

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

**Before  
L.T. BOOKER, J.K. CARBERRY, D.O. HARRIS  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**CHRISTIAN W. CARNEY  
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201000149  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 22 May 2009.

**Military Judge:** Col John Ewers, Jr., USMC.

**Convening Authority:** Commanding General, 1st Marine  
Division (Rein), Camp Pendleton, CA.

**Staff Judge Advocate's Recommendation:** Maj M.J. Kent, USMC.

**For Appellant:** Donald Rehkopf, Jr., Esq; Maj Kirk Sripinyo,  
USMC.

**For Appellee:** Maj Elizabeth A. Harvey, USMC.

**28 April 2011**

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

BOOKER, Senior Judge:

Officer members sitting as a general court-martial convicted the appellant, on mixed pleas, of order and drug offenses, respectively violations of Articles 92 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 912a. The convening authority approved the adjudged sentence of confinement for 6 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge from the United States Marine Corps.

The appellant filed initial, and with leave of court supplemental, briefs and assignments of error. His initial brief

contained the following three assignments: that the military judge erred by admitting sentencing evidence that did not preserve the appellant's confrontation rights; that the military judge committed plain error by allowing testimony about uncharged misconduct in Iraq; and that the sentence was inappropriately severe. His supplemental brief contained the following four assignments: that the officer who authorized a seizure of his automobile was not "neutral and detached," thus leading to an illegal search by civilian authorities; that the military judge's findings on the motion to suppress were clearly erroneous; that the appellant was not permitted to confront a sentencing witness; and that the approved sentence is inappropriately severe. In both the initial and the supplemental briefs, the allegation of an inappropriately severe sentence is raised personally pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Finding no error materially prejudicial to the substantial rights of the appellant after our thorough review of the record and the parties' pleadings, we affirm the findings and the approved sentence. Arts. 59(a) and 66(c), UCMJ.

The majority of the evidence giving rise to the charges against the appellant was discovered during a search of his private vehicle by California authorities, specifically members of the Orange County Sheriff's Department (OCSD), pursuant to a warrant issued by a California judicial officer. At trial, the appellant unsuccessfully sought to suppress the evidence based on what he claimed was a defective seizure authorization from his commander. He also sought to suppress evidence seized in Texas, but his guilty plea to a possession of marijuana charge waived his ability to appeal an adverse ruling on that motion.

#### **The Seizure of the Appellant's Car**

The appellant contests the decision of his commander to allow California authorities to remove his car from Camp Pendleton so they could search it. He does not raise before us any challenge to the California search warrant that the authorities later executed.

The appellant had a car with him on base in California. California authorities investigating the murder of a Marine, Private First Class (PFC) [S], off base wished to search the car in conjunction with their efforts. A Marine, Lance Corporal (LCpl) [H], who occasionally bought drugs from the appellant, reported that the last time he saw PFC [S] alive was in the company of the appellant and walking toward the appellant's car. Working in tandem, local Naval Criminal Investigative Service (NCIS) agents and the California authorities presented this information to the appellant's commander. The commander consulted with the division staff judge advocate, determined that probable cause existed to seize the car, and then authorized the California authorities to remove the car from the base. The California authorities, acting on a search warrant issued by a local judicial official, searched the car and, while they were

unable to find any evidence immediately useful to their murder investigation, discovered evidence of possession and distribution of controlled substances. They turned that evidence over to the military authorities and this prosecution eventuated.

Litigation of this motion consumed about a sixth of the entire trial transcript, specifically, pages 13 through 171 and 215 through 229. The military judge received testimony from two OCSD investigators, an agent of the NCIS, a Marine criminal investigator on detail to the NCIS, the former staff judge advocate of the 1st Marine Division, and the commander who authorized the seizure. The military judge's comprehensive findings and analysis are set out in Appellate Exhibit LXV.<sup>1</sup>

We review a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007). We review underlying questions of probable cause to authorize the seizure *de novo*. *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996). We view the evidence of record in the light most favorable to the prevailing party. *Id.* Having analyzed the military judge's ruling and the commander's initial determination against those standards, we are satisfied that the seizure was lawful.

A military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect. See, e.g., *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). While the appellant's review of the trial transcript has identified some minor discrepancies between testimony and the military judge's findings, we are satisfied on the whole that his findings are supported by the record and are not clearly erroneous. See *United States v. Leedy*, 65 M.J. 208, 213 n.4 (C.A.A.F. 2007). We further agree with the military judge's implicit conclusion that the items of evidence seized, specifically, suspected controlled substances and drug-abuse paraphernalia, while not evidence of the murder that the California authorities were seeking, were nonetheless properly seized under the "plain view" doctrine. The California authorities were lawfully inside the car looking for evidence of a murder, including trace forensic evidence, and this required a thorough search; they inadvertently discovered controlled substances and paraphernalia inside the car and its containers; and the contraband nature of the items was readily apparent. See *Coolidge v. New Hampshire*, 403 U.S. 443, 466-71 (1971).

