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

Before
F.D. MITCHELL, J.A. FISCHER, B.T. PALMER
Appellate Military Judges

UNITED STATES OF AMERICA

v.

DONALD L. HUDSON
AVIATION ORDNANCEMAN AIRMAN RECRUIT (E-1), U.S. NAVY

NMCCA 201400267
SPECIAL COURT-MARTIAL

Sentence Adjudged: 2 April 2014.
Military Judge: CAPT Robert Blazewick, JAGC, USN.
Convening Authority: Commanding Officer, Transient Personnel Unit/Pre-Trial Confinement Facility, Jacksonville, FL.
Staff Judge Advocate's Recommendation: LT Ingrid E. Paige, JAGC, USN.
For Appellant: LT Ryan Aikin, JAGC, USN.
For Appellee: Capt Cory Carver, USMC; LT Ann Dingle, JAGC, USN.

17 September 2015

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

MITCHELL, Chief Judge:

A military judge sitting as a special court-martial, convicted the appellant, contrary to his pleas, of one specification of unauthorized absence, four specifications of failing to obey a lawful order, and one specification of wrongfully using marijuana, in violation of Articles 86, 92, and

112a, Uniform code of Military Justice, 10 U.S.C. §§ 886, 892, and 912a. The appellant was sentenced to confinement for 45 days and a bad-conduct discharge. The convening authority approved the sentence as adjudged and except for the punitive discharge ordered it executed.

The appellant asserts the following assignments of error: (1) that his convictions for failing to obey lawful orders to submit to a urinalysis (Additional Charge II, Specifications 1 and 2) are factually insufficient; (2) that the convening authority had an other than official interest in the court-martial and should have been disqualified; and (3) that he lacked mental responsibility due to his post-traumatic stress disorder and atypical paranoid disorder and thus should not have been convicted of the charges.[1] We find partial merit in the appellant's initial assignment of error and will take corrective action in our decretal paragraph. Otherwise, after reviewing the record of trial and the pleadings of the parties, we determine the findings and approved sentence to be correct in law and fact. We also find that following our corrective action no errors materially prejudicial to the substantial rights of the appellant remain. Arts. 59(a) and 66(c), UCMJ.

Background of Case

On 26 November 2013, charges were referred against the appellant for unauthorized absence (UA), failure to obey orders, and wrongful use of marijuana. On 10 March 2014, the convening authority referred additional charges for two unauthorized absences and two specifications for failure to obey other lawful orders. The appellant's first two assignments of error deal with Additional Charge II and its specifications.

On 26 February 2014, at approximately 0730, the appellant requested and was granted permission to leave the Transient Personnel Unit/Pretrial Confinement Facility (TPU/PCF) and visit the local Personnel Support Detachment (PSD) to attend to matters related to his pay. He did not return to TPU/PCF until the next day, 27 February 2014, at approximately 0830.[2] The appellant's leadership at the command, including his commanding officer (CO), believed that he was UA during that time,

[1] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). We have considered this assignment of error and find that it is without merit. *United States v. Clifton*, 35 M.J. 79, 83 (C.M.A. 1992).

[2] Record at 282-83.

presumably because a routine administrative matter at PSD would not typically take 25.5 hours to resolve.

TPU/PCF had a command policy that anyone UA for more than 24 hours must submit to urinalysis testing upon returning to the command. The command's local urinalysis instruction states that before collecting a urine sample from an individual, the command should attempt to obtain consent and a knowing waiver of rights to decline to give a sample. When the appellant returned to the TPU/PCF, the command's Urinalysis Program Coordinator (UPC), Ship's Serviceman First Class (SH1) T, was instructed to "talk to [the appellant] so he can provide a sample."[3] In accordance with the command's instruction, SH1 T approached the appellant and stated that he was believed to have been UA for more than 24 hours and thus was required to provide a urine sample.[4]

SH1 T then presented the appellant with a form titled: "CONSENT URINALYSIS TESTING." The form, *inter alia*, contained the following advisory:

