UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
E.S. WHITE, R.E. VINCENT, J.E. STOLASZ
Appellate Military Judges

UNITED STATES OF AMERICA

v.

DAN L. ROOT
STAFF SERGEANT (E-6), U.S. MARINE CORPS

NMCCA 200800075
Review Pursuant to Article 62(b), Uniform code of Military Justice, 10 U.S.C. § 862(b).

Military Judge: CDR R.W. Redcliff, JAGC, USN.
Convening Authority: Commanding General, 3d Marine Aircraft Wing, MCAS Miramar, San Diego, CA.
For Appellant: LT Duke Kim, JAGC, USN.
For Appellee: LT Gregory Manz, JAGC, USN.

29 April 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

STOLASZ, Judge:

This case is before us on a Government interlocutory appeal, pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862, and RULE FOR COURTS-MARTIAL 908, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). The Government requests we reverse a ruling by the military judge suppressing various items of evidence removed from the appellant's residence. Those items include his personal computer and associated media.[1]

[1] The appellee also made a written statement. Appellate Exhibit IV at 11, 12, 13. It does not appear from the defense motion to suppress that he requested suppression of the statement.

After carefully considering the record of the proceedings, the Government's brief on appeal, and the appellee's reply brief, we deny the Government's interlocutory appeal.

I. Background

A. Procedural Posture

The appellee was charged with bigamy and two specifications of possession of child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. On 27 November 2007, an Article 39(a), UMCJ, hearing was held to address the appellee's motion to suppress his personal computer, computer tower, laptop computer, and external hard drives as evidence against him. Naval Criminal Investigative Service (NCIS) Special Agent (SA) Derik Rowe was the sole witness to testify at the hearing. On 11 January 2008, the military judge issued formal findings on the record suppressing the evidence. The Government then filed a timely notice of appeal pursuant to Article 62, UCMJ.[2]

B. The Military Judge's Ruling

In his written decision, the military judge noted that he considered the written materials submitted by the defense and Government, the oral arguments of the defense and Government, and the testimonial evidence. His decision contained 37 findings of fact and 19 conclusions of law, and concluded that the seizure of the appellees personal computer, computer tower, laptop computer, and external hard drives from his residence, on 10 July 2007, was tainted by an earlier illegal search and seizure of various items from the appellee's workspace on 28 June 2007. Appellate Exhibit VIII at 11.

C. Facts

On 28 June 2006, two Marine officers, Captain (Capt) Jennifer Larsen and First Lieutenant (1st Lt) Gary Demercurio, discovered pornographic material in the appellee's workspace. The appellee was on leave at the time. 1st Lt Demercurio shared an office with the appellant, which included an open and unsecured wall locker. AE IV at 20-21, Appendix (3). Capt Larsen saw a MAXIM magazine in plain view in the wall locker, and questioned whether it was appropriate material in the work place. *Id.* Ten to fifteen minutes later, while looking for a highlighter, 1st Lt Demercurio found a stack of digital video disks (DVD's), one of which was entitled "Girls on Trampolines," and he showed that DVD to Capt Larsen. The two officers began to look around the workspace area, and they found multiple CD's and DVD's, some containing pornographic material. Capt Larsen

[2] The Government provided notice of the appeal on 11 January 2008, pursuant to R.C.M. 908(b)(3). AE XI

advised the command sergeant major about finding the pornographic CD's and DVD's. They decided to secure the material, and agreed that the sergeant major would discuss the matter with the appellee when he returned from leave. While securing the material, Capt Larsen discovered a magazine entitled "Barely Legal" which she thought might contain child pornography. She spoke to the unit's executive officer (XO), who was then the acting commanding officer (CO), Lieutenant Colonel (LtCol) Butler. *Id.* LtCol Butler secured the materials overnight, and Capt Larsen delivered the pornographic material to NCIS SA Zach Paton the following morning. AE IV at 17-21, Appendix (2).

NCIS SA Paton and SA Rowe subsequently conducted a search of the appellee's workspace based on a search authorization issued by the appellee's command. Record at 14. During their search, they discovered additional magazines, DVD's, and CD's that, upon forensic examination, were discovered to contain adult and child pornographic material. *Id.* at 14, 15.

