continued to serve as a STC. (Id.) In mid-2016, Judge Rosenow relocated to Travis Air Force Base to serve as a military judge. (Id.) From mid-2016 to March 2018, Judge Rosenow and Maj BJ personally socialized approximately four times with their significant others and one time without their significant others. (Id.) Although Judge Rosenow's wife and Maj BJ's girlfriend knew each other, they were more acquaintances than friends. (Id.) In February 2017, Judge Rosenow's wife went into labor while Judge Rosenow and Maj BJ were out of town. (Id.) Maj BJ's girlfriend went to the hospital and was present with Judge Rosenow's wife for the birth of their children. (Id.)

Motion to Recuse the Military Judge

Col DE was first detailed as the military judge in this case. (JA at 32). On March 1, 2018, Col DE detailed Judge Rosenow to replace him

as the military judge. (*Id.*) Trial was scheduled to begin on March 12, 2018. (*Id.*) On March 7, 2018, Maj BJ e-mailed Judge Rosenow to request an R.C.M. 802 conference, stating:

Defense and I spoke concerning our friendship and we wanted to discuss the matter jointly with you . . . I think both sides are simply concerned about the perception of fairness of the proceedings, not only from the Accused's perspective . . . but also from an outsider as well.

(JA at 35). The parties held a conference that same day, where Maj BJ and the Senior Defense Counsel (SDC) both expressed concerns regarding Judge Rosenow presiding over a case where Maj BJ appeared as counsel. (JA at 51-52). The next day, the Defense filed a motion for Judge Rosenow to recuse himself based on his personal relationship with Maj BJ. (JA at 29). The Government did not oppose the Defense's motion, agreed with the facts, and did not provide a written response. (JA at 43, 48).

Judge Rosenow adopted as facts the attachments to the Defense's motion for recusal. (JA at 49). Additionally, Judge Rosenow interpreted the Government's non-opposition to the Defense's motion as a joint request. (JA at 56). Ultimately, Judge Rosenow denied the motion, stating:

4

The Court is simply unconvinced that a reasonable person knowing all the circumstances – including especially the relatively limited involvement professionally and socially, the deliberate and increased separation since the military judge's reassignment, the span of time and settings in which the military judge has served as a military judge and his ruling's lengthy statement of impartiality – would harbor doubt on this measure.

(Id.) Judge Rosenow further stated:

Service in the JAG Corps regularly develops and encourages the types of relationships identified in this case as potentially disconcerting by the parties. Accordingly, it is the commonality between so many relationships derived from shared uniform service and the earlier professional and social interactions involving the military judge and the STC that must further allay any suspicion of the reasonable person observing this proceeding.

(JA at 57). Finally, Judge Rosenow stated that he compared his relationship with Maj BJ "against the relationships and behaviors recounted in *Butcher, Lewis, Berman, Cron, Witt, and Sullivan*" and found "the overwhelming balance of precedent supports rather than undermines the conclusions in this ruling." (*Id.*)

Summary of Argument

Judge Rosenow should have recused himself in accordance with R.C.M. 902(a) because his impartiality might have reasonably been questioned due to his close personal friendship with Maj BJ, the STC on this case. Judge Rosenow and Maj BJ's relationship went beyond that of the typical professional relationship this Court would expect to find between two Air Force judge advocates of the same rank following similar career paths. This error requires reversal because it prejudiced SSgt Uribe and undermined public confidence in the judicial process.

Argument

THE LOWER COURT ERRED IN FINDING THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING A JOINT MOTION TO RECUSE.

Standard of Review

This Court reviews a military judge's ruling on a motion that he recuse himself for an abuse of discretion. *United States v. Sullivan*, 74 M.J. 448, 453 (C.A.A.F. 2015). "A military judge's ruling constitutes an abuse of discretion if it is arbitrary, fanciful, clearly unreasonable or clearly erroneous." *Id.* (internal quotation marks and citation omitted).

Law and Analysis

1. Judge Rosenow should have recused himself under R.C.M. 902(a) due to his close personal friendship with the senior trial counsel prosecuting the case, Maj BJ.

"[A] military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably

R.C.M. 902(a). "The military judge should broadly be questioned." construe grounds for challenge but should not step down from a case unnecessarily." R.C.M. 902(d), Discussion. This Court applies "an objective standard for identifying an appearance of bias by asking whether a reasonable person knowing all the circumstances would conclude that the military judge's impartiality might reasonably be questioned." Sullivan, 74 M.J. at 453. R.C.M. 902(a) "was enacted to maintain public confidence in the judicial system by avoiding 'even the appearance of partiality." United States v. Butcher, 56 M.J. 87, 90 (C.A.A.F. 2001) (quoting Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 860 (1988)). "[W]hat matters is not the reality of bias or prejudice but its appearance." Liteky v. United States, 510 U.S. 540, 548 (1994).