> I, _____, USN, ____-____-_____ TPU/PTCF HAVE BEEN REQUESTED TO PROVIDE A CONSENT URINALYSIS SAMPLE.
>
> I UNDERSTAND THAT I MAY DECLINE TO PROVIDE A CONSENT URINALYSIS SAMPLE.
>
> ___ 1. I HAVE BEEN INFORMED THAT I MAY DECLINE TO GIVE A SAMPLE FOR CONSENT URINALYSIS TEST.
>
> . . . .
>
> AFTER BEING INFORMED OF MY RIGHT TO DECLINE A CONSENT URINALYSIS SAMPLE, I, _____, HAVE DECLINED TO PROVIDE A URINE SAMPLE FOR TESTING . . . .[5]

The appellant declined to consent to provide a urinalysis sample, filled out the form accordingly and wrote at the bottom of the form "I am declining this urinalysis test . . . ."[6]

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[3] *Id.* at 290.

[4] *Id.* at 291.

[5] Defense Exhibit E at 1.

[6] *Id.*

Following the appellant's declination to provide a urine sample, the UPC consulted with his chain of command and it was determined that the command would collect a "probable cause" sample. The UPC then supplied the appellant with a new form which contained nearly identical language to the first form, including the title, "CONSENT URINALYSIS TESTING," with the words "PROBABLE CAUSE" included in the fifth paragraph.[7] That form also advised the appellant he had the right to decline to give a sample, which he did, writing at the bottom of the form: "I don't understand what this process is for."[8]

The appellant was next brought before the CO of TPU/PCF who gave the appellant a direct order to provide a urine sample. The appellant's response was "okay."[9] The UPC then approached the appellant a third time and stated, "You have declined consent, you have declined probable cause, now my CO is ordering you to provide a command direct (sic)."[10] For a third time, the UPC presented the appellant with a form which this time included the advisory language:

> AFTER BEING INFORMED OF MY RIGHT TO DECLINE A CONSENT URINALYSIS SAMPLE, I, _____, HAVE DECLINED TO PROVIDE A URINE SAMPLE FOR TESTING, (VO) CONSENT TEST, (PO) PROBABLE CAUSE AND COMMAND DIRECTED.[11]

The appellant again declined to provide a urine sample.

Presumably as a result of the difficulties the command encountered in executing the urinalysis, the appellant was ordered into pretrial confinement. On 28 February 2014, the appellant reported to the brig in Jacksonville. The Brig Officer ordered the appellant to provide a urinalysis sample as part of his check-in procedure. The appellant told the Brig Officer that he would not provide a sample.[12] The UPC again presented the appellant with a "CONSENT URINALYSIS TESTING" form

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[7] *Id.* at 2.

[8] *Id.*

[9] Record at 124.

[10] *Id.* at 299.

[11] DE E at 3.

[12] Record at 265.

identical to the first form.[13] The appellant again filled in the blank spaces on the form and on the bottom he wrote ". . . I don't mind the urine test but if I take it that means I admit to being UA and I can't do that."[14]

In the two specifications under Additional Charge II, the appellant was charged with and convicted of disobeying the lawful order of the CO of TPU/PCF given on 27 February 2014, and the order of the Brig Officer given on 28 February 2014 to provide a urine sample.

The military judge entered special findings with his conviction for disobeying the orders to provide a urine sample. The military judge concluded, *inter alia*, that the appellant "must have known that a petty officer who is also a member of that Commanding Officer's command, cannot lawfully countermand a direct lawful order from the Commanding Officer."[15]

Other facts necessary to address the assigned errors will be provided below.

Factual Sufficiency

In his initial assignment of error, the appellant avers that his convictions for both specifications under Additional Charge II are factually insufficient. We agree in part and find Specification 1 of Additional Charge II to be factually insufficient.

The Law

We review issues of factual sufficiency *de novo*. *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make

[13] DE E at 4.

[14] *Id.*

[15] Appellate Exhibit XVI at 5.

[our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Our factual sufficiency determination is limited to a review of the "entire record," meaning evidence presented at trial. *United States v. Bethea*, 46 C.M.R. 223, 225 (C.M.A. 1973); *see also United States v. Reed*, 54 M.J. 37, 44 (C.A.A.F. 2000).

Analysis

To prove a violation of Article 92(2), failure to obey order or regulation, the Government must prove beyond a reasonable doubt: (1) that a certain lawful order was issued by a member of armed forces; (2) that accused had knowledge of the order; (3) that it was the duty of accused to obey the order, and (4) that the accused failed to obey the order. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), Part IV, ¶ 16b(2).