When he returned from leave on 10 July 2007, the appellee found SA Paton and SA Rowe waiting for him at his office. He was taken to a private office, patted down, and advised that he was suspected of obtaining child pornography. He was then driven to the NCIS office on the base and advised by SA Rowe that adult and child pornographic material was found in his workspace and on his computer during the 28 June 2007 search. He was given his Article 31(b), UCMJ, rights. The appellee waived his rights, and provided a written statement which he signed at 1348. AE X at 2; AE IV at 9, 11, 12, 13, Appendix (1). The appellee then voluntarily consented to a search of his off-base residence, which began at 1450. The appellee was not restrained during the questioning or the search, and was described as calm and cooperative throughout the process. NCIS agents seized the appellee's personal computer, computer tower, laptop computer and external hard drives. The appellee subsequently consented to the seizure and inspection of these items. *Id.* at 10.

The Government and defense agree that a prior ruling, in a separate but related case involving this appellant, that the search of the appellee's workspace was illegal as lacking in probable cause was binding on the court in this case.[3] Record at 33, 35, 36.

[3] The evidence seized from the appellant's work space on 28 June 2006 formed the basis for the charges in the related case. The military judge in that case ruled that the search of the appellee's work space lacked probable cause and that the search authorization was defective. Thereafter, the Government withdrew and dismissed the charges. AE VIII at 5 ¶¶ 34 and 35. *See* R.C.M. 905(g)("Any matter put in issue and finally determined by a court-martial, reviewing authority, or appellate court which had jurisdiction to determine the matter may not be disputed by the United States in any other court-martial of the same accused...").

II. The Law

Article 62(b), UCMJ, commands that we may only act with respect to matters of law. *See also United States v. Gore,* 60 M.J. 178, 185 (C.A.A.F. 2004); *United States v. Lincoln,* 40 M.J. 679, 683 (N.M.C.M.R. 1994), *set aside in part and affirmed in part,* 42 M.J. 315 (C.A.A.F 1995). A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Barnett,* 63 M.J. 388, 394 (C.A.A.F. 2006); *United States v. Bailey,* 55 M.J. 38, 41 (C.A.A.F. 2001); *United States v. Allison,* 49 M.J. 54, 57 (C.A.A.F. 1998). The factual findings of the military judge "'should not be disturbed unless it is unsupported by the evidence of record or was clearly erroneous.'" *United States v. Burris,* 21 M.J. 140, 144 (C.M.A. 1985)(quoting *United States v. Middleton,* 10 M.J. 123, 133 (C.M.A. 1981)). In applying the abuse of discretion standard we are not free to substitute our judgment for that of the military judge. *Id*. The Government, as appellant, has the burden of persuasion by a preponderance of the evidence. *United States v. Taylor,* 60 M.J. 720, 725 (N.M.Ct.Crim.App. 2004); MILITARY RULE OF EVIDENCE 311(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

The Government asserts the taint from the initial illegal search of the appellee's workspace was attenuated by his voluntary consent to the search of his residence. Both the Government and defense agree, and it is not an issue, that the appellee's consent to the search of his residence was voluntary. Thus, we look to determine if the appellee's consent to search was "'sufficiently an act of free will to purge the primary taint of the initial invasion.'" *United States v. Khamsouk,* 57 M.J. 282, 290 (C.A.A.F. 2002)(quoting *Wong Sun v. United States,* 371 U.S. 471, 486 (1963)). If the appellee's consent, even though voluntary, was obtained through exploitation of the initial illegality, then the taint of that first search is not attenuated by the subsequent consent. *Brown v. Illinois,* 422 U.S. 590, 602 (1975). In *Brown*, the Supreme Court, listed three factors to determine if the taint was attenuated: (1) the temporal proximity of the initial illegality to the voluntary consent; (2) the presence of intervening circumstances; and, (3) the purpose and flagrancy of the official misconduct. *Id.* at 603-04. These three factors were adopted by our superior court in *Khamsouk. Khamsouk,* 57 M.J. at 291.