"[M]ilitary judges serve as the independent check on the integrity of the court-martial process. The validity of this system depends on the impartiality of military judges in fact and in appearance." *Hasan v. Gross*, 71 M.J. 416, 418-19 (C.A.A.F. 2012). "An impartial and disinterested trial judge is the foundation on which the military justice system rests, and avoiding the appearance of impropriety is as important as avoiding impropriety itself." United States v. Berman, 28 M.J. 615, 616 (C.A.A.F. 1989).

"The interplay of social and professional relationships in the armed forces poses particular challenges for the military judiciary." Butcher, 56 "Judges have broad experiences and a wide array of M.J. at 91. backgrounds that are likely to develop ties with other attorneys, law firms, and agencies." Id. (quoting United States v. Norfleet, 53 M.J. 262, 269-70 (C.A.A.F. 2000)). "The practice of military law can sometimes require the military judge and counsel to attend the same social gatherings, to share the same messing facilities, the same general living accommodations, and on occasion, the same mode of transportation." Berman, 28 M.J. at 619. "In light of these circumstances, members of the military judiciary must be particularly sensitive to applicable standards of judicial conduct." Butcher, 56 M.J. at 91. Indeed, "[a] judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on his or her conduct that might be viewed as burdensome by the ordinary citizen and do so freely and willingly." Air Force Instruction (AFI) 51-110, Professional Responsibility Program, Attachment 8, The Air Force Uniform Code of Judicial Conduct, Cannon

2A. Further, "[a] judge shall conduct all of the judge's extra-judicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially." *Id.* at Cannon 4A.

In *Sullivan*, this Court looked at whether the military judge should have recused himself due to prior professional and social relationships with a number of the court-martial participants. 74 M.J. at 449. This Court stated that "although a social relationship creates special concerns, those relationships that had a social component occurred years prior to the court-martial and were not close or intimate." Id. at 454 (internal quotation marks omitted). Further, this Court found that "most of the military judge's contacts were professional and routine in nature," and that "the number and type of contacts . . . appear to simply be the natural consequence of the military judge's length of service in the relatively small Coast Guard." Id. at 454-55. In Butcher, this Court looked at whether the military judge should have recused himself after he attended a party that trial counsel also attended and played tennis with trial counsel as his doubles partner. 56 M.J. at 89. There, this Court noted that the case did "not involve intimate personal relationships or extensive interaction." Id. at 93. In Berman, this Court held that the military judge should have recused himself when he had a sexual relationship with the prosecuting attorney. 28 M.J. at 617-18. However, this Court stated, "[o]ur decision today should not be rea[d] as disqualifying a trial judge on the basis of personal acquaintanceship or a professional friendship that is shared with other members of the bar." *Id.* at 619.

In United States v. Cron, the AFCCA addressed whether the military judge should have recused himself based on his relationship with the STC. 73 M.J. 718, 725-28 (A.F. Ct. Crim. App. 2014). There, the military judge and the STC had never been to each other's houses, had never been stationed together, and had never spent any time alone together. Id. at 726. While they had spent time together in group settings, the military judge characterized their relationship as "like Air Force friends we see each other when we are TDY together, and we don't see each other when we are not." Id. The AFCCA found the military judge did not err in declining to recuse himself since his relationship with the STC was that "of a 'professional friendship' between two Air Force Judge Advocate officers of the same rank with similar career progression." Id. at 727.

10

This case is wholly distinguishable from the routine relationship this Court would expect to find between two Air Force judge advocates of the same rank following similar career paths. Judge Rosenow and Maj BJ's relationship was more than simply a "personal acquaintanceship or a professional friendship." Berman, 28 M.J. at 619. Rather, they held a close personal friendship. Additionally, Judge Rosenow and Maj BJ's contact with one another was more than just "professional and routine in nature." Sullivan, 74 M.J. at 454. From mid-2012 to mid-2016, Judge Rosenow and Maj BJ both served as STCs, a close-knit community of senior litigators. (JA at 33). Starting in mid-2014, the two were stationed together at Joint Base Andrews, Maryland and became friends. (Id.) Not only did Judge Rosenow and Maj BJ see each other in their shared office and discuss legal issues, but they also socialized together outside of the workplace. (Id.) The two were such close friends that Judge Rosenow invited Maj BJ to attend his out-of-town bachelor party in April 2015. (JA at 33, 50). This was not simply a local gathering that all Air Force judge advocates were invited to, rather it was an exclusive party in which a soon-to-be groom celebrates with his closest male friends. Cf. Butcher, 56 M.J. at 89 (where the military judge attended a party that all