In Specification 1 of Additional Charge II, the appellant was charged with violating the TPU/PCF CO's direct order to provide a urine sample. On 27 February 2014, when the appellant was brought before the CO, TPU/PCF, and was given the order to provide a urine sample, the appellant responded to the order by saying "okay." Rather than assembling the necessary personnel (e.g. an observer) and items needed to conduct the urinalysis (e.g. collection cup, sign-in log, etc.), the UPC merely produced essentially the same "consent" rights advisory form giving the appellant the option to decline to provide a sample. While the CO's direction was clear that she was ordering the appellant to provide a urine sample, it is equally clear that, using the slightly modified "consent form" for the third time for this "command directed" urinalysis, the appellant believed that he had the right to decline to provide a urine sample. Said another way, when the CO of TPU/PCF directed the appellant to provide a urine sample, the command's representative, the UPC, responsible for the proper implementation of the urinalysis instruction and procedures produced a command-approved form which had the practical effect of giving the appellant the option to decline.

Of note, we are particularly disturbed by the fact that the record, to include the testimony by the UPC, suggests that he and the command leadership did not completely understand the different urinalysis collection premises and/or the rights associated therewith. For example, after the appellant declined to consent to give a voluntary sample, the appellant should have

been ordered to give a sample as part of a unit sweep because, as per instruction, anyone suspected of being an unauthorized absentee for more than 24 hours was required to submit to a urinalysis.[16] Instead, the command leadership indicated that when the appellant declined to give his consent the collection premise became "probable cause." There is nothing in the record to suggest that any probable cause analysis was conducted by command leadership prior to making this decision.

Finally, we note that even after the appellant was ordered to provide a sample by the CO, TPU/PCF, instead of rounding up an observer and getting the items needed to collect the urine sample (the collection bottle, log, etc.), the UPC again used a slightly modified version of the same consent form thus informing the appellant that he had the right to decline participation. As this was a direct order by the CO, TPU/PFC, no form was necessary to collect the urine sample, let alone a modified "consent" form. We find that the UPC's action in providing the appellant a consent form indicating that he could decline to provide a urine sample created a reasonable mistake of fact concerning his duty to obey the order and that he could decline to provide a urine sample. On this record, we are not convinced of the appellant's guilt beyond a reasonable doubt on this specification of Additional Charge II.

The appellant additionally contends that his conviction of Specification 2 of Additional Charge II is likewise factually insufficient. We disagree. As part of the brig check-in process, incoming detainees are required to provide a urine sample for testing. The Brig Officer testified that after he was informed by one of his duty officers that the appellant had refused to give a urine sample, he made contact with the appellant and gave the appellant a direct order to provide a urine sample. The appellant informed the Brig Officer that he would not provide a sample.[17] The disobedience of the order given by the Brig Officer was instantaneous upon the appellant's refusal to comply. Even though the UPC again used the same "consent" form in an attempt to collect the urine sample which again indicated that the appellant could decline, at this point

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[16] *See United States v. Patterson*, 39 M.J. 678, 682 (N.M.C.M.R. 1993) "Individual commands are authorized in accordance with OPNAV Instruction 5340.4B . . . to categorize personnel returning from a period of unauthorized absence as a unit for the purpose of conducting urinalysis inspections. . . . Based upon this instruction, the military judge found the seizure of appellant's urine and the laboratory report derived therefrom to be part of a valid **'unit sweep**[.]'" (Emphasis added)).

[17] Record at 265.

not only had the appellant refused to comply with the Brig Officer's order, he wrote on the consent form that he would not provide a urine sample as that would be an admission that he was an unauthorized absentee. The appellant's mistaken understanding of the legal implication of providing a urine sample is irrelevant and, unlike the previous order issued by the CO, TPU/PFC, the appellant's intent to refuse to provide a urine sample was clear from the outset after receiving the order by the Brig Officer. We have little difficulty finding that the evidence adduced at trial was sufficient to find the appellant guilty of this specification beyond a reasonable doubt.

