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

Before
E.E. GEISER, L.T. BOOKER, J.K. CARBERRY
Appellate Military Judges

UNITED STATES OF AMERICA

v.

BELTON J. JONES
PRIVATE (E-1), U.S. MARINE CORPS

NMCCA 200800856
GENERAL COURT-MARTIAL

Sentence Adjudged: 22 May 2008.
Military Judge: LtCol Thomas Sanzi, USMC.
Convening Authority: Commanding General, 1st Marine Division (Rein), Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: LtCol R.M. Miller, USMC.
For Appellant: Patrick J. Callahan, Esq.; Maj Anthony Burgos, USMC.
For Appellee: LT Duke Kim, JAGC, USN.

29 October 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

BOOKER, Senior Judge:

A general court-martial of officer and enlisted members convicted the appellant, contrary to his pleas, of attempting to influence the testimony of a witness, conspiracy to obstruct justice, and possessing an ounce[1] of marijuana with intent to

[1] On the Government's motion, the military judge reduced the charged amount from four ounces to one. Record at 616. He instructed the members to this effect. *Id.* at 695. Both the staff judge advocate's recommendation and the

distribute, in violation of Articles 80, 81, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 881, and 912a. The approved sentence extended to confinement for 4 years, forfeiture of all pay and allowances, and a dishonorable discharge from the U.S. Marine Corps.

The appellant raises the following errors: (1) that the military judge erred in allowing LtCol H to sit as a member of the court-martial; (2) that the military judge erred in admitting Prosecution Exhibits 11 through 16 due to insufficient foundation; (3) that the military judge erred in not declaring a mistrial when information that the appellant had previously been incarcerated was introduced at trial; (4) that the military judge erred in not granting a motion to treat the conspiracy and attempt offenses as one offense for sentencing; and (5) that the appellant's defense counsel at trial was ineffective in certain particulars.[2]

We find no merit in the appellant's assigned errors, but we have determined that the finding of guilty to the specification alleging an attempt to influence the testimony of a witness is legally and factually unsupportable. We will set aside the finding in our concluding paragraph and reassess the sentence. Following our action, we are satisfied that the findings and reassessed sentence are correct in law and in fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Background

The allegations against the appellant began with suspicion of drug distribution, discovered by a traffic stop on board Marine Corps Base Camp Pendleton in late September 2007. During the course of the traffic stop, the military policeman learned that the appellant did not hold a valid driver's license, and he therefore placed him under apprehension. The military policeman conducted a quick safety pat-down, and a quantity of money fell from the appellant's pants. The appellant was placed, handcuffed, in the back seat of a patrol car. The appellant's traveling companion was placed in another patrol car. The military policeman then conducted a search of the car the

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convening authority's action incorrectly state that the amount on which the members returned their guilty finding was four ounces. The supplemental court-martial order shall note the correct amount. *See United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998).

[2] This last assignment was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

appellant was driving and discovered a small quantity of marijuana on a passenger's seat. At some point, the appellant was removed from the patrol car for a more thorough search of his person. The military policeman in charge of the patrol car discovered a large plastic baggie that contained 23 smaller then baggies, each filled with a small quantity of marijuana, stuffed between the bench and the back of the patrol car's back seat.

The appellant was placed in pretrial confinement after the traffic stop. The appellant had access to the brig's telephone service while in confinement, and he used the telephone in mid-December 2007 to contact a colleague in Los Angeles. Using a rough sort of code, the appellant asked the colleague whether he would be willing to prevent a witness from testifying against the appellant, and he later provided the colleague information that the colleague could use to locate and discourage the witness. These conversations were recorded on the brig's telephone-monitoring system and played for the members at trial.

Unsuccessful Challenge for Cause

The appellant elected to be tried by a court-martial composed of officer and enlisted members. One of the officers summoned to the venire was Lieutenant Colonel (LtCol) H. That member was the commanding officer of a battalion onboard Camp Pendleton, and his promotion to his current grade had been presided over by the convening authority, Major General (MajGen) W. The member was also acquainted with a special agent of the Naval Criminal Investigative Service (NCIS) who played a peripheral role in processing the case against the appellant.[3]

The appellant challenged LtCol H for implied bias. His counsel articulated the following factors: that LtCol H was a convening authority, and therefore served a "pseudo prosecutorial" [sic] function; that he had a "very high opinion" of the NCIS agent; and that "he personally knows the General." Record at 337. The military judge denied the challenge against LtCol H, and the defense used its peremptory challenge, thus preserving the issue of erroneous denial of the challenge for cause.

