

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

**Before
J.K. CARBERRY, L.T. BOOKER, E.C. PRICE
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**STEVEN E. MAUCERI
FIRST LIEUTENANT (O-2), U.S. MARINE CORPS**

**NMCCA 201000573
GENERAL COURT-MARTIAL**

Sentence Adjudged: 24 June 2010.

Military Judge: Maj Stephen F. Keane, USMC.

Convening Authority: Commanding General, 1st Marine
Logistics Group, MarForPac, Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: LtCol W.M. Pigott,
Jr., USMC.

For Appellant: LT Daniel W. Napier, JAGC, USN.

For Appellee: CAPT Samuel C. Moore, USMC.

28 July 2011

OPINION OF THE COURT

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

PER CURIAM:

A general court-martial composed of officer members convicted the appellant, contrary to his plea, of one specification of violating a lawful general regulation, U.S. Navy Regulations, Article 1111 (1990) by wrongfully engaging in pecuniary dealings with an enlisted person in violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892. The convening authority approved the adjudged sentence of five months confinement and a dismissal from the Marine Corps.

The appellant now raises the following errors on appeal:
(1) that the Government impeded access to a relevant witness and

other discoverable evidence in violation of Article 46, UCMJ, and RULE FOR COURTS-MARTIAL 701(e), UNITED STATES (2008 ed.); (2) that the military judge abused his discretion by denying the production of a witness and the relevant portion of an FBI investigation; and (3) that the military judge abused his discretion by denying the defense motion to compel the production of a witness without allowing the defense to call the witness for purposes of the motion to compel.

After careful examination of the record of trial and the parties' pleadings, we conclude that the findings and the 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.

Statement of Facts

In February 2008, the appellant presented a financial management class to a small group of Marines at Camp Pendleton, California. After the class, Corporal (Cpl) C, approached the appellant and asked for investment advice for a large sum of money he recently acquired. The appellant arranged a meeting to introduce Cpl C to John Borzellino, who unbeknownst to the appellant was running a large financial scam. The appellant arranged a total of three meetings with Mr. Borzellino, Cpl C, and himself in order to induce Cpl C to invest in Mr. Borzellino's enterprise.

After meeting with Mr. Borzellino and the appellant, Cpl C expressed reservations about investing so much of his inheritance. The appellant assuaged those concerns by agreeing to execute a promissory note with Cpl C for the amount of his investment, \$150,000 plus \$30,000 in consideration. On 17 March 2008, the appellant met with Cpl C and presented him a promissory note on behalf of Nise Shares, Inc., a corporation formed by the appellant and his wife. The terms of the note, signed by the appellant, called for Nise Shares, Inc., to pay Cpl C his principal plus \$30,000 within one year. Prosecution Exhibit 1. After executing the promissory note, the appellant sent the account number and routing number for Nise Shares to Cpl C and requested that he transfer the money "asap". PE 3. Cpl C transferred \$150,000 to the account which was then transferred from the appellant's company to Mr. Borzellino. For his services in securing Cpl C's investment, the appellant received a \$5000 referral fee.

Soon after Cpl C's investment, Mr. Borzellino absconded with Cpl C's money and that of other investors. Mr. Borzellino was reported to the FBI and Special Agent (SA) Horner began an investigation into Mr. Borzellino's activities. SA Horner had no first-hand knowledge of any actions involving the appellant, Cpl C or Mr. Borzellino. Furthermore, the appellant's conduct was not the subject of the FBI investigation.

Government Impeded Defense Access to FBI Agent and Other Discoverable Evidence

The appellant maintains that the Government violated its disclosure obligations by refusing to allow SA Horner, the agent investigating Mr. Borzellino's activity, to testify at the appellant's court-martial and by failing to disclose portions of the FBI investigation, specifically, the statements of Cpl C and the appellant's wife. The appellant contends that SA Horner's testimony was relevant and necessary to show that Mr. Borzellino was a scam artist and to "lay out the Borzellino investment scheme and where the alleged transaction between 1stLt Mauceri and Sgt Cruz fell into that scheme." AE II at 4.