Our own independent review of the evidence, viewed in the light most favorable to the Government, reveals that two OCSD investigators began investigating PFC [S]'s murder shortly after his bullet-riddled body was discovered on 15 May 2008 in a remote area. Shell casings found at the scene suggested that a handgun

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<sup>1</sup> We note that the approval package for an individual military counsel request, Appellate Exhibit LXVI (see record of trial index), is mislabeled as Appellate Exhibit LXV.

was used. The investigators contacted the NCIS because the body was clad in a Marine uniform, and investigation by the NCIS revealed that the body was likely that of a missing Marine assigned to the 5th Marine Regiment. Further investigation led the deputies to question, on several occasions, LCpl [H], who was being separated for drug abuse. The interviews occurred sporadically until approximately 22 May.

While LCpl [H] initially was uncooperative or at best unresponsive, he eventually informed the deputies that, on 13 May 2008 and acting at the appellant's direction, he asked PFC [S] to meet him and the appellant outside a barracks building. As LCpl [H] returned to the barracks he saw PFC [S] approach the appellant's car, which at the time was occupied by the appellant and a companion; later that same day, PFC [S] missed several restricted men's musters. Still later that same day, while riding in the passenger seat of the appellant's car, LCpl [H] asked the appellant about PFC [S]'s whereabouts. The appellant informed him that he need no longer worry about PFC [S]. In the meantime, the appellant's companion took LCpl [H]'s mobile phone and apparently copied personal contact information from it in an attempt to intimidate LCpl [H]. Finally, LCpl [H] revealed to the police that the companion pressed a steel object against his neck and told LCpl [H] to forget about PFC [S]. Although LCpl [H] was not sure that he had seen a small handgun, he certainly believed the object was a handgun.

Based on this information, the OCSD investigators concluded that the appellant's car might contain evidence useful to their investigation, specifically, a handgun and other evidence (e.g., DNA, blood, fibers, other casings) related to the PFC [S] murder investigation. In the meantime, other investigative sources identified registration information for the appellant's car and identified the unit to which he was assigned.

Lieutenant Colonel (LtCol) [D], the officer who authorized seizure of the car, was not the appellant's ordinary commanding officer. Because the appellant did not deploy with his unit, however, LtCol [D] assumed military justice responsibility over the appellant and all other 5th Regiment Marines similarly situated. LtCol [D] had authority over the physical location of the appellant's car. LtCol [D] received a comprehensive briefing from an NCIS agent as well as the two OCSD investigators. This briefing was not under oath. It included frequent references to LCpl [H], including the fact that he was awaiting an administrative separation, and the history of his transformation from reluctant to cooperating witness regarding the death of PFC [S].

We, as did LtCol [D], concern ourselves with "probabilities" when making a probable cause determination, and we, like LtCol [D], are not required to have statements provided to us under oath in making that determination. See MIL. R. EVID. 315(f)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.); see also MIL. R.

EVID. 316(d)(4)(A). The question is not whether the evidence presented in support of the seizure is sufficient to support a conviction, nor whether there is a specific probability, nor whether a preponderance of the evidence supports a conclusion that contraband will be present. The question instead is whether there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Leedy*, 65 M.J. at 213 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). In light of the evidence produced during the suppression hearing, we are satisfied that LtCol [D] had probable cause to authorize seizure of the appellant's car and that he had the legal authority to do so. We ourselves also conclude that probable cause existed to authorize seizure of the appellant's car. We also reach the same conclusion as the military judge regarding the "plain view" discovery of the contraband.

We have considered the appellant's argument that LtCol [D] was not "neutral and detached" and consider it to be without merit. LtCol [D] was performing his duties properly, assessing the credibility of the information provided by the NCIS and OCSA agents against the backdrop of his life experiences, just as would any finder of fact, and against the further backdrop of information he had collected during the normal course of duty. See MIL. R. EVID. 315(f)(2)(C).

#### **Uncharged Misconduct in Iraq**

We dispense with this assignment of error quickly. During testimony before the members, a witness mentioned in passing that the appellant had used drugs in Iraq and in the States by way of illustrating how he thought the appellant could be a supplier to him of drugs. Record at 521. During a session outside the presence of the members, the military judge cautioned the trial counsel to keep a tighter rein on the witness. *Id.* at 535. The entire context of the appellant's alleged drug use in Iraq was two or three questions and answers during an examination that covered 75 pages of recorded testimony.

