

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
COOK, TELLITOCCHI, and HAIGHT
Appellate Military Judges

**Specialist HC, United States Army, by and through Captain JESSE S.
SOMMER, United States Army, Special Victim Counsel, Petitioner**

v.

Colonel MARK A. BRIDGES, United States Army, Military Judge, Respondent

**Private First Class NICHOLAS E. WHITE, United States Army,
Real Party in Interest**

ARMY MISC 20140793

Headquarters, U.S. Army Japan & I Corps (Forward)
Mark A. Bridges, Military Judge

For Petitioner: Captain Jesse S. Sommer, JA (on brief).

For Real Party in Interest: Lieutenant Colonel Jonathan F. Potter, JA; Captain Robert H. Meek, JA (on brief).

Amicus Curiae:

For the United States: Colonel John P. Carrell, JA; Major Daniel D. Derner, JA; Captain Janae M. Lepir, JA; Captain Carrie L. Ward, JA (on brief).

For the Air Force Special Victims' Counsel Program: Lisa R. Kreeger-Norman, Esq.; Captain Aaron D. Kirk, JA.

For the Navy Victims' Legal Counsel Program: Lieutenant Nicholas Smith, JA; Lieutenant Commander James Toohey, JA; Lieutenant Commander Patrick Korody, JA.

For the Marine Corps Victims' Legal Counsel Organization: Major Jahn C. Olson, JA.

For the United States Coast Guard Office of Member Advocacy and Legal Assistance: Lieutenant Kristen M. Byers, JA; Lieutenant Commander Kelley L. Tiffany.

1 December 2014

ORDER

JALS-GA

WHEREAS:

On 20 October 2014, Petitioner filed a petition with this court for extraordinary relief in the nature of a writ of mandamus ordering the trial court to grant petitioner's request for a continuance. Petitioner also requested this court stay the proceedings in the court-martial of *United States v. White*. On 5 November 2014, this court ordered the United States Army Government Appellate Division to file an answer to the petition, ordered petitioner to respond, identified various issues to be addressed, and invited amicus curiae briefs. We have now received response and brief from the U.S. Army Government Appellate Division, response and brief from the real party in interest through appellate defense counsel, response and brief from the Petitioner through counsel, and amicus curiae briefs in support of the petition from the Air Force Special Victims' Counsel Program, the Navy Victims' Legal Counsel Program, the Marine Corps Victims' Legal Counsel Organization, and Coast Guard special victims' counsel in the Office of Member Advocacy and Legal Assistance.

After consideration of all filings, we deny the petition for a writ of mandamus and deny the request for a stay of the trial proceedings.

BACKGROUND

According to the charge sheet, for alleged crimes committed in September 2013 in Camp Zama, Japan, various charges were preferred on 15 July 2014 against Private First Class (PFC) White to include the offenses of rape, abusive sexual contact, battery, and stalking of Petitioner, HC. After an Article 32, UCMJ, hearing, these charges were referred to a general court-martial on 9 September 2014. After various pretrial discussions and e-mail conversations, on 22 September 2014, the assigned Special Victim Counsel (SVC), Captain (CPT) Sommer, co-located with SPC HC and stationed at Fort Bragg, North Carolina, e-mailed Captain (CPT) JP, the Chief of Military Justice at Camp Zama, Japan, and stated, "I will rely on you to inform the court that I will be unavailable from Tuesday, 14 October through Friday, 14 November on account of currently scheduled Courts Martial and Army training. Any proceedings in this matter, then, will have to be thereafter, or before."

The military judge docketed this case for arraignment and motions to occur on 27 October and trial to begin on 12 December 2014 at Camp Zama. Upon learning of the December trial date, the SVC notified CPT JP via e-mail of a scheduling conflict with another court-martial to be held at Fort Bragg. Captain JP responded, "The last list you provided me with did not indicate any conflict in December. If the Government does ask for the trial date to be changed I anticipate the case being pushed far to the right given that the [military judge's] docket is very busy which is why he scheduled this case for a weekend and we are working with two defense [counsel's] schedules." The SVC replied, detailing conflicts with other trial dates of

10-12 December and 15-17 December, and further stated, “The earliest I can realistically do this is January, unless the Court wants to do this over the Christmas holiday. I intended to stay on Post to catch up.”

Captain JP then asked the SVC to e-mail the military judge an explanation of the scheduling conflicts. The SVC did so and informed the military judge, “Indeed, mid January will be the earliest I will be able to attend with my client.” To which, the military judge responded, “I am not going to move the trial date. And I do not consider SVCs to be parties to the trial, so I do not include you in docketing decisions. You need to communicate with the TC.” The government did not, at that time, seek a continuance, so the SVC moved the court for delay. To which, the military judge e-mailed in response that he was unaware of the SVC’s authority to seek a continuance but added, “Even if you had such authority, you have no good cause for a continuance. As you say, there are no known [Military Rules for Evidence] 412 or 513 issues to be litigated at the trial.”

