

**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.

**Dekoras D. CAFFIE
Sergeant (E-5), U.S. Marine Corps**

NMCCA 200601263

Decided 8 May 2007

Sentence adjudged 21 March 2006. Military Judge: D.A. Winklosky. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Camp Lejeune, NC.

LCDR KELVIN STROBLE, JAGC, USN, Appellate Defense Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

MITCHELL, Judge:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of failure to obey a lawful order, cruelty and maltreatment of subordinates, false official statement, adultery, indecent acts, and indecent language, in violation of Articles 92, 93, 107, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 893, 907, and 934. The appellant was sentenced to a bad-conduct discharge, confinement for 18 months, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

We have examined the record of trial, the sole assignment of error,¹ and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error was committed that was materially prejudicial to the

¹ The military judge failed to provide an adequate remedy for the Government's failure to provide the proper mandatory notice of immunity to the defense counsel in accordance with MILITARY RULE OF EVIDENCE 301(c)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was assigned as a combat instructor at Marine Combat Training Battalion, School of Infantry (SOI), Training Command, Camp Lejeune. His responsibilities included serving as a squad leader for a platoon of Marine students training at SOI. From 12 April until 3 May 2005, the appellant served as the squad leader for Fox Company, Fourth Platoon, which consisted of approximately 80 Marines represented equally by gender. The majority of the charges the appellant faced at court-martial involved inappropriate conduct with students assigned to his platoon, including having sexual intercourse with two female Marines and making inappropriate remarks of a sexual nature to other female Marines while they were students under his authority.

Prior to trial, during an Article 39(a) session conducted on 21 February 2006 to hear unrelated motions, the civilian defense counsel expressed concern that while there were no written grants of immunity, two witnesses testified telephonically during the Article 32 investigation that they had been promised immunity. Record at 20. The trial counsel asserted that there were no grants of immunity. *Id.* In a subsequent Article 39(a) session conducted on 1 March 2006, summarizing an 802 conference earlier that morning, the military judge indicated that the civilian defense counsel again expressed concern as to whether some witnesses had been granted "informal" immunity and the trial counsel again informed the court that no grants of immunity had been delivered to any of the witnesses. *Id.* at 33.

The trial on the merits commenced on 14 March 2006. The third witness called by the Government was Lance Corporal (LCpl) S,² one of the two female Marines with whom the appellant, a married man, was charged with having sex. During direct examination by the trial counsel, the appellant's civilian defense counsel objected and interjected that he thought this witness might be asked to testify regarding conduct she engaged in with appellant and others which may be a violation of the UCMJ. He went on to express concern that she was promised immunity by "hordes of people who had no authority to do [so]." Record at 121. The trial counsel confirmed he would be asking questions which may cause the witness to incriminate herself.

² LCpl S is the married name of LCpl H.

He additionally asserted once again that the witness "has never received a grant of immunity." *Id.* at 123.³ The military judge shortly afterward called a one-hour recess and informed counsel for both sides he would "discuss the privilege issue with the witness" after the recess. *Id.* at 130. When the court reconvened, the trial counsel disclosed that this witness and three others had been granted immunity by the convening authority the day before trial, 13 March. The trial counsel erroneously thought that since the actual, physical document had not been delivered to LCpl S, she did not have immunity. After receiving briefs and hearing argument on this issue, the military judge concluded the witness did in fact have immunity; the Government did not comply with the rules and governing instructions concerning the grant of immunity to LCpl S;⁴ and, over defense objection, stated the appropriate remedy was to grant a one-day continuance.⁵ *Id.* at 146-53. The appellant now contends this remedy was inadequate. We disagree.

Grants of Immunity

It is a basic principle that, upon request, the Government must disclose to the defense material evidence favorable to the accused. *Brady v. Maryland*, 373 U.S. 83 (1963). Included within the obligation is disclosure of evidence affecting the credibility of a Government witness. *Giglio v. United States*, 405 U.S. 150 (1972). As a grant of immunity is a powerful circumstance affecting credibility, the Government must disclose to the defense the fact that a Government witness is to testify under an assurance of immunity. *United States v. Webster*, 1 M.J. 216, 219 (C.M.A. 1975).

Procedurally, MILITARY RULE OF EVIDENCE 301(c)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) sets forth the notification requirements when a prosecution witness has been granted immunity and provides possible remedies the military judge may consider when the Government fails to adhere to these notice requirements. The fact the Government did not adhere to these

³ These discussions took place after the military judge excused the witness from the courtroom.

⁴ The military judge ruled that the grants of immunity issued to Private (Pvt) W, LCpl T, and LCpl R complied with the requirements of MIL. R. EVID. 301(c)(2) as they were delivered within a reasonable time before the witness testified. Record at 146-53.

⁵ The appellant's civilian defense counsel requested the military judge strike the testimony of the witness; declare the proceedings a mistrial, dismiss the charges, or grant the defense a 30-day continuance. Record at 133-41, 145-46, 149, 155.

requirements with regard to the grant of immunity issued to LCpl S is not in dispute.⁶ The only issue before this court is whether the military judge abused his discretion when he provided as a remedy to the defense, a one-day continuance.

We find the military judge did not abuse his discretion in granting a one-day continuance for the Government's failure to disclose that LCpl S was granted immunity prior to her testifying. MIL. R. EVID. 301(c)(2) allows the military judge to grant a continuance until notification is made and in this case, the military judge gave the defense an additional day after the appropriate notification was made. The appellant now contends the military judge's ruling "left the defense unprepared to confront material witnesses on the impact of the immunity on their testimony and credibility (sic)." Appellant's Brief of 20 Dec 2006 at 8. We find this argument unpersuasive. Quite to the contrary, the record of trial is replete with instances in which the civilian defense counsel expressed concern that witnesses were either promised immunity or given *de facto* immunity. Record at 20-21, 33. The record of trial also suggests that the trial defense team anticipated immunization of witnesses was more than a possibility; it was a probability. To now argue the military judge's ruling left the defense unable to prepare an adequate defense appears to be a bit disingenuous. Finally, although the appellant asserts the one-day continuance was inadequate, he has failed to specifically assert any preparation the defense was unable to accomplish during the granted one-day continuance. Absent evidence of a negative impact, we find no prejudice to the appellant. We find this assignment of error to be without merit.

Conclusion

Accordingly, we affirm the approved findings of guilty and the sentence as approved by the convening authority.

Senior Judge GEISER and Judge BARTOLOTTA concur.

For the Court

R.H. TROIDL
Clerk of Court

⁶ The appellant does not assert and we do not find an abuse of discretion when the judge ruled that notice of the grants of immunity issued to LCpl T, PVT W or LCpl R were within the time constraints established by MIL. R. EVID. 301(c)(2).