Article 46, UCMJ, 10 USC § 846, provides all parties to a court-martial with "equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." R.C.M. 701(e) further provides that "[n]o party may unreasonably impede the access of another party to a witness or evidence." R.C.M. 701(a)(6), which implements *Brady v. Maryland*, 373 U.S. 83 (1963), requires the Government to disclose known evidence that reasonably tends to negate or reduce the accused's degree of guilt or reduce the punishment that the accused may receive if found guilty. Evidence that could be used for impeachment is also subject to discovery. *United States v. Bagley*, 473 U.S. 667, 678 (1985). Each party is entitled to the production of evidence that is relevant and necessary. R.C.M. 703(f)(1). The Rules also set forth additional duties concerning disclosure of information requested by the defense, R.C.M. 701(a)(2) and (5), including the requirement to permit the defense to inspect any documents "which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense" R.C.M. 701(a)(2)(A).

The appellant was charged with violating Navy Regulations by wrongfully engaging in pecuniary dealings with an enlisted person through the execution of a promissory note. As such, the appellant's criminal conduct was complete when he executed the promissory note with Cpl C. Even if the venture had been successful, the appellant would be no less guilty of engaging in pecuniary dealings with an enlisted person. The appellant's crime was separate and distinct from Mr. Borzellino's actions. The fact that the appellant transferred Cpl C's money to Mr. Borzellino who then absconded with it does not reduce the appellant's degree of guilt for the offense charged; reduce the maximum authorized punishment; and is not material to the preparation of appellant's defense. The appellant's crime was separate and distinct from Mr. Borzellino's actions.

Moreover, SA Horner did not investigate the appellant's actions and was not a percipient witness to any of the communications or actions between or among Cpl C, the appellant, the appellant's wife and Mr. Borzellino. Thus, to the extent

that he had any relevant information, it would have consisted largely of objectionable hearsay. We agree with the military judge that the Borzellino investigation and the statements taken as part of the investigation were neither relevant nor necessary on the merits and to the extent that they might have been relevant during sentencing, they were not necessary as other witnesses could have testified to the nature of Mr. Borzellino's financial scheme, namely Cpl C, the appellant's wife or Mr. Crewe, one of Mr. Borzellino's partners and victims.

In those cases in which the defense does not submit a discovery request or submits only a general discovery request, the appellant is entitled to relief if he demonstrates that the nondisclosure was wrongful and shows a "reasonable probability"¹ of a different result at trial if the evidence had been disclosed. Assuming without deciding that the Government's nondisclosure was wrongful, we are convinced, for the reasons detailed below, that there was not a reasonable probability of a different result had the material been disclosed. See *United States v. Roberts*, 59 M.J. 323, 326-27 (C.A.A.F. 2004). We note that, contrary to the appellant's assertion, there is no evidence in the record that trial defense counsel submitted a specific discovery request to the trial counsel. Moreover, the only evidence in the record that a general discovery request was submitted is trial defense counsel's affidavit that her practice was to submit a discovery request for *inter alia*, "statements by the accused or any other potential witness in connection with the investigation of *this case*." Other than this post-trial affidavit, there is no discovery request in the record.

First, the evidence of the appellant's guilt was overwhelming. The evidence demonstrated clearly that the appellant executed a promissory note on behalf of his corporation with Cpl C. Second, the information sought by the appellant pertained to Mr. Borzellino's conduct, not the appellant's. Thus, it was not relevant to the appellant's case. Third, SA Horner was not a percipient witness to any of the actions or discussions between or among the appellant, Cpl C, and Mr. Borzellino. Thus, his testimony would have consisted largely of objectionable hearsay. Fourth, Cpl C testified as to Mr. Borzellino's investment scheme and the manner in which the promissory note was executed. Fifth, the members received testimony that the appellant was also one of Mr. Borzellino's victims. Sixth, the appellant's wife testified in sentencing regarding Mr. Borzellino's investment scheme and the manner in which the promissory note was executed, and the nature of the interactions with Mr. Borzellino and Cpl C. For the foregoing reasons, we conclude that it is not reasonably probable that disclosure of the requested material would have led to a different result.

