

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

**Before
J.A. MAKSYM, L.T. BOOKER, J.R. PERLAK
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**SCOTT L. SPERLIK
CHIEF HOSPITAL CORPSMAN (E-7), U.S. NAVY**

**NMCCA 200900497
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 11 June 2009.

Military Judge: CDR Holiday Hanna, JAGC, USN.

Convening Authority: Commanding Officer, Naval Ophthalmic Support and Training Activity, Yorktown, VA.

Staff Judge Advocate's Recommendation: LCDR G.W. Saybolt, JAGC, USN.

For Appellant: Maj Kirk Sripinyo, USMC; LT Sarah Harris, JAGC, USN.

For Appellee: LCDR Sergio Sarkany, JAGC, USN.

26 August 2010

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

PERLAK, Judge:

A special court-martial consisting of officer members convicted the appellant of one specification of false official statement and one specification of wrongful use of cocaine in violation of Articles 107 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 912a. The appellant was sentenced to a bad-conduct discharge, and the convening authority approved the sentence as adjudged.

The appellant raises two errors: first, that his conviction for false official statement was legally and factually

insufficient, and second, that in light of *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S. Ct. 2527 (2009), the admission of the results from the Navy Drug Screening Laboratory violated his Sixth Amendment right to confront witnesses. This court specified a third issue as to whether the military judge erred by failing to give proper sentencing instructions.

For the reasons set out below, we find the appellant's assignments of error to be without merit and affirm the findings of guilty as to the specifications under Charges I and II. However, due to error in the sentencing instructions addressed in the specified issue, we set aside the sentence and authorize a rehearing.

Statement of Facts

The appellant was serving as the Command Chief for a shore activity in the tidewater region of Virginia. He and friends went to a bar on Saturday, 13 September 2008, had a few drinks, and stayed until closing. The following Monday, 15 September 2008, the appellant provided a urine sample as part of his command's monthly random urinalysis program. The appellant's sample tested positive for the cocaine metabolite.

On 16 October 2008, the appellant was informed of the positive urinalysis by the command legal officer. After being informed of his Article 31(b), UCMJ, rights, the appellant made a statement. Before the legal officer, he opened a calendar on his computer and stated that his medical appointment the Friday before the urinalysis explained the positive test result. Then at the bottom of his Navy's Military Suspect's Acknowledgement and Waiver of Rights Form, the appellant voluntarily wrote, "I have been followed by [Ear Nose and Throat] for UPPP operation including a scope recently [with] local anesthetic." Prosecution Exhibit 8. The appellant provided the same explanation five days later to the Command's Drug and Alcohol Programs Advisor (DAPA).

On 21 October 2008, the appellant emailed the DAPA to inform her that he did not actually have an ENT appointment on the Friday. The appellant did have an orthopedic appointment that Friday, but he explained he accessed the ENT clinic through the backdoor and had a scoping procedure done without an appointment. At trial, the appellant could not identify the doctor who performed the scope and ultimately stated that no medication was used during the brief examination.

In support of the positive urinalysis, the Government presented the Full Documentation Report from the Navy Drug Screening Laboratory, Prosecution Exhibit 7, and the testimony of the urinalysis coordinator, the observer, and the Senior Chemist at the Navy Drug Screening Laboratory. The Senior Chemist at the drug laboratory laid the evidentiary foundation to introduce the lab reports into evidence. He testified as to the reliability of the tests, the results of the appellant's urine testing, how

urine samples are handled and how results are generated at the laboratory. Neither party called the lab technicians at the Navy Drug Screening Laboratory whose names appeared on the lab report and chain of custody documents, and who reviewed the appellant's paperwork, tested his urine sample, or prepared the lab report. The appellant's civilian defense counsel cross-examined the Government's witnesses, but did not object to the introduction of the lab results into evidence.

False Official Statement

The standard of review for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *United States v. Pimienta*, 66 M.J. 610, 615 (N.M.Ct.Crim.App. 2008), *rev. denied*, 67 M.J. 194 (C.A.A.F. 2008). We review factual sufficiency by determining whether this court is convinced of the appellant's guilt beyond a reasonable doubt after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses. *United States v. Turner*, 25 M.J. 325, 325 (C.M.A. 1987). This court, like the trier of fact, may accept one part of a witness' testimony while rejecting another. *United States v. Abdirahman*, 66 M.J. 668, 672 (N.M.Ct.Crim.App. 2008).