attorneys in the judicial circuit had been invited to). Further, Maj BJ traveled from Washington, D.C. to New York City to attend this party, presumably at some financial expense to himself. In June 2015, Maj BJ was invited to and attended Judge Rosenow's wedding. (JA at 33).

In mid-2016, Judge Rosenow and Maj BJ's interactions became more limited due to Judge Rosenow's position as a military judge. (Id.) Even so, the two were again stationed together - this time at Travis Air Force Base, California – and, it is important to note, that they continued to spend time together socially. (Id.) From mid-2016 up until this courtmartial, Judge Rosenow and Maj BJ personally socialized approximately four times with their significant others and once without their significant others. (Id.) As their significant others were "more of acquaintances than friends," the driving force of spending time together was Judge Rosenow and Maj BJ's obvious, personal friendship. (Id.) Additionally, in February 2017, Maj BJ's girlfriend went to the hospital and was present with Judge Rosenow's wife during the birth of their children. (*Id.*) Although this event was unexpected, the fact that Judge Rosenow's wife felt comfortable reaching out to Maj BJ's girlfriend when she entered labor prematurely in the middle of the night speaks to the extensiveness of Judge Rosenow and Maj BJ's relationship. (JA at 50).

Judge Rosenow's ruling that he and Maj BJ had "relatively limited involvement professionally and socially" is clearly unreasonable as the facts show that they had a close and intimate personal friendship. (JA at 56). Their personal relationship did not exist "years prior to the courtmartial," but developed and continued in the four-year time span leading up to SSgt Uribe's court-martial. Sullivan, 74 M.J. at 454. Further, Judge Rosenow's ruling that "the JAG Corps regularly develops and encourages the types of relationships identified in this case," and thus the commonality of their relationship "further allay[s] any suspicion of the reasonable person observing this proceeding," is also clearly unreasonable because Judge Rosenow and Maj BJ's relationship is not a typical professional relationship between two judge advocates. (JA at 57). Judge Rosenow and Maj BJ did not merely exist in the same judge advocate circle where they attended the same social gatherings and shared the same military facilities. *Berman*, 28 M.J. at 619. Instead, they actively sought each other out to socialize outside of the general judge advocate community on a more personal level, both one-on-one and

with their significant others. Additionally, while Maj Rosenow identified the likelihood of developing relationships in the JAG Corps, he failed to recognize that this does not "allay any suspicion" of partiality but instead requires even greater vigilance by members of the military judiciary. Here, Maj Rosenow maintained his personal relationship with Maj BJ even after he became a military judge in the same geographical region that Maj BJ prosecuted cases in. Finally, although the military judge stated that he "has no personal bias or prejudice concerning any party or counsel for that party," and understood his obligation to be impartial, his ruling was clearly erroneous as it focused more on whether he was actually biased instead of whether there was the appearance of bias. (JA at 56). The correct standard evaluates whether there is an appearance of bias as "avoiding the appearance of impropriety is as important as avoiding impropriety itself." Berman, 28 M.J. at 616.

Lastly, a joint request for recusal provides support for disqualification under R.C.M. 902(a) because a "disinterested observer would have noted that the government joined the [accused's] motions for recusal – a very unusual development demonstrating that all parties were seriously concerned about the appearance of partiality." *Sullivan*,

14

74 M.J. at 455 (internal quotation marks and citation omitted). This Court has "caution[ed] military judges to be especially circumspect in deciding whether to disqualify themselves in such instances." Id. Here, the military judge interpreted the Government's non-opposition to the Defense's motion for recusal to be a joint request, stating "doing anything" less would insufficiently weigh the role the government took in raising the issue, the varying descriptions of its concerns across time and the shared need for both parties to receive a hearing free of doubts regarding the military judge's integrity and impartiality." (JA at 56). The Defense and the Government were mutually concerned about Judge Rosenow and Maj BJ's personal friendship. Maj BJ stated "both sides are simply concerned about the perception of fairness of the proceedings" from the perspective of SSgt Uribe and an outsider. (JA at 35). Further, during a R.C.M. 802 conference with the parties, both Maj BJ and the SDC expressed concerns regarding Judge Rosenow presiding over a case where Maj BJ appeared as counsel. (JA at 51, 52). Their joint request for Judge Rosenow's recusal demonstrated that both the Government and the Defense were seriously concerned about the appearance of partiality in this case.