¹ In this context, the Supreme Court has defined a "reasonable probability" as a probability sufficient to undermine confidence in the outcome. *Bagley*, 473 U.S. at 682.

Military Judge's Misapprehension of Nature of Motion

At a session of the trial held pursuant to Article 39(a), UCMJ, the defense filed a motion for appropriate relief captioned, "Production of Witness," which requested the production of SA Horner. See Appellate Exhibit II. The military judge denied the motion concluding that SA Horner's testimony was not relevant on the merits and not necessary for sentencing. See Appellate Exhibit XX. The appellant now argues that the military judge abused his discretion in denying the appellant's motion to compel SA Horner's production because he failed to understand that the motion was, in reality, a motion to compel discovery. This argument is without merit.

Contrary to the appellant's assertion that the military judge failed to properly ascertain the nature of the motion, we find that the military judge properly addressed the issue presented, i.e., a motion to compel production of SA Horner. Neither the motion filed by trial defense counsel nor her argument, which specifically cited to R.C.M. 703, suggests that the defense was requesting that the military judge order discovery under R.C.M. 701. The record indicates clearly that this was a motion for production of a witness and that the military judge properly addressed the issue. Record at 13-34. Accordingly, we decline to grant relief on this issue.

The appellant also argues that the military judge failed to consider reasonable alternatives to SA Horner's in-person testimony. In light of the military judge's conclusion that SA Horner's testimony was not relevant and necessary, we fail to see why he would consider alternatives to in-person testimony. This argument is likewise without merit.

Failure to Compel Production

In his final assignment of error, the appellant argues that the military judge abused his discretion by denying the motion to compel production of SA Horner and by doing so without allowing the defense to call him to testify on the motion.

The standard of review for rulings denying the production of a witness is abuse of discretion. *United States v. McElhaney*, 54 M.J. 120, 126 (C.A.A.F. 2000). An appellate court will not set aside a military judge's denial of a witness unless it has a "definite and firm conviction" that the military judge committed "a clear error of judgment." *Id.* at 126 (citation and internal quotation marks omitted). After taking evidence on the defense motion to compel, the military judge denied the motion, noting that the testimony was not relevant on the merits because SA Horner's testimony regarding Mr. Borzellino's financial scam was a collateral matter that would not negate the offenses charged or establish any credible defense. As to SA Horner's testimony on sentencing, the military judge ruled that such testimony, "if relevant at all, would nevertheless be cumulative and not

necessary". Appellate Exhibit XX at 4. Finally the military judge noted that he would grant leeway to the defense if sentencing evidence relating to Mr. Borzellino became necessary.

We find that the military judge did not abuse his discretion in denying the request to compel production of SA Horner. Testimony from SA Horner on the merits was not relevant to whether the appellant entered into a pecuniary matter with Cpl C. As discussed earlier, the appellant's offense was complete when he executed the promissory note. Mr. Borzellino's conduct was of no consequence to the charged offense. We also agree that any evidence that the appellant was likewise duped by Mr. Borzellino, while relevant on sentencing, would have been cumulative with the testimony of other witnesses.

As to the appellant's claim that SA Horner was necessary to discuss the appellant's cooperation with the FBI investigation into Mr. Borzellino, we find that such testimony would not have been particularly mitigating as we would expect any crime victim to cooperate with law enforcement authorities. In light of the nature of the appellant's offense, i.e., a pecuniary dealing with an enlisted person, we find that SA Horner's testimony regarding the appellant's cooperation into the Borzellino matter was not relevant or necessary and that the military judge did not abuse his discretion in denying the defense motion to compel his testimony.

Finally, we are satisfied that the military judge did not abuse his discretion in making his ruling based on the defense counsel's proffer of SA Horner's expected testimony.

Conclusion

The findings and the approved sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court