III. Analysis

The military judge's findings of fact are not clearly erroneous, and are supported by the evidence of record. *Burris,* 21 M.J. at 144. We therefore adopt them. We review the military judge's conclusions of law *de novo*.[4] *Khamsouk,* 57 M.J. at 286. We must determine if the military judge abused his discretion. The issue is whether the appellee's voluntary consent to the

[4] We note that some of the military judge's 19 conclusions of law appear to be a mixture of fact and law.

search of his residence was an independent act of free will which served to attenuate the taint of the initial illegal search of his workspace. Put another way, did NCIS agents exploit the initial illegal search of the appellee's workspace to obtain his consent for the search of his residence? After careful review, we find that the military judge correctly applied the three *Brown* factors and did not abuse his discretion in determining the appellee's voluntary consent to the search of his residence did not sufficiently attenuate the taint of the first illegal search.

A. Temporal Proximity

In weighing the temporal proximity factor, courts look to various factors including the characteristics of the accused, whether the accused understood his right to refuse consent, the accused's knowledge of the prior illegality, and the nature of the accused's detention, if any. *United States v. Conklin,* 63 M.J. 333, 341 (C.A.A.F. 2006)(Baker, J., dissenting).

The appellee, a 34-year-old staff sergeant with 14 years of military service, was informed on the day of his return from leave by NCIS SA Rowe that NCIS had searched his workspace and computer, and found adult and child pornography. Record at 21.

The passage of time between the initial illegal search and the appellee's voluntary consent was 11 days (29 Jun 2007-10 Jul 2007). The Government asserts that the relevant period of time is between "the illegal conduct and consent." *Conklin,* 63 M.J. at 338. Here, they assert that period was 11 days, which served to vitiate the taint. Appellee's Brief of 25 Feb 2008 at 11. We conclude however, that insofar as we are attempting to determine whether the appellee's consent was an independent act of free will, we should pay particular attention to the period of time between when the appellee first learned of the illegal search and his subsequent consent. Here, that period of time is not 11 days, but at most a few hours. Thus, we conclude the temporal proximity factor does not favor the Government.

B. Intervening Circumstances

We find that there were no intervening circumstances of consequence between the initial illegal search, and the appellee's subsequent consent to the search of his residence. The appellee returned from leave on 10 July 2006, and was immediately met by NCIS agents waiting for him at his workspace. He was subsequently transported to the NCIS office on base, and advised that he was suspected of possessing child pornography based on the prior search of his workspace by the same NCIS agents. The appellee was given his Article 31(b) rights, waived his rights, and subsequently provided a 2-page written statement. AE IV at 9. The appellee then voluntarily consented to the search his residence. *Id.* at 11. The appellee was described as calm and cooperative throughout the process and was not in custody. This chronology of events suggests no intervening event

which would serve to break the causal connection of the initial illegal search and the appellee's subsequent written statement and consent to the search of his residence. In fact, it could be argued the appellee experienced "a sense of futility" knowing the agents, having already discovered child pornography in his workspace, were know focused on his residence. *See e.g., Conklin,* 63 M.J. at 341 (Baker, J., dissenting)(quoting *Commonwealth v. Pileeki,* 818 N.E. 2d 596, 600 (Mass. App. Ct. 2004). This factor favors the appellee.

C. Purpose and Flagrancy of the Official Misconduct

The primary purpose of the exclusionary rule is "the deterrence of police conduct that violates Fourth Amendment rights." *Khamsouk,* 57 M.J. at 291-92 (quoting *Stone v. Powell,* 428 U.S. 465, 486 (1976)). The exclusionary rule has never been interpreted to "proscribe the introduction of illegally seized evidence in all proceedings or against all persons." *Id.* at 292 (citation omitted). We attempt to strike a balance between society's interest in the "'determination of truth at trial'" and the "'incremental contribution that might [be] made to the protection of Fourth Amendment values'" through the application of the rule. *Khamsouk,* 57 M.J. at 292 (quoting *Stone v. Powell,* 428 U.S. 465, 488 (1976)).