The Government was required to prove beyond a reasonable doubt (1) that the appellant made a certain official statement, (2) that the statement was false in certain particulars, (3) that the appellant knew it was false at the time he made the statement, and (4) that the false statement was made with the intent to deceive. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.), Part IV, ¶ 31(b). The appellant must have actually known the false statement was false, but proof may come by circumstantial evidence. *Id.* at ¶ 31(c)(5). It is a defense if the accused held an honest, although erroneous, belief that the statement was true. *Id.*

The appellant made an official statement to the legal officer, wherein he stated that an ENT appointment the Friday before the urinalysis explained his positive test result. That statement proved to be false, as the appellant did not have an ENT appointment on the Friday before the urinalysis. The questions then remaining are whether the Government proved beyond a reasonable doubt that the appellant knew the statement was false at the time he made it and whether it was made with the intent to deceive. The essence of the appellant's argument was that he had merely been brainstorming or exploring possible explanations for the positive result, not stating as fact the nexus of the appointment to the result, and was simply mistaken.

The trial included testimony of the appellant, those he made his statements to, and the officer responsible for the medical treatment facility referred to in the appellant's version of

events. At the close of the evidence, the testimony and non-existence of documentation that would have necessarily been generated by the appellant's version of events left the members to concluded that there was no scheduled ENT appointment, no walk-in ENT appointment, no backdoor access to the treatment area, no physician or other provider identified, no record of any scoping procedure performed, no associated anesthetic, and no evidence to show that any putative clinical anesthetic would produce a positive cocaine metabolite result. Considering all of the evidence and circumstances surrounding its making, we conclude that a reasonable trier of fact could indeed have found that the appellant knew the statement was false when he made it and that he made it with the intent to deceive. As such, we find each element of the offense of false official statement was proven beyond a reasonable doubt. This assignment of error is without merit.

Drug Lab Reports

Citing the Supreme Court's decision in *Melendez-Diaz*, the appellant argues that the laboratory reports contain testimonial statements and, as such, the Confrontation Clause requires that the witnesses who made the statements be unavailable, and that the accused have had a prior opportunity to cross-examine the witnesses before the reports could be admitted into evidence. See, *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). There being no compelling basis to distinguish the instant case, we disagree with the assertions in support of the assigned error and follow *United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006), in which the Court of Appeals for the Armed Forces found drug laboratory documents to be non-testimonial in nature and, in applying the indicia of reliability analysis set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980), concluded that the lab report was a record of a regularly conducted activity of the Navy Drug Screening Laboratory that qualifies as a business record under MILITARY RULE OF EVIDENCE 803(6), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) a firmly rooted hearsay exception.

Accordingly, we do not find that admission of the drug lab reports and the allied documents submitted by the prosecution in the appellant's case was error. This assignment of error is without merit.¹

Sentencing

The military judge, in discussing proposed instructions, stated his intention to give, "the standard instructions with respect to a punitive discharge." Record at 777. A colloquy ensued, wherein civilian defense counsel argued that the military judge's proposed instructions were inadequate. He argued, in

¹ We decide this assignment of error based on current jurisprudence and mindful of Confrontation Clause matters involving military urinalysis testing pending decision before the Court of Appeals for the Armed Forces this term.

essence, that the state of the instructions, absent greater discussion of administrative consequences, would leave the members with the mistaken impression that the appellant's "career will just continue on unimpeded, and the danger is obvious, that they may choose to impose a BCD only because they think they have to do that to prevent the career from continuing." *Id.* at 778. Civilian defense counsel specifically addressed this concern in a proposed instruction, Appellate Exhibit XXI, which was not given. The state of the record is that civilian defense counsel objected to the instructions proposed, maintained that objection and at best acquiesced in a partial instruction posited by the military judge, stating, "We requested the long instruction, but we'll take what we can get, obviously." Record at 779. The military judge amended his proposed instructions to state, "Not awarding a bad conduct discharge does not mean the accused will necessarily be retained in the naval service." Record at 815; AE XLVIII at 4.

In argument on sentence, the Government asked for neither a punitive discharge nor confinement, limiting the specifics of their recommendation to reduction. Record at 801. The trial defense counsel argued that the conviction alone was sufficient punishment. *Id.* at 804.

Within an hour of receiving their instructions on sentencing, the members submitted two questions to the military judge during sentencing deliberations: first "[g]iven the Navy's Zero Tolerance on drugs and the fact of 2 convictions here, why would the prosecution only ask for reduction to E-6?;" and second "if punitive [sic] discharge is not given—your instructions indicate that accused may still not be retained in Naval Service. What does that mean—how does that happen (determined by whom?)." AEs XLIX and L.