Then, significantly, the government, on 7 November 2014, requested a delay until 5 or 26 January 2015 based upon the alleged “victim insist[ing] upon being accompanied and represented by her SVC at trial.” The government also contended that a ‘continuance must be granted in order for the victim to be treated with fairness and respect’ during trial.” On 10 November 2014, the accused in this case, PFC White, formally requested a speedy trial, asserting, “Delay in this case under the circumstances proposed by the government will be severely prejudicial to PFC White and violate his constitutional rights.” The defense specifically requested that his court-martial “be held as docketed for 12-14 December 2014.” After full consideration of this issue, the military judge denied the continuance.

DISCUSSION

This court has jurisdiction to review this petition. *See* All Writs Act, 28 U.S.C. § 1651(a) (2012); *LRM v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013). The requested writ would be “in aid of” our existing jurisdiction as that term “includes cases where a petitioner seeks ‘to modify an action that was taken within the subject matter jurisdiction of the military justice system.’” *Id.* at 368 (quoting *Denedo v. United States*, 66 M.J. 114, 120 (C.A.A.F. 2008)). Also, the petition may even pertain to “interlocutory matters where no finding or sentence has been entered in the court-martial.” *Id.* (citing *Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012); *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 25 (1943)). Furthermore, we acknowledge that the victim and her special victim counsel are not “strangers” to this court-martial and, while not a party, do enjoy “limited participant standing” as outlined in *Kastenberg*. *Id.*; *see also Ctr. for Constitutional Rights v. United States*, 72 M.J. 126, 129 (C.A.A.F. 2013).

To prevail on a request for a writ of mandamus, petitioner “must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances.” *Hasan*, 71 M.J. at 418 (citing *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004)). Here, the petitioner fails on all three requirements.

First, petitioning a superior court to deconflict calendars and schedules not only of parties, but of multiple judges, counsel, witnesses, and victims certainly cannot be the only, or even the best or most practical, means to set trial dates and manage a lower court’s docket. This is especially true in the military justice system with its worldwide jurisdiction, its features of portability and deployability, and its trial locations that span the globe. While all may have an interest in the effective implementation of the Army’s Special Victim Program, we note the appointment, assignment, logistical support, resourcing, travel, and monitoring of these counsel fall to the Program Manager, Chiefs of Legal Assistance, and Offices of the Staff Judge Advocate. *See* Memorandum from Office of The Judge Advocate General, to Judge Advocate Legal Services Personnel, Subject: Office of The Judge Advocate General Policy Memorandum #14-01, Special Victim Counsel (1 Nov. 2013). Surely, these entities must assume some responsibility in finding a solution to conflicts with schedules and other demands or duties. In fact, such exigencies are alluded to in the Special Victim Counsel Handbook:

[t]ransfer of counsel due to deployments, PCS, ETS and other unique circumstances will be coordinated by the SJA through the SVCPM. The victim will be consulted throughout the process of any transfer of counsel. If a new SVC is appointed, coordination will be made between outgoing and incoming SVCs to ensure an effective transfer of services.

See Special Victim Counsel Handbook, para. 3-3 (1 Nov. 2013). Reference to this provision does not suggest this court recommends such action here; it is only cited to show there are, in fact, other remedies available when an SVC is faced with competing demands.

Second, petitioner’s right to the issuance of the requested writ of mandamus is not clear or indisputable. The legal basis upon which petitioner relies for his complaint that he was excluded from docketing discussions is Rule 2.3.1 of the

Rules of Practice before Army Courts-Martial¹. That rule merely provides, “Upon assuming representation, SVCs will provide contact information to the trial counsel for inclusion on the Electronic Docket Request.” This language facilitates notice; it does not mandate personal inclusion of the SVC in all future docketing discussions between the military judge and the parties. While the availability and calendars of relevant SVCs may be matters appropriate for consideration, the military judge certainly can control how those matters are presented to him. In fact, this particular SVC, in his submitted affidavit, indicates this information is typically communicated through trial counsel and not directly to the military judge. *See* Special Victim Counsel Handbook, para. 4-2(d) (The SVC’s schedule will be communicated to the trial counsel, which the trial counsel will consider when scheduling proceedings). Therefore, the military judge’s admonition to the SVC to voice his concerns through trial counsel was understandable. Furthermore, the “Preamble” to the Rules of Practice Before Army Courts-Martial, the very rules which petitioner claims were violated, specifies that noncompliance with these rules “does not give rise to any rights or remedies for an accused and the rules will be interpreted and applied in that light.” If the rules provide no basis for relief for an accused, then, logically, they provide no basis for relief for others.

