

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

E.E. GEISER

F.D. MITCHELL

J.G. BARTOLOTTA

UNITED STATES

v.

**Ryan D. BISSON
Private (E-1), U.S. Marine Corps**

NMCCA 200600997

Decided 9 July 2007

Sentence adjudged 10 May 2005. Military Judge: A.C. Williams.
Staff Judge Advocate's Recommendation: LtCol D.S. Jump, USMC.
Review pursuant to Article 66(c), UCMJ, of Special Court-Martial
convened by Commanding Officer, Marine Aircraft Group 12, 1st
Marine Aircraft Wing, Marine Corps Air Station, Iwakuni, Japan.

LT ANTHONY YIM, JAGC, USN, Appellate Defense Counsel
LtCol JOHN F. KENNEDY, USMCR, Appellate Government Counsel
LT JESSICA M. HUDSON, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

BARTOLOTTA, Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to mixed pleas, of two specifications of violating a lawful general order, drunk on duty, assault consummated by a battery, indecent assault, and indecent language, in violation of Articles 92, 112, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 912, 928, and 934.¹ The appellant was sentenced to confinement for eight months, forfeiture of \$823.00 pay per month for eight months, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

¹ The appellant pled guilty to the orders violations, drunk on duty, assault consummated by a battery, and indecent language. He pled not guilty to the indecent assault but guilty of its lesser included offense of assault consummated by a battery.

We have considered the record of trial, the appellant's sole assignment of error asserting the military judge abused his discretion by denying the appellant's motion to dismiss due to unlawful command influence (UCI),² and the Government's response.³ We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Unlawful Command Influence

1. Facts

The following facts were obtained from witness testimony presented at the 9 May 2005 motions hearing, see Record at 14-76, the military judge's findings of fact, see Appellate Exhibit XXVIII, and the good military character evidence presented at trial by the two defense witnesses concerning the UCI motion, see record at 302-06; Defense Exhibit A at 1-3.

At the time of the events at issue, the appellant was a member of the Aviation Supply Department (ASD), Marine Aviation Logistics Squadron 12 (MALS-12), Marine Aircraft Group 12 (MAG-12), 1st Marine Aircraft Wing (1st MAW), stationed at Marine Corps Air Station (MCAS), Iwakuni, Japan. The charges against the appellant were preferred by the MALS-12 commanding officer (CO), Lieutenant Colonel (LtCol) Harold D. Johnson, III, on 21 January 2005, and referred by the MAG-12 CO, Colonel (Col) H. F. Barker, on 16 March 2005. See Charge Sheet. Col Barker is the convening authority in this case. There is no evidence from the record that Col Barker was privy to any of the following communications or events at the time.

In mid-April 2005, two senior Marines in the appellant's chain of command, Second Lieutenant (2dLt) Aaron Schneltzer (the

² WHETHER THE REMEDIAL ACTIONS OF THE CONVENING AUTHORITY WERE ENOUGH TO REMOVE THE INITIAL TAIN OF UNLAWFUL COMMAND INFLUENCE.

³ The appellant's assignment of error is in two parts: (1) whether the appellant waived the issue of UCI for appellate review by pleading guilty; and, (2) whether the CO's remedial actions could remove the taint of UCI. Appellant's Brief of 19 Sep 2006 at 4-5. The appellant's guilty plea did not waive appellate review of his UCI motion. *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994); see also RULE FOR COURTS-MARTIAL 905, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). Because the Government correctly concurs with the appellant on the first part, see Government's response of 7 Nov 2006 at 3, we will only address the second part of the appellant's assignment of error.

appellant's officer-in-charge (OIC)) and Gunnery Sergeant (GySgt) Catherine M. McCoy (the appellant's staff noncommissioned officer-in-charge (SNCOIC)), informed the Aviation Supply Officer, Captain (Capt) Jeffrey D. Stone, of their desire to help the appellant during his court-martial. Their intent was to present good military character evidence on the appellant's behalf either by testifying at trial or through a written statement. Capt Stone recommended they get "all the details" before they write any recommendations. Record at 50-51, 63.