During an ensuing Article 39(a), UCMJ, session, the military judge denied the civilian defense counsel's request that he declare a mistrial based on the questions asked. Record at 835. The military judge also denied the civilian defense counsel's request for instructions on administrative processing. Instead, the military judge instructed the members:

I cannot answer the question raised by Appellate Exhibit XLIX. I can, however, remind you that the Navy's policy known as - or referred to as "zero tolerance" or any such similar policies—similar administrative policies should not be considered in fashioning a sentence for this court-martial.

Id. at 837. The members answered that they understood what they were told. *Id.* Then, in response to Appellate Exhibit L, the military judge instructed:

Administrative processing is separate from the issue of a punitive discharge in this case. You

should concern yourself with whether a punitive discharge should be awarded in this case. The decision about whether the accused will be discharged for these offenses administratively is not before the court.

Id. at 837-38. Fourteen minutes later, the members returned, sentencing the appellant to a bad-conduct discharge. *Id.* at 840.

Discussion

The military judge has a duty to give appropriate instructions in sentencing. RULE FOR COURTS-MARTIAL 1005(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). If a military judge denies a party's requested sentencing instruction, that decision is reviewed for an abuse of discretion. *United States v. Hopkins*, 56 M.J. 393, 395 (C.A.A.F. 2002) (citing *United States v. Greaves*, 46 M.J. 133 (C.M.A. 1997)). The military judge's discretion is not unbridled. It requires exercising correct principles of applicable law and proper tailoring of instructions based on the particular facts and circumstances of the case. *Greaves*, 46 M.J. at 139. In this case, in light of the sequence of events above and further considerations developed herein, we find that the military judge abused his discretion in failing to tailor his instructions to the facts and circumstances of the case. *Id.*

The record demonstrates that the policy of zero tolerance, and its seemingly reflexive relationship to a punitive discharge in the minds of the members, carried into deliberations. Specific, clearly curative instructions were required in order to dispel the members' biases or improper consideration of that policy. None were given by the military judge.

We note that during initial questioning by the military judge on *voir dire*, the members indicated their ability to disregard the military policy of "zero tolerance" and "base [their] decision on an appropriate sentence . . . solely on the evidence presented in [court] and the instructions which [he would] give. . . ." Record at 106-07. In general, the members are presumed to follow the instructions of the military judge. *United States v. Ashby*, 68 M.J. 108, 123 (C.A.A.F. 2009) (citing *United States v. Jenkins*, 54 M.J. 12, 20 (C.A.A.F. 2000)). However, the members' questions during deliberations called that presumption into question. Aware of this, the efforts of the military judge to cure were inadequate and constitute an abuse of discretion.

The Government presented no evidence during sentencing that hinted at zero tolerance. Their theme was a betrayal of trust by the appellant, particularly as the senior enlisted leader of his activity. But the Government did not ask for a punitive discharge. Consequently, when the members specifically asked about zero tolerance during sentencing deliberations, it

evidenced that an improper consideration may have been impacting their deliberations. The civilian defense counsel noted the need to dispel the members' bias to the point of asking for a mistrial during the Article 39(a) session and alternatively for an instruction explaining zero tolerance. But rather than ensuring the members' biases were eradicated, the military judge only provided a minimal instruction -- that he could not instruct on zero tolerance and only reminded them that it should not be considered.

The military judge further abused his discretion, in light of the specific questions presented by the members, in failing to fully address their concerns about administrative processing. Here, the appellant was an E-7 chief hospital corpsman at nearly nineteen years of service with no further enlistments required to vest his retirement. PE 1. The essence of the members' questions was to request guidance on the effects of administrative processing and a punitive discharge on the appellant's career. The military judge's unsatisfactory gloss over the issues of punitive discharge and administrative processing, in the face of a defense objection and members' questions clearly signaling a requirement for proper instructions, constitutes an abuse of discretion.² We provide appropriate relief in our decretal paragraph.

Conclusion

The findings are affirmed. The sentence is set aside and the record is returned to the Judge Advocate General of the Navy for remand to an appropriate convening authority with a rehearing on sentence authorized. In the event that a rehearing on the sentence is impracticable, a sentence of no punishment may be approved. R.C.M. 1107(e)(1)(C)(iii).

Senior Judge MAKSYM and Senior Judge BOOKER concur.

For the Court

R.H. TROIDL
Clerk of Court

² The Military Judge's Benchbook contained at the time of trial, and still contains, guidance on the affect of a punitive discharge on retirement benefits. See Chapter 2, § V, ¶ 2-5-22.