Based on Judge Rosenow and Maj BJ's close personal friendship and the parties' joint request to recuse Judge Rosenow, a reasonable person knowing all the circumstances would conclude that the military judge's impartiality might reasonably be questioned. As such, Judge Rosenow should have recused himself from this case.

2. <u>Reversal is required because this error prejudiced SSgt Uribe</u> <u>and undermined public confidence in the judicial process.</u>

"This Court has recognized that not every judicial disqualification error requires reversal." United States v. McIlwain, 66 M.J. 312, 315 (C.A.A.F. 2008). To determine whether a military judge's disqualification warrants a remedy, this Court looks at "(1) the risk of injustice to the parties, (2) the risk that the denial of relief will produce injustice in other cases, and (3) the risk of undermining public confidence in the judicial process." Id. (citing Liljeberg, 486 U.S. at 864) (additional citations omitted).

This case requires relief due to the first and third *Liljeberg* factors. Regarding the first, a military judge:

has broad discretion in carrying out [a fair trial], including the authority to call and question witnesses, hold sessions outside the presence of members, govern the order and manner of testimony and argument, control voir dire, rule on the admissibility of evidence and interlocutory questions, exercise contempt power to control the proceedings, and, in a bench trial, adjudge findings and sentence.

McIlwain, 66 M.J. at 314 (quoting United States v. Quintanilla, 56 M.J. 37, 41 (C.A.A.F. 2001)). In this case, Judge Rosenow ruled on numerous motions including defense motions to suppress evidence under Mil. R. Evid. 404(b), to admit evidence under Mil. R. Evid. 412, and to exclude evidence under Mil. R. Evid. 413. (JA at 66-69). Further, Judge Rosenow sided with the Government by ruling against numerous Defense objections to evidence and testimony throughout the court-martial. (JA at 74-96). On appeal, SSgt Uribe raised ten issues including whether the military judge erred by denying the Defense's motion to dismiss due to assistant trial counsel's prior representation of him, whether the military judge erred by denying the Defense's motion that he recuse himself, whether the evidence was legally and factually sufficient, and whether the trial counsel engaged in prosecutorial misconduct. (JA at 2). Each time Judge Rosenow ruled on motions, ruled on evidence, deliberated findings, and deliberated the sentence, he exercised his discretion, a discretion that a reasonable person would conclude might not have been exercised in an impartial manner. Unlike *Butcher*, where the events giving rise to disgualification occurred near the end of trial, here Judge

Rosenow exercised his discretion on matters of significance throughout the entire court-martial concerning both findings and sentencing. 56 M.J. at 92. Further, many of his actions were adverse to SSgt Uribe. Thus, the risk of injustice to the parties – in particular, SSgt Uribe – is high.

The third *Liljeberg* factor is also implicated by the facts of this case. There is a risk of undermining the public's confidence in the military justice system where the judge is close personal friends with the prosecuting attorney. A reasonable person knowing all of the circumstances would question Judge Rosenow's impartiality where he actively socialized with Maj BJ, both one-on-one and with their significant others, before and during his tenure as a military judge. Additionally, Maj BJ's participation in major life milestones of Judge Rosenow's – his bachelor party, his wedding, and the birth of his children - further contribute to an appearance of bias and partiality. Finally, Maj BJ identified and raised the issue of his friendship with Judge Rosenow, expressed his concerns regarding "the perception of fairness of the proceedings," and did not oppose the Defense's motion to recuse. The risk of undermining the public's confidence in the military justice system is high where both parties agree that the military judge should be recused due to an appearance of bias yet the military judge refuses to step down from the case.

Conclusion

A reasonable person knowing all of the circumstances might reasonably question Judge Rosenow's impartiality due to his close personal friendship with the STC, Maj BJ. The military judge's failure to recuse himself resulted in injustice to the parties and undermined public confidence in the integrity of the military justice system.

WHEREFORE, SSgt Uribe respectfully requests that this Honorable Court set aside the finding and sentence.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was electronically filed with the Clerk of Court on August 5, 2020, pursuant to this Court's order dated July 7, 2020, and that a copy was also electronically served on the Air Force Appellate Government Division on the same date.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because it contains 3,741 words.

This brief complies with the typeface and type style requirements of Rule 37.

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