Capt Stone then met with LtCol Johnson concerning 2dLt Schneltzer's and GySgt McCoy's request.⁴ Major Louis E. Ortiz, the executive officer (XO), was also present for most of this meeting. LtCol Johnson imparted to Capt Stone his concerns regarding squadron personnel testifying. These concerns essentially fell into three categories. First, that command representatives would be "inserting themselves into [the court-martial] process . . . without a request from" counsel.⁵ *Id.* at 15. Second, he didn't want it to appear the command was taking sides to the detriment of any victims. *Id.* And third, if someone was going to testify on another's behalf they should first be informed of all the facts. *Id.* at 15-16, 41-42. LtCol Johnson did not order the two Marines not to testify. *Id.* at 16, 42, 51-52.

Following the meeting, Capt Stone told 2dLt Schneltzer and GySgt McCoy not to provide character statements on behalf of the appellant at that time, but did not tell them when they could provide statements. *Id.* at 52-53. It was Capt Stone's belief that character statements did not "apply to the guilt or innocence" of an accused, but rather were used only to mitigate a sentence. *Id.* He also imparted to them some of LtCol Johnson's concerns regarding involvement of MALS-12 Marines. The 2dLt and the GySgt understood this conversation as an order not to testify or provide statements at any time and not to assist the appellant. See Encl 1 to AE I; AE X; Record at 62. When contacted by trial defense counsel (TDC), both 2dLt Schneltzer and GySgt McCoy explained they were ordered not provide assistance. On 22 April 2005, GySgt McCoy signed an affidavit to that effect stating that she had "been ordered . . .

⁴ It is unclear whether Capt Stone was ordered to meet with LtCol Johnson or whether he sought out a meeting with the LtCol on his own. Record at 15, 50.

⁵ LtCol Johnson's concern here appears to be based on mission accomplishment and accountability. MALS-12 had recently failed a readiness inspection for which the squadron was shut down and it was long-standing policy that requests for squadron personnel must be routed through the chain of command. AE XXVIII.

via the chain of command, not to provide any statements on behalf of" the appellant. AE X. According to the affidavit, GySgt McCoy understood the order was "to the effect of 'the chain of command represents the government, the government is prosecuting him, and writing statements undermines the authority of the government and the CO.'" *Id.* 2dLt Schneltzer's 21 April 2005 e-mail to TDC indicates the same language. See Encl 1 to AE I.

On Saturday, 23 April 2005, LtCol Johnson learned that 2dLt Schneltzer and GySgt McCoy believed that they had been ordered not to testify on the appellant's behalf. Record at 18. On 25 April 2005, LtCol Johnson issued a policy letter to his command titled "Commander's Intent on Military Justice Matters" which stated, in pertinent part:

I understand that prior guidance that I issued on this subject may have been misunderstood or misinterpreted. My guidance was that members of this command were not to interfere with or impede a pending court-martial and that requests for witnesses must be made through the chain of command to maintain personnel accountability. At no time was my guidance that a member of this command could not or should not testify as a witness at a court-martial, to include testifying favorably on behalf of an accused. **There will be no adverse actions taken against any member of this command for participating in the court-martial process.**

See Encl 2 to AE II (original emphasis); Record at 18-29. Capt Stone read this letter to the ASD SNCO's and officers and then had the letter distributed to the same. Record at 54-55, 64. At this meeting Capt Stone explained that he either misunderstood or misinterpreted the LtCol's guidance, which may have resulted in confusion in his explanation to 2dLt Schneltzer and GySgt McCoy. *Id.* at 55, 70. Shortly thereafter GySgt McCoy agreed to testify for the appellant and 2dLt Schneltzer provided a favorable and detailed written character statement.⁶ DE A at 1-3. TDC was in possession of 2dLt Schneltzer's favorable statement prior to the 9 May 2005 motions hearing. Record at 82-83; AE XV. On 25 April 2005, the appellant moved to dismiss

⁶ 2dLt Schneltzer was temporarily deployed to Thailand during the trial and had been for some time prior. He did not testify at the motions' hearing.

all the charges alleging the actions of LtCol Johnson and Capt Stone constituted UCI.⁷ AE I.

