

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

BEFORE

W.L. RITTER

J.F. FELTHAM

E.S. WHITE

UNITED STATES

v.

**Clayton A. CHAFFIN
Corporal (E-4), U. S. Marine Corps**

NMCCA 200500513

Decided 22 February 2007

Sentence adjudged 8 April 2004. Military Judge: J.P. Colwell. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d FSSG, U.S. Marine Corps Forces, Atlantic, Camp Lejeune, NC.

LT KATHLEEN KADLEC, JAGC, USN, Appellate Defense Counsel
LT CRAIG POULSON, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WHITE, Judge:

A general court-martial, composed of officers, convicted the appellant, contrary to his pleas, of wrongfully using marijuana on divers occasions, two specifications of wrongfully distributing cocaine, wrongfully distributing marijuana, three specifications of wrongfully soliciting others to possess cocaine, wrongfully soliciting another on divers occasions to possess marijuana, and wrongfully soliciting another to use marijuana, in violation of Articles 112a and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 912a and 934. The appellant was sentenced to 39 months confinement, total forfeiture of pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge.

The convening authority (CA) disapproved the findings of guilty to one specification each of wrongfully distributing cocaine, wrongfully distributing marijuana, and wrongfully soliciting another to possess cocaine. He then reassessed the sentence, and approved a sentence of 36 months confinement, total forfeiture of pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge.

After carefully considering the record, the appellant's four assignments of error,¹ the Government's answer, and the appellant's reply, we conclude the appellant's second assignment of error has partial merit, requiring us to set aside the findings of guilty to Specifications 1 and 3 of Charge III, as well as the sentence. We conclude the remaining findings are correct in law and fact, and that no other error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Admission of Residual Hearsay

The appellant contends the military judge erroneously admitted into evidence, pursuant to MILITARY RULE OF EVIDENCE 807, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Prosecution Exhibits 5 and 6, the statements to the Naval Criminal Investigative Service (NCIS) of Lance Corporal (LCpl) T.A. Cope, USMC, and Corporal (Cpl) J.G. Damazyn, USMC, respectively. Both had given statements to NCIS prior to trial implicating the appellant in involvement with illegal drugs.² Both were called as Government witnesses, but denied any knowledge of the appellant's involvement with illegal drugs, and repudiated their NCIS statements as untrue. The Government then offered their statements as evidence on the merits under MIL. R. EVID. 807. The appellant objected. After hearing evidence and argument, the military judge admitted both statements. Record at 828-29.³

¹ I. The military judge erred in denying defense challenge for cause; II. The military judge erred in admitting Prosecution Exhibits 5 and 6; III. There was insufficient evidence to convict on Specification 1 of Charge III, Specification 10 of Charge V, and Additional Charge II and its sole specification; IV. The military judge erred in excluding defense alibi evidence.

² LCpl Cope's statement said, in relevant part, that the appellant approached him in late January 2003, offering to sell him "weed", that LCpl Cope then accompanied the appellant to the appellant's room in the barracks, where the appellant gave him enough marijuana for two cigarettes, and that in return LCpl Cope gave the appellant a compact disc or two. Cpl Damazyn's statement said, in relevant part, that around November 2002, he and another Marine (LCpl Sikorski) bought cocaine from the appellant, paying \$20.00 each. It also said that, around November or December 2002, together with LCpl Cope, he smoked marijuana which Cope had supposedly gotten from the appellant, and that in November 2002, he had used marijuana that he was told had been provided by the appellant with LCpl Sikorski and the appellant.

³ PE 5, the statement of LCpl Cope, is relevant only to Specification 4 of Charge III. Because the CA disapproved the finding of guilty to that specification, Convening Authority's Action of 11 Jan 2005 at 8, any error in admitting PE 5 was harmless, and we need not address PE 5 further. PE 6, the statement of Cpl Damazyn, is relevant to Specifications 1, 2, 3, and 5 of Charge III. The appellant was acquitted of Specification 5, and the CA disapproved the finding of guilty to Specification 2. We need be concerned, therefore, only with PE 6 and its effect on Specifications 1 and 3 of Charge III.

We review a military judge's evidentiary rulings for abuse of discretion. If the ruling involves a mixed question of fact and law, we review findings of fact under the clearly erroneous standard, and conclusions of law under the *de novo* standard. *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003); *United States v. Wellington*, 58 M.J. 420, 425 (C.A.A.F. 2003); *United States v. Kelley*, 45 M.J. 275, 279-80 (C.A.A.F. 1996). We will not overturn the military judge's ruling unless it is "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous," or "influenced by an erroneous view of the law." *United States v. Thompson*, 63 M.J. 228, 230 (C.A.A.F. 2006) (quoting *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)); *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995).