When the parties were discussing instructions to the members, the military judge offered a curative instruction on the uncharged misconduct. *Id.* at 770. The defense counsel "decided during an 802 conference that they wanted to take the third option which is not to have me talk about the issue again" and the civilian defense counsel stated that he had no objection to the judge's striking the instruction altogether. *Id.* This action by the defense counsel constitutes waiver, and thus there is no error. See *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (citations omitted).

#### **Sentencing Concerns**

The appellant and a fellow Marine were stopped in Texas for a moving violation. The responding officer had the appellant, who was the passenger, step out of the car while he investigated

the traffic offense and, later, suspected marijuana possession, the offense to which the appellant entered a guilty plea. The responding officer had a camera in his car that recorded the entire encounter. After the responding officer authenticated the contents of the recording, Prosecution Exhibit 22, the Government played the recorded traffic stop for the members during its case in sentencing. The audio portion of the recording is nearly unintelligible for substantial portions due to background wind and traffic noise, and the members were not provided a transcript at the direction of the military judge. Record at 857. The parties did have a transcript, and it is attached as AE LX.

At trial, the defense sought originally to exclude this recording as a violation of the appellant's right to confront the witnesses against him. Record at 839. See U.S. CONST. AMEND. VI; see also *Crawford v. Washington*, 541 U.S. 36 (2004). The defense then apparently withdrew its *Crawford* objection and objected instead to the possibility of unfair prejudice. Record at 856-57. The confrontation challenge was apparently directed at the driver's statement that both he and the appellant had smoked some marijuana in the car. The unfair prejudice objection seems directed more toward an allegation of uncharged misconduct.

As the defense conceded at trial and the parties on appeal seem to agree, there are no military cases applying *Crawford* to sentencing proceedings, and the case law in civilian jurisdictions is unhelpful due to the adversarial nature of court-martial sentencing. *United States v. McDonald*, 55 M.J. 173, 176 (C.A.A.F. 2001). It is, however, a fair reading of sentencing cases to conclude that, with limited exceptions, due process, not confrontation, is the paramount consideration. Compare *Pepper v. United States*, 131 S. Ct. 1229, 1235 (2011) (sentencing judges enjoy wide discretion regarding the type of evidence they may consider) with *Apprendi v. New Jersey*, 530 U.S. 466, 490 n. 16 and 494 n. 19 (2000) (any fact that increases punishment above a statutory maximum becomes an "element" that must be proven beyond a reasonable doubt). Cf. RULE FOR COURTS-MARTIAL 1004, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) (listing aggravating factors which must be unanimously found beyond a reasonable doubt in order to impose the death penalty).

Turning to the case before us, we note that the appellant pleaded guilty to possessing marijuana in Texas. The possession alleged was of "some amount," and therefore would be punished at the "user" level, providing for a two-year maximum punishment; no evidence was presented to the members that the mass of the marijuana exceeded 30 grams. The heavier burden of *Apprendi*, therefore, does not apply to this particular charge, and we are not prepared to say that confrontation is required past the guilt phase in non-enhancement cases.

The patrol car's recording was offered as evidence of the circumstances surrounding the commission of the offense of possession. The responding officer remarked to both the driver

and the appellant that he had smelled marijuana, and eventually the driver surrendered the marijuana in the car. While it is true that the driver was the first to admit use and implicate the appellant in use of the marijuana, during the substantive encounter with the officer the appellant also acknowledged that he had "blunted" the marijuana and smoked it. PE 22, local time approximately 22:43. The members also could determine from the video the appellant's demeanor during the encounter.

Having reviewed the recording, we are satisfied that no error materially prejudicial to the substantial rights of the appellant occurred. We are further satisfied, given the appellant's admission on the recording to the use of marijuana preceding the traffic stop, that any statements of the driver were harmless beyond a reasonable doubt and did not contribute to the sentence imposed in this case. See *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986).

We now address the assignment of error personally asserted. With respect to the approved sentence, the members had before them evidence of a sophisticated drug-distribution operation run by the appellant. Many of his customers were active-duty Marines. The members also convicted the appellant of possession of myriad other controlled substances in addition to those which he was distributing. They balanced this negative information against the positive picture offered by the appellant's parents and siblings, his service in Iraq, and his community service on Long Island and as reflected in a battalion landing team newsletter, and arrived at the sentence, the confinement being a mere tenth of the maximum permissible. We have conducted our own assessment of the sentencing evidence and we conclude that the sentence adjudged and approved is appropriate for this offender and his offenses. See *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

### **Conclusion**

The findings and the approved sentence are affirmed.

Senior Judge CARBERRY and Judge HARRIS concur.

For the Court

R.H. TROIDL  
Clerk of Court