The other legal basis upon which petitioner relies in his complaint is 10 U.S.C. § 1044e(b)(6), which authorizes legal assistance in the form of “[a]ccompanying the victim at any proceedings in connection with the reporting, military investigation, and military prosecution of the alleged sex-related offense.” The statute authorizes various types of legal assistance to eligible victims of alleged sex-related offenses. The Army SVC program implements that statute, and the Special Victim Counsel Handbook, in its “Background” section, provides:

The SVC Program does not increase a victim’s standing in court-martial hearings or other military justice proceedings beyond the standing victims are currently afforded under existing law and rules (e.g., evidentiary hearings under [Military Rules of Evidence] 412, 513, and 514). Victims, whether represented by SVC or civilian counsel, are not parties to a court-martial under Rule[] for Courts-Martial 103 and do not have the same entitlements as parties under the UCMJ.

¹ The applicable version of the Rules of Practice Before Army Courts-Martial was promulgated by the Chief Trial Judge, United States Army Trial Judiciary, on 1 November 2013.

Possible legal bases upon which petitioner's clear and indisputable right to issuance of a writ include the victims' rights articulated in *Kastenber* and victims' rights delineated in Article 806b, UCMJ.² We find the petitioner, at this time, has not shown that any of those rights have been or will be violated.

Third, issuance of a writ of mandamus is not appropriate under these circumstances. In accordance with Rules for Courts-Martial [hereinafter R.C.M.] 801(a)(1) and 906(b)(1), and Article 40, UCMJ, the military judge has broad discretion when ruling on requests for continuances. See *United States v. Thomas*, 22 M.J. 57 (C.M.A. 1986). It is appropriate to consider various factors, to include the availability of witnesses, which would presumably also encompass the availability of those counsel representing particular witnesses, e.g., victims, immunized witnesses, and co-conspirators. See R.C.M. 906(b)(1) discussion. That said, the petitioner has not shown the military judge here abused his discretion in refusing to further delay the trial. This is particularly so in light of the military judge's balancing the alleged victim's interests espoused in the government's motion for continuance against the accused's interest in enforcement of his constitutional right to a speedy trial. This appellate court "must zealously defend the military trial judge's authority to manage the proceedings over which he presides." *United States v. Browers*, 20 M.J. 356, 361 (C.M.A. 1985) (Cox, J. concurring). "The writ of mandamus is a drastic instrument which should be invoked only in truly extraordinary situations." *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983) (citing *Allied Chemical Corp. v. Daiflon, Inc.*, 49 U.S. 33 (1980); *Will v. United States*, 389 U.S. 90 (1967); *Platt v. Minnesota Mining & Manufacturing Co.*, 376 U.S. 240 (1964)). Such an exceptional case may exist "where there is clear abuse of discretion or 'usurpation of judicial power.'" *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953) (quoting *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945)). Neither is present in this case. The

² In Policy Memorandum 14-09, Disclosure of Information to Crime Victims, The Army Judge Advocate General references certain victims' rights enumerated in Article 6b, UCMJ, and requires the government provide victims and their SVCs, if applicable, notice of "[a]ny docket requests, as well as docketing or scheduling orders, including deadlines for filing motions and the date, time, and location for any session of trial." Memorandum from The Office of The Judge Advocate General, for Judge Advocate Legal Service Personnel, Subject: Disclosure of Information to Crime Victims – POLICY MEMORANDUM 14-09, para. 4.b(3) (1 Oct. 2014) (Disclosure Mem.). It is informative that this notice need not be provided until receipt or filing by the government, not beforehand. Also, we note "this policy is not intended to, and does not, create any entitlement, cause of action, or defense in favor of any person arising out of the failure to accord a victim the notice outlined in this policy." Disclosure Mem., para. 5.

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military judge has “ultimate responsibility for the criminal docket” and should not forfeit that duty, lest “he becomes a pawn of counsel.” *United States v. Herron*, 4 M.J. 30, 32 (C.M.A. 1977) (Fletcher, J., concurring).

CONCLUSION

Here, the military judge’s management of his docket was not extraordinary, an abuse of discretion, or outside his proper scope of judicial power. Therefore, the petition for extraordinary relief in the nature of a writ of mandamus and application for stay of proceedings are DENIED.

FOR THE COURT:


ANTHONY O. POTTINGER
Acting Clerk of Court