To admit a hearsay statement under MIL. R. EVID. 807, the military judge must determine that, among other things, the statement is more probative *on the point for which it is offered* than other evidence which the proponent can procure through reasonable efforts.⁴ In this case, the military judge found PE 6 was the only evidence the Government possessed linking the appellant to the distribution of cocaine to Cpl Damazyn (alleged in Specification 2 of Charge III), and that it was, therefore, absolutely necessary to the Government's case. Record at 826. The military judge did not, however, limit use of PE 6 solely to that specification, nor did he make any findings about whether PE 6 was more probative than other evidence the Government could procure through reasonable efforts on Specifications 1 and 3 of Charge III.⁵

The military judge must look not at the evidence that was presented or proffered, but rather at the evidence that "could have been produced." *United States v. Holt*, 58 M.J. 227, 231 (C.A.A.F. 2003); *United States v. Guaglione*, 27 M.J. 268, 275 (C.M.A. 1988). In this case, Specification 3 of Charge III alleges the appellant distributed cocaine to LCpl Sikorski in November 2002. It appears, therefore, the testimony of LCpl Sikorski would likely be the most probative evidence of that

⁴ This requirement is typically referred to as the "necessity" prong of the residual hearsay analysis. MIL. R. EVID. 807 also requires that a statement be material, that it possess circumstantial guarantees of trustworthiness equivalent to those of statements admissible under MIL. R. EVID. 803 and MIL. R. EVID. 804 ("reliability" prong), that its admission serve the general purposes of the rules and be in the interests of justice, and that the proponent give sufficient notice to permit the adverse party fair opportunity to prepare to meet it. There is no dispute that PE 6 is material. The appellant does, however, argue he was denied adequate notice and that the statement is not reliable. We do not reach these issues, given our decision on the "necessity" issue.

⁵ Specification 1 alleged the appellant used marijuana on divers occasions between July 2002 and July 2003. Specification 3 alleged the appellant distributed cocaine to LCpl Sikorski in November 2002.

allegation. See *United States v. Welsh*, 774 F.2d 670, 672-73 (4th Cir. 1985)(when live witness can testify to same facts contained in hearsay statement, hearsay statement not more probative than other evidence proponent can reasonably procure); *Netterville v. Missouri*, 800 F.2d 798, 801 (8th Cir. 1986)(live testimony more probative than hearsay statement about same facts). Indeed, the trial counsel said during opening statement that LCpl Sikorski would testify he had bought cocaine from the appellant. Record at 389. Nevertheless, the Government did not call LCpl Sikorski to testify. More importantly for the present purpose, the Government did not explain why PE 6 was more probative than LCpl Sikorski's live testimony, or why it could not reasonably produce LCpl Sikorski to testify, as they had said they would.

Likewise, the live testimony of LCpl Sikorski would appear to be more probative of the allegations in Specification 1 of Charge III than the hearsay statement of Cpl Damazyn in PE 6. According to PE 6, Cpl Damazyn, the appellant, and LCpl Sikorski all used marijuana together around November 2002. Again, the Government failed to explain why PE 6 was more probative than LCpl Sikorski's live testimony on that issue or why it could not reasonably procure that testimony.

As the proponent of the evidence, the Government bore the burden to establish its admissibility. *United States v. Palmer*, 55 M.J. 205, 208 (C.A.A.F. 2001); *United States v. Browning*, 54 M.J. 1, 9 (C.A.A.F. 2000); *United States v. Shover*, 45 M.J. 119, 122 (C.A.A.F. 1996). The Government failed, however, to establish it was necessary to use the hearsay statement of Cpl Damazyn, i.e. that his statement was more probative on the points for which it was offered than other evidence which the Government could procure through reasonable efforts. The military judge therefore abused his discretion in admitting PE 6.

Having concluded the military judged erred in admitting PE 6, we must test that error for prejudice. Art. 59(a), UCMJ (finding of court-martial may not be held incorrect due to an error of law unless error materially prejudices substantial rights of accused). For a nonconstitutional error, such as this one, the Government must demonstrate "the error did not have a substantial influence on the findings." *United States v. Berry*, 61 M.J. 91, 97 (C.A.A.F. 2005)(quoting *United States v. McCollum*, 58 M.J. 323, 342 (C.A.A.F. 2003)). We evaluate prejudice from the erroneous admission of Government evidence by weighing: (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question. See *McDonald*, 59 M.J. at 430 (citing *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)).