> [D]eserving of exclusionary treatment are searches and seizures perpetrated in intentional and flagrant disregard of Fourth Amendment principles. But the question of exclusion must be viewed through a different lens when a Fourth Amendment violation occurs because the police have reasonably erred in assessing the facts, mistakenly conducted a search authorized under a presumably valid statute, or relied in good faith upon a warrant not supported by probable cause.

Illinois v. Gates, 462 U.S. 213, 261 n.14 (1983) (White, J., concurring in the judgment).

The military judge determined that the NCIS agents knew, or should have known, through their training and experience, that the search authorization provided by LtCol Butler for the initial search of the appellee's workspace was highly questionable, and facially deficient. The judge determined that, at a minimum, the NCIS agents acquiesced to LtCol Butler's unconstitutional authorization and directive to search the appellee's workplace. The military judge indicated that the agents then exploited the product of the illegal search to interrogate the appellee and obtain his consent to search his residence. "But for" the illegally seized images there would have been no basis to question the appellee or suspect that he had child pornography at his residence. AE VIII, ¶ 18 at 10-11. The military judge stated that deterring such conduct falls squarely within the purpose for the exclusionary rule and its requirement for the

suppression of illegally obtained derivative evidence. *Id.,* ¶ 19 at 10-11.

Although the NCIS agents' search of the appellee's workspace was pursuant to a search authorization later held to be a violation of the Fourth Amendment, their conduct was not as flagrant or purposeful in nature as the conduct of the police in *Brown,* where the agents illegally broke into Brown's home, waited there for him to return home, and then arrested him, all without either a search or arrest warrant. One might argue the NCIS agents relied in good faith upon the search authorization from the acting commanding officer. *Gates,* 462 U.S. at 261 n.14. NCIS SA Rowe testified that the command notified NCIS of explicit material in the appellee's workspace. The agents then presented LtCol Butler with a request for authorization to search the appellee's workspace. SA Rowe seemed confused when testifying that "he guessed" the probable cause for that search was the material initially brought to the agents, followed by their asking LtCol Butler for permission to search. Record at 20.

Thus, we are presented with a situation where two Marine officers inadvertently came across explicit material in an open and unsecured wall locker in a workspace the appellee shared with one of these officers. They brought the matter to the attention of the unit's acting CO who requested assistance from NCIS. NCIS agents requested permission to search, and found materials which contained adult and child pornography. The issuance of the search authorization was later found to lack probable cause. The NCIS agents, before questioning the appellee, advised him of the search of his workspace, but did not advise him that any evidence obtained from that search could not be used against him.[5] They then obtained an incriminating statement from the appellee, which suggested he likely had child pornography at his home, and the agents requested and obtained his consent to search his residence.

It is our view that the initial illegal search was the one factor that directly led to the request for consent from the appellee to search his residence. While the conduct of the Government agents in conducting the initial illegal search was not purposeful or flagrant, neither was it completely in good faith. We agree with the military judge that the NCIS agents either knew or should have known, even without a judicial ruling, that there was no probable cause for the search of the appellee's workspace. At best, it appears that the agents were willfully ignorant of the lack of legal justification for their search. They exploited the fruits of that illegal search to obtain an incriminating statement from the appellee, and subsequently additional evidence from the search of his residence.

[5] Of course, at the point the NCIS agents questioned the appellee, a judge had not yet ruled the search unconstitutional, which presumably explains why the agents did not give the appellee such advice.

Consequently, applying the *Brown* factors to the facts of this case, we agree with the military judge that the appellee's waiver of his Article 31(b) rights and his consent to search his residence did not purge the taint of the prior illegal search. *See, e.g. Conklin,* 63 M.J. at 340.

Conclusion

For the foregoing reasons, the interlocutory ruling of the military judge that is the subject of this appeal is affirmed. The record is returned to the Judge Advocate General for remand to the court-martial. The stay of proceedings effected by R.C.M. 908(b) is dissolved.

Senior Judge WHITE and Judge VINCENT concur.

For the Court

R.H. TROIDL
Clerk of Court