At the motions hearing, GySgt McCoy testified she originally thought she was ordered not to testify and that she initially felt hesitant. Record at 64; AE X. However, after LtCol Johnson's policy letter was read and Capt Stone explained the miscommunication, she no longer felt any misgivings about testifying favorably for the appellant. Record at 63-65, 69, 71. TDC explained to the military judge the testimony of GySgt McCoy and 2dLt Schneltzer would be used as rehabilitative evidence on sentencing and not during the merits phase. *Id.* at 83-86.

The military judge determined the defense met its initial burden of presenting "some evidence" of UCI. Record at 109; AE XXVIII. The military judge then found that the corrective actions taken by LtCol Johnson and Capt Stone rectified any problem, removed any taint of UCI, and removed any prejudice to the appellant. *Id.* Accordingly, the military judge denied the appellant's motion. *Id.*

The appellant did not call GySgt McCoy or 2dLt Schneltzer to testify on the merits. During the sentencing phase of trial, GySgt McCoy testified on behalf of the appellant and 2dLt Schneltzer's character statement was admitted into evidence. Record at 302-06, 318; DE A at 1-3.

2. Law

At trial, the defense must meet an initial burden to bring forth "some evidence" that raises UCI which could potentially cause the proceedings to be unfair. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)(citing *United States v. Strombaugh*, 40 M.J. 208, 213 (C.M.A. 1994); accord *United States v. Ayala*, 43 M.J. 296, 300 (C.A.A.F. 1995)). See *United States v. Johnson*, 54 M.J. 32, 34 (C.A.A.F. 2000). Though this threshold is low, the evidence required to meet it must be more than mere allegation or speculation. *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002)(citing *Biagase*, 50 M.J. at 150). "At trial, the accused must show facts which, if true, constitute [UCI], and that the alleged [UCI] has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *Biagase*, 50 M.J. at 150.

⁷ Similarly, here the appellant requests this court set aside the findings and sentence. Appellant's Brief at 6.

During appellate consideration of UCI claims, the factors are framed in light of a completed trial. The appellant bears the burden on appeal to: (1) show facts which, if true, constitute UCI; (2) show that the proceedings at trial were unfair; and (3) show that the UCI was the cause of the unfairness. *Biagase*, 50 M.J. at 150; *Stombaugh*, 40 M.J. at 213. See *United States v. Reynolds*, 40 M.J. 198, 202 (C.M.A. 1994). On appeal, prejudice will not be presumed until such time as the defense can meet its burden to show "proximate causation between the acts constituting [UCI] and the outcome of the court-martial." *Biagase*, 50 M.J. at 150 (citing *Reynolds*, 40 M.J. at 202); *United States v. Singleton*, 41 M.J. 200, 202 (C.M.A. 1994). Unlike trial courts, appellate courts generally have the benefit of "viewing the alleged UCI retrospectively, thoughtfully evaluating the actual impact it had upon the completed trial." *United States v. Schweitzer*, No. 200000755, 2007 CCA LEXIS 164 at 51, unpublished op. (N.M.Ct.Crim.App. 10 May 2007)(emphasis omitted).