Personal Interest of Convening Authority

The appellant next contends that the convening authority should have been disqualified because she had a personal interest in the appellant's prosecution. Specifically, the appellant argues that since the CO, TPU/PCF issued the order which formed the basis of Specification 1 of Additional Charge II, she had a personal interest in the appellant's prosecution and was thus a "type three" accuser who should have been disqualified. We disagree.

The Law

The question of whether a convening authority is an "accuser" under Article 1(9), UCMJ, 10 U.S.C. § 801(9) is a question of law that we review *de novo*. *United States v. Asby*, 68 M.J. 108, 129 (C.A.A.F. 2009) (citing *United States v. Conn*, 6 M.J. 350, 354 (C.M.A. 1979)). Article 1 (9) defines an accuser as:

> (1) One who signs and swears to the charges;
> (2) One who directs that charges nominally be signed and sworn to by another; or
> (3) One who has an interest other than an official interest in the prosecution of the accused.

An accuser is disqualified from convening a general or special court-martial, or referring charges to a court-martial. *See* RULES FOR COURTS-MARTIAL 504(c)(1) and R.C.M. 601(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). Additionally, Article 23(b), UCMJ, prohibits an accuser from convening a general or special court-martial against the person accused and provides that "[i]f any such officer is an accuser, the court shall be convened by superior competent authority . . . ."

Analysis

Convening authorities are presumed to act without bias. *United States v. Brown,* 40 M.J. 625, 629 (N.M.C.M.R. 1994). The appellant has the burden of rebutting this presumption. *United States v. Argo,* 46 M.J. 454, 463 (C.A.A.F. 1997) (citing *United States v. Hagen*, 25 M.J. 78, 84 (C.M.A. 1987)). The test for determining whether a convening authority is an accuser is "whether he 'was so closely connected to the offense that a reasonable person would conclude that he had a personal interest in the matter.'" *United States v. Voorhees*, 50 M.J. 494, 499 (C.A.A.F. 1999) (quoting *United States v. Jackson*, 3 M.J. 153, 154 (C.M.A. 1977)) (additional citation omitted). "Personal interests relate to matters affecting the convening authority's ego, family, and personal property". *Id*.

To illustrate, the Court of Military Appeals found that a convening authority had a personal interest in a court-martial where he was the victim in the case, *United States v. Gordon*, 2 C.M.R. 161, 165-66 (C.M.A. 1952); where the accused attempted to blackmail the convening authority, *United States v. Jeter*, 35 M.J. 442 (C.M.A. 1992); and where the accused had potentially inappropriate personal contacts with the CA's fiancée, *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994). The Court of Appeals for the Armed Forces has also found, under certain circumstances, that a convening authority's dramatic expression of anger towards an accused might disqualify the commander if it demonstrates personal animosity. *See Voorhees,* 50 M.J. at 499.

We first note that the appellant did not raise this issue at trial and therefore has forfeited this issue on appeal, absent plain error. *See United States v. Shiner*, 40 M.J. 155, 156 (C.M.A. 1994). Even if we choose to not apply forfeiture, based on the record before us, we find no evidence of personal interest or bias on the part of the convening authority to disqualify her as a "type three" accuser in this case. While it is not disputed that the appellant was charged with, *inter alia*, violating a direct order given by the convening authority, it is clear from the record that the CO was merely enforcing a standing order applicable to all returning unauthorized absentees gone in excess of 24 hours. That she issued the order does not in and of itself establish that the convening authority had other than an official interest in the prosecution of appellant's case. There is nothing in the record to suggest that her interest was anything other than official i.e., maintaining good order and discipline within her command which is in fact the responsibility of a CO. We therefore find this

aspect of the appellant's argument to be without merit and decline to grant relief.

Sentence Reassessment

When setting aside a specification, this court will normally reassess the sentence in light of those changes. After this court's action in finding Specification 1 of Additional Charge II factually insufficient, we also conclude the sentencing landscape was has not been dramatically altered and upon reassessing the sentence conclude that absent the error no lesser sentence would have been imposed by the military judge and approved by the convening authority. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006).

Conclusion

The finding of guilty for Specification 1 under Additional Charge II is set aside. The remaining findings and the sentence are affirmed.

Senior Judge FISCHER and Judge PALMER concur.

For the Court

R.H. TROIDL
Clerk of Court