[3] The NCIS agent was originally on the Government's witness list, but as his role was limited, the Government decided not to call him. The defense planned, therefore, to call the agent to testify about a thorough search of the appellant's barracks room "which yielded nothing." Record at 339 (quoting the individual military counsel). The witness essentially confirmed this description, testifying that other than a pump-action shotgun, which he stated was not linked to the appellant, the search unearthed "no items of evidentiary value." Record at 594-95.

The military judge recognized that the challenge was one of implied bias and cited the correct legal standard on the record: whether a reasonable observer, considering the record as a whole, would perceive that the appellant's court-martial was not before members who were impartial and fair. Record at 341-42; *see United States v. Townsend*, 65 M.J. 460, 465 (C.A.A.F. 2008). "[T]he objective nature of the inquiry dictates that we accord 'a somewhat less deferential standard' to implied bias determinations of a military judge." *Townsend*, 65 M.J. at 463 (citing *United States v. Armstrong*, 54 M.J. 51, 54 (C.A.A.F. 2000)). Had the military judge not invoked the liberal mandate principles in deciding the challenge against LtCol H, moreover, we would accord his determination even less deference. *Townsend*, 65 M.J. at 464.

In response to the military judge's questions, Record at 306-07, LtCol H readily acknowledged that he had a long-standing professional relationship with the CA, MajGen W. He noted that MajGen W had, at the member's request, promoted him to his current grade. Neither trial counsel nor the individual military counsel (IMC) asked any questions about the relationship with MajGen W. We are satisfied on this record that LtCol H was free from any actual or perceived "expectation of a result," Record at 307, on behalf of the CA.

When asked about his role as a battalion commander and convening authority, LtCol H displayed a decidedly "hands off" approach to military justice. Record at 308-09. After discussing his view of the process, LtCol H professed, in response to a question from the IMC, that he thought he could "maintain a fair mind based on evidence prevented [sic] in the courtroom." *Id.* at 309.

The most probing questions of LtCol H, and the most discussion by the parties on the record, occurred regarding Special Agent T of the NCIS. In discussing the agent, LtCol H referred to him by his first name and noted that he had relied upon the agent's advice regarding some disciplinary matters within LtCol H's battalion. LtCol H put it this way: "I trusted what he was doing in the case he dealt with me, and I found him to be a very credible NCIS representative . . ." *Id.* at 310. LtCol H also stated, in that same response, that "I also think I could balance that -- as any other witness coming here, I think I could also give a fair shake to," before acknowledging that their past working relationship might influence his view of the agent's testimony. When the IMC then asked LtCol H whether he valued his experiences with the special

agent, LtCol H responded "He is one that I would work with in the future . . . based on a Marine type of relationship, yes." *Id*.

Based on our review of the questions posed to LtCol H, his responses to them, the parties' arguments, and the military judge's ruling, we have no difficulty concluding that "the risk that the public will perceive that the accused received something less than a court of fair, impartial members," *Townsend*, 65 at 463, is not high at all; it may, in fact, be nonexistent. The military judge characterized the challenge as "LtCol H has created such a professional relationship with this special agent that he's not going to, believe he would favor his testimony over someone else's." *Id.* at 340. Neither party disputed the military judge's characterization.

When he ruled finally on the challenge, the military judge held that "it was very clear from [LtCol H's] answer that he was going to weigh the evidence of all witnesses that appear before the court, including [the agent]". *Id.* at 342. Here, the military judge obviously "recogniz[ed] the human condition" and resolved that there was no "substantial doubt" that LtCol H could put aside his views of the special agent. *See United States v. Elfayoumi*, 66 M.J. 354, 357 (C.A.A.F. 2008). In so doing, the military judge did not abuse his discretion, and we resolve this assignment of error adversely to the appellant.