As PE 6 was the only evidence before the court concerning Specifications 1 and 3 of Charge III,⁶ there can be no doubt that

⁶ With respect to Specification 1 of Charge III, the trial counsel contended during closing arguments that, in addition to PE 6, Private First Class (PFC)

its erroneous admission substantially influenced the findings on both specifications. Accordingly, we must set aside the findings on these specifications, and the sentence.

Remaining Assignments of Error

We have fully considered the appellant's three remaining assignments of error, and conclude they are without merit. We see no evidence in the voir dire of Lieutenant Colonel B.P. Goddard, USMC, of either actual or implied bias. RULE FOR COURTS-MARTIAL 912(f)(1)(N), MANUAL FOR COURTS-MARTIAL UNITED STATES (2002 ed.); see *United States v. Leonard*, 63 M.J. 398, 401 (C.A.A.F. 2006); *United States v. Moreno*, 63 M.J. 129, 133-34 (C.A.A.F. 2006). We find the military judge did not abuse his discretion in denying the defense challenge for cause.

Additionally, after carefully reviewing the record, we conclude the evidence was legally and factually sufficient to support the appellant's conviction of specification 10 of Charge V, and of Additional Charge II and its sole specification.⁷ Art. 66(c), UCMJ; *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000).

Finally, we hold the military judge did not abuse his discretion when he excluded defense alibi evidence due to the defense's failure to provide timely notice of its intent to offer such evidence. R.C.M. 701(g)(3). The military judge found the defense's failure to provide timely notice was a willful attempt to gain an unfair tactical advantage, and that finding is amply supported by the record. Further, the military judge correctly applied the law to the facts, balancing the accused's right to present evidence in his defense against the countervailing public interests. *Taylor v. Illinois*, 484 U.S. 400, 415 (1988); *United*

R.L. Bierce, USMC, testified he used marijuana with the appellant, Cpl Damazyn, LCpl Sikorski and a fourth Marine around January 2003. In fact, PFC Bierce denied using marijuana with the appellant. Record at 557-59. While Trial Counsel attempted to impeach PFC Bierce with a prior inconsistent statement, that statement was not admitted for the truth of the matters asserted, leaving PE 6 the only substantive evidence on this specification.

⁷ We are also satisfied the appellant was not harmed by the trial counsel's assertion during opening statement that the Government would present evidence the appellant had distributed drugs between enlistments, which evidence was later excluded under MIL. R. EVID. 404(b). (The appellant makes this contention as part of his argument on the sufficiency of the evidence). Assuming, *arguendo*, the statement was error, the military judge instructed the members that counsels' arguments are not evidence, and that the members must resolve the guilt or innocence of the accused "on the evidence presented here in court." Record at 988. See *United States v. Rushatz*, 31 M.J. 450, 456 (C.M.A. 1990). The appellant declined to request an additional curative instruction, and did not object to the instructions given by the military judge. Record at 534, 928; R.C.M. 920(f).

States v. Pomarleau, 57 M.J. 351 (C.A.A.F. 2002); R.C.M. 701(g)(3), Discussion.

Conclusion

Accordingly, the findings of guilty to Specifications 1 and 3 of Charge III, and to Charge III, are set aside. The remaining findings of guilty are affirmed. The sentence is set aside. The record is returned to the Judge Advocate General of the Navy for referral to an appropriate convening authority. That convening authority may order a rehearing on Specifications 1 and 3 of Charge III, and on the sentence. If the convening authority determines a rehearing on one or both of the specifications is impracticable, he may dismiss one or both of the specifications and the Charge and order a rehearing on sentence only. If the convening authority determines a rehearing on sentence is impracticable, he may reassess the sentence in accordance with the criteria in *United States v. Sales*, 21 M.J. 305, 307-08 (C.M.A. 1986), *United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000), and R.C.M. 1107(e)(1)(B), or he may approve a sentence of no punishment. The record will then be returned to this court for completion of appellate review. *Boudreaux v. U.S. Navy-Marine Corps Court of Military Review*, 28 M.J. 181, 182 (C.M.A. 1989).

Senior Judge RITTER and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court