Once the defense meets its initial burden of production at trial or on appeal, the burden then shifts to the Government to convince the court beyond a reasonable doubt there was no UCI, or that the UCI will not (at trial) or did not (on appeal) affect the findings and sentence. *Stombaugh*, 40 M.J. at 214. The Government can meet this burden by: (1) disproving beyond a reasonable doubt the predicate facts on which the allegation of UCI is based; (2) persuading the court beyond a reasonable doubt that the facts established do not constitute UCI; or (3) convincing the court beyond a reasonable doubt that the UCI will not prejudice the proceedings (trial) or did not affect the findings and sentence of the court-martial (appeal). *Biagase*, 50 M.J. at 151. The burden on the government is high because "'command influence tends to deprive servicemembers of their constitutional rights.'" *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004)(quoting *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986)). We review a military judge's findings of fact under a clearly-erroneous standard, and the question of UCI flowing from those facts as a matter of law we consider *de novo*. *United States v. Ayers*, 54 M.J. 85, 95 (C.A.A.F. 2000); *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994). See *United States v. Kreutzer*, 61 M.J. 293, 299 (C.A.A.F. 2005)(*de novo* review of whether constitutional error is harmless beyond a reasonable doubt); *United States v. Villareal*, 52 M.J. 27, 30 (C.A.A.F. 1999)(*de novo* review of issues of unlawful command influence).

3. Analysis

We have reviewed the military judge's findings of fact and conclusions of law, as well as the entire record of trial. We are confident that the military judge's findings of fact are supported by the evidence of record, are not clearly erroneous, and we adopt them as our own. We agree with the appellant, the Government, and the military judge that the appellant met his initial burden under the *Stombaugh-Biagase* test. *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006). At issue is whether the Government met its burden of demonstrating, beyond a reasonable doubt, that these proceedings were untainted by UCI. *Id.*

There is no question that after the first conversation with Capt Stone both 2dLt Schneltzer and GySgt McCoy were hesitant to provide statements for the appellant. It is also evident that after the remedial actions taken by LtCol Johnson and Capt Stone, both witnesses provided very favorable evidence for the appellant. GySgt McCoy unequivocally explained that once she read LtCol Johnson's letter and spoke with Capt Stone a second time, she no longer had any misgivings about testifying. It is apparent by his favorable character statement that 2dLt Schneltzer's initial hesitation also disappeared. It appears, therefore, that the chain of command's remedial actions effectively remedied any taint of UCI. Moreover, notwithstanding their favorable character evidence, these witnesses were not called on the merits by the defense. The appellant's "what if" line of argument is unpersuasive. Appellant's Brief at 6.

To the extent the appellant met the first prong of the *Stombaugh-Biagase* test for raising UCI, he has failed to identify any unfairness in his special court-martial caused by the chain of command's earlier miscommunication. The military judge's conclusion that the Government met its burden of demonstrating, beyond a reasonable doubt, that these proceedings were untainted by UCI was correct. The record demonstrates the appellant obtained very favorable character evidence from these witnesses and, in fact, other witnesses provided favorable character evidence for the appellant as well. We are, therefore, convinced beyond a reasonable doubt that there was no impact upon the findings and sentence of this court-martial.

Approval of Forum Request and Assembly of the Court

Although we agree with appellate defense counsel's decision not to raise this as an assignment of error, we note the military judge did not state his approval of the appellant's request for trial by military judge alone, nor did he state that the court-martial was assembled. Record at 5. Having carefully examined the record of trial we find substantial compliance with Article 16, UCMJ. *United States v. Goodwin*, 60 M.J. 849, 850 (N.M.Ct.Crim.App. 2005)(citing *United States v. Turner*, 47 M.J. 348, 350 (C.A.A.F. 1997) and *United States v. Mayfield*, 45 M.J. 176, 178 (C.A.A.F. 1996)). See also *United States v. Hansen*, 59 M.J. 410, 412 (C.A.A.F. 2004); *United States v. Townes*, 52 M.J. 275, 276-77 (C.A.A.F. 2000).

Because the military judge substantially complied with the requirements of Article 16(2)(B), UCMJ, and the appellant was not harmed by the omitted statements regarding forum approval and court assembly, we find no prejudice to the appellant's substantial rights.

Conclusion

Accordingly, the approved findings and sentence are affirmed.

Senior Judge GEISER and Judge MITCHELL concur.

For the Court

R.H. TROIDL
Clerk of Court