Prosecution Exhibits 11 through 16

The appellant was apparently concerned that witnesses would testify against him and describe his drug distributions. While in pretrial confinement, he made use of the brig's telephone system to communicate with an acquaintance in an attempt to dissuade a witness from appearing against him. The conversations were recorded and presented to the members in both oral and written form.[4]

The Government offered two witnesses, Mr. Do and Gunnery Sergeant (GySgt) Dr, to authenticate the recordings. Mr. Do was a civilian staff employee at the brig whose duties included

[4] The transcripts, PE 12, 14, and 16, were offered contemporaneously with the recordings, PE 11, 13, and 15. The IMC objected to the transcripts on the basis that they were different from discovery material previously provided, and he objected as well to their authenticity, but the military judge overruled the objection. The military judge permitted the IMC to offer alternative transcripts, but apparently the IMC decided not to do so. *See generally* Record at 555-61.

administration of the phone system. Mr. Do testified he had frequent contact with the appellant. GySgt Dr was a brig counselor who had had conversations with the appellant. Mr. Do and GySgt Dr both listened to the recordings in open court, in the presence of the members, and identified the appellant's voice. Neither witness could identify other voices on the recordings. Mr. Do also described how the brig telephone system operated and how he researched the appellant's telephone activity and transferred recordings associated with the appellant to the digital medium that was played in the courtroom.

As a general rule, authentication as a condition precedent to admissibility "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." MILITARY RULE OF EVIDENCE 901(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Moreover, voice identifications are possible through "opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." MIL. R. EVID. 901(b)(5).

Here, as noted, the Government offered two witnesses familiar with the appellant's voice to present their opinions whether one of the voices on the recording was that of the appellant. The Government also offered the brig staff member responsible for the communications system to explain the process of recording and retrieving recorded communications. Once those witnesses had testified, it then became the duty of the members, serving as the finders of fact, to determine whether that was in fact the appellant's voice on the recordings and what weight to give the evidence. *See generally United States v. Blanchard*, 48 M.J. 306, 310 (C.A.A.F. 1998). We hold that the military judge did not abuse his discretion when he ruled that the prosecution exhibits were sufficiently authenticated.

Mistrial

One of the witnesses against the appellant was Private (Pvt) C. Private C met the appellant at the Camp Pendleton brig when the appellant was serving a sentence from a previous court-martial. The parties litigated *in limine* the propriety of introducing evidence of the appellant's prior convictions for drug offenses (distribution and use of both marijuana and ecstasy in 2005 and 2006). *See* Appellate Exhibits VIII and IX. The military judge directed the Government not to introduce evidence of the convictions in its case-in-chief, but allowed

that, depending on the evidence, the Government might be permitted to use the evidence in rebuttal. Record at 118.

During the Government case on the merits, Pvt C stated that he served 75 days confinement due to a special court-martial conviction for larceny; that he knew the appellant; that at some point he saw the appellant daily; and that when he knew the appellant" [m]e and [the appellant] were in squad bay eight together in the brig . . . ." The appellant argues that the members could reasonably have inferred that the appellant was likewise serving time. The IMC timely objected to Pvt C's statement and suggested that a mistrial might be appropriate. Record at 576-82.

We begin by noting that the defense never formally moved for a mistrial. While the IMC argued to the judge that he may have had the basis for one based on an arguable violation of the order limiting Pvt C's testimony, Record at 581, ultimately the matter was resolved to the satisfaction of the defense through an immediate curative instruction by the military judge and an offer to provide a tailored instruction when the members were charged. Record at 577, 582.

The record reflects a military judge who was extraordinarily sensitive to the possibility that a member would equate confinement with guilt. One of the officers called to the venire, Colonel H, served as an Initial Review Officer (IRO) at the local brig. He could not say whether he sat as the IRO on the appellant's case. The military judge nonetheless granted a challenge against that particular member due to the possibility, real or remote, that he would have concluded that an offense triable by a court-martial had been committed and that the appellant had committed it (part of the standard for continuing a member in pretrial confinement -- *see* RULE FOR COURTS-MARTIAL 305, MANUAL FOR COURTS-MARTIAL, UNITES STATES (2008 ed.)). Record at 335, 341.

Both parties correctly observe in their pleadings that a mistrial is a drastic remedy. A military judge has broad discretion to grant a mistrial, and we will not disturb his decision not to grant a mistrial absent a clear abuse of discretion. *See, e.g., United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003)(citations omitted). When ruling on a motion for mistrial, the military judge is placed in the challenging position of "determin[ing] the prejudicial impact of an error." *Id*. at 91. Our review of the military judge's exercise of discretion must take into account his "superior point of

vantage" in assessing the potential harm to the accused. *Id*. at 90 (citing *United States v. Freeman*, 208 F.3d 332, 339 (1st Cir. 2000)).

Where, as here, there is no formal request for a mistrial, we must consider first whether the IMC waived or forfeited the issue at trial. Waiver is a knowing decision not to exert a particular right or privilege; forfeiture, on the other hand, is a failure to make a timely assertion of a right or privilege. If there is waiver, then there is nothing for us to review, as there is no error; if, on the other hand, forfeiture applies, then we must determine whether there is plain error that requires correction. *See, e.g., United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009).

Based on the record before us, we are satisfied that the appellant, through his IMC, waived his opportunity to request a mistrial. The military judge immediately gave a curative instruction after Pvt C intimated that he and the appellant had been confined together. Record at 577. Further into Pvt C's testimony, the IMC asserted that he had "legitimate grounds for a mistrial," but the remedy that he sought was to stop Pvt C's testimony or at the very least to curtail it severely. *Id.* at 581-82.

Even had the appellant requested a mistrial, the remedy crafted by the military judge was sufficient to protect the appellant's interests, most important among them the presumption of innocence. We consider not only the testimony of Pvt C, but also the testimony on the preceding day of SSgt R to place this matter in the proper context.

Members might have inferred from the testimony of SSgt R that he had learned that the appellant had a record for dealing drugs. The military policeman had run a query about a license for the appellant before he placed him under apprehension, Record at 368, 385, and it is quite possible that he became concerned about drugs, *see* Record at 385. Notably, however, SSgt R never revealed anything about the appellant to the members other than the fact that he learned that the appellant did not hold a valid driver's license. All the rest of his testimony, direct and cross, had to do with his observations that led to the traffic stop, his search of the appellant and the car he was driving, and his procedures for preparing for patrol. Staff Sergeant R couched his testimony in terms related to his law-enforcement experience, approximately 5 years at the time of trial, and training.

As noted above, the IMC objected to the testimony of Pvt C when that witness mentioned that he and the appellant were together in squad bay eight in the brig. The IMC's concern was not that Pvt C had revealed improper character evidence, but rather that he did not know what further information Pvt C was likely to disclose. Record at 577. At a session outside the presence of the members, the IMC clarified that his primary concern, and the subject of the previous motion hearing, was an allegation of dealing pills. Record at 587. That information never came before the members.

Based on the immediate corrective action that the military judge took, Record at 577, the military judge's instruction to the trial counsel to limit Pvt C's testimony and to discuss those limits with the witness before resuming his testimony, Record at 582, and the members' assurances that they would not make any "inferences about guilt" based on his rows of ribbons versus his status as an E-1, Record at 295, we confidently conclude that there was no danger of "manifest injustice" to be cured by declaring a mistrial, had one been requested.

Multiplicity

After the findings had been returned, the appellant moved the military judge to consider the findings for conspiracy and attempt multiplicious for sentencing. Record at 763. The Government did not oppose this motion. *Id*. The military judge nonetheless ruled that the two offenses were separate and declined to merge them for sentencing purposes. *Id*. at 764.

We express no opinion on the correctness of the military judge's ruling. Having conducted our own independent review of the evidence under Article 66(c), UCMJ, we have determined that the conviction for attempt (Specification 2 of Additional Charge I) is not supported by the record, and therefore we set aside that finding of guilty and dismiss the underlying specification and Additional Charge I. In our opinion, the actions that led to the attempt conviction amounted to no more than preparatory steps to the conspiracy of which the appellant was rightly convicted.

Having set aside one of the guilty findings, we must now decide whether we can appropriately reassess the sentence or should instead return this case for resentencing. We note that the maximum possible confinement time has been reduced from 25 years to 20; all other maximum punishments remain the same. We

are confident that the reduced maximum confinement time does not constitute a "dramatic" change to the sentencing landscape; *see generally United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006). The members concluded from the evidence that the appellant possessed marijuana, packaged in small amounts, onboard a military installation. This conclusion, coupled with the large quantity of cash a military policeman found secreted on the appellant's person, allowed the members further to find an intent to distribute the marijuana. The appellant sought, through a confederate, to hinder production of evidence against him, going so far as to counsel the confederate to "hit him up on the jack or something" and furnishing a general location and phone number to enable the confederate to carry out his wishes. Most notably, at the time of his trial, the appellant had been convicted at special court-martial of multiple drug offenses (including use, possession, distribution, and attempted distribution of both marijuana and ecstasy) and, having served his term of confinement, was awaiting final review of the punitive discharge awarded at the previous court-martial. After reviewing the evidence presented on the merits and on sentencing, we conclude that the appellant's sentence would have been at least the same as that adjudged by the members and approved by the convening authority had he been sentenced only for the possession with intent to distribute and for the conspiracy. *Id*. at 478.

Ineffective Assistance of Counsel

In his final assignment of error (which he asserted personally), the appellant alleges that his defense team was ineffective because of a lack of robust cross-examination of one of the prosecution witnesses, SSgt R; because of lack of objection to certain proffered testimony by an NCIS agent; and because of insufficient emphasis on the incredibility of another witness's testimony. This assignment of error is without merit.

The appellant claims that SSgt R gave testimony at trial that was inconsistent with testimony he had given at a pretrial investigation. A review of the trial transcript shows that SSgt R was confronted with some arguably inconsistent testimony, although in the main the witness averred that his testimony was consistent with his testimony at the pretrial investigation. *See* Record at 380-98 *passim*.

The appellant next claims that Special Agent N improperly voiced an opinion to the members that the appellant was engaged in dealing drugs. Special Agent N had considerable experience

in anti-narcotics police work in both Chicago and the NCIS, but he was neither offered nor qualified as an expert witness. In response to a prosecution question about the significance of the possession by a person of the bundled drugs in PE 6, Special Agent N responded "Can assume that they're a drug dealer." Record at 500.

Finally, the appellant claims that although Lance Corporal (LCpl) Da gave inconsistent testimony, the IMC failed to incorporate this fact into his closing argument. The particular discrepancy noted during LCpl Da's testimony was whether one military working dog or two were at the scene.

Persons accused at court-martial are entitled to the effective assistance of counsel. *See, e.g., United States v. Fluellen*, 40 M.J. 96, 98 (C.M.A. 1994)(citations omitted). To prevail on a claim of ineffective assistance, an appellant must show both that counsel's performance was deficient and that the deficiency was so serious as to deprive him of a fair trial. We view these claims, moreover, indulging "'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004)(quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

Examining the particular points raised by the appellant, we note first of all that the testimony of SSgt R did not vary widely with what he said at the pretrial investigation. *See, e.g.*, Record at 380, 382, 389. The appellant does not cite to any specific examples of inconsistencies, and our review of SSgt R's testimony in the record and his testimony at the pretrial investigation, AE XX, reveals only minor points of departure on truly insignificant matters. The inconsistencies show no difference between black and white; they are more about subtle shades of grey.

Regarding Special Agent N's testimony, we observe that the members themselves saw and touched the packaged marijuana, and they were empowered through the military judge's instructions to use their own knowledge of the ways of the world to determine whether the exhibit supported an inference that the appellant was intending to distribute the marijuana. Even if there were error in receiving Special Agent N's statement "Can assume that they're a drug dealer," that error is harmless in light of the packaging of the marijuana and the large amount of money found on the appellant's person.

Finally, as to LCpl Da's testimony, there is a dispute whether one or two military working dogs showed up at the scene, and whether the dogs were trained to detect drugs or explosives. In any event, the testimony is consistent that the dog or dogs did not alert that evening. The members were properly instructed on the use to make of this discrepancy, and the IMC properly argued in favor of discrediting LCpl Da's entire testimony.

We are satisfied that the appellant's detailed defense counsel and individual military counsel provided him with effective assistance throughout the trial. The team successfully barred damaging evidence (misconduct in selling drugs to other Marines; misconduct in falsifying a urinalysis in the brig; the appellant's earlier conviction for, among other things, drug distribution; the appellant's discussions in the brig with Pvt C about selling drugs once he was released) through pretrial motions. Both counsel vigorously cross-examined the Government's witnesses, and the team advanced their own theories for the members to accept. The team succeeded in reducing the appellant's punitive exposure through motions for findings of not guilty under R.C.M. 917. The IMC's closing argument pointed out the inconsistent testimony and offered the members a reasonable alternative explanation for all the Government's evidence. After trial, the defense team continued its vigorous representation with a credible clemency request to the CA citing the appellant's service in Iraq and the trauma that it caused him. This assignment of error is without merit.

Conclusion

As noted above, the finding of Guilty to Specification 2 of Additional Charge I is set aside, and that specification and Additional Charge I are dismissed. The remaining findings of guilty are affirmed, and the approved sentence, having been reassessed, is affirmed.

Chief Judge GEISER and Judge CARBERRY concur.

For the Court

R.H. TROIDL
Clerk of Court