

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

**Before
J.R. PERLAK, M.D. MODZELEWSKI, R.Q. WARD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**SEAN MURRAY
MASTER-AT-ARMS SECOND CLASS (E-5), U.S. NAVY**

**NMCCA 201200295
Review Pursuant to Article 62(b), Uniform Code of Military Justice,
10 U.S.C. § 862(b)**

Military Judge: CAPT Tierney M. Carlos, JAGC, USN.
Convening Authority: Commanding Officer, U.S. Naval Air
Station, Sigonella, Italy.
For Appellant: Maj David N. Roberts, USMC.
For Appellee: LT David Dziengowski, JAGC, USN.

21 August 2012

OPINION OF THE COURT

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

MODZELEWSKI, Senior Judge:

This case is before us on a Government interlocutory appeal, pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862. Master-at-Arms Second Class (MA2) Sean Murray was charged, *inter alia*, with aggravated sexual assault of JH and wrongful sexual contact with JH in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. Prior to trial, the military judge granted a motion to suppress, in its entirety, the results of the Sexual Assault Nurse Examination (SANE) conducted on the appellee after JH reported the alleged offenses. The Government contends the

military judge erred as a matter of law and fact in granting the defense motion to suppress.¹

After considering the record of proceedings and the pleadings,² we conclude that the military judge did not abuse his discretion in concluding that the SANE examination was not properly admissible as a search incident to lawful apprehension (SILA), and in granting the defense motion to suppress.

Procedural Background

At the pretrial motion session, the Government relied heavily on consent as the theory of admissibility for the results of the SANE examination. The trial counsel called only one witness, the SANE nurse, who testified at length about the manner in which she conducted her physical examination of the appellee and whether she obtained the appellee's consent to that examination. In his subsequent argument on the motion, the trial counsel primarily argued that the entire SANE report was admissible as the appellee had consented to the examination. As his fall-back position, which is considerably less developed in the record, trial counsel argued that the examination was also permissible as a search incident to lawful apprehension under MILITARY RULE OF EVIDENCE 314(g), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), and that the results were therefore admissible under that alternative theory as well.

In his Findings of Fact and Conclusions of Law, the military judge focused on the facts surrounding the issue of consent. It was the primary theory advanced by the Government, and the evidence and testimony presented at the motions session pertained exclusively to that theory of admissibility. On appeal, the Government has abandoned the theory of consent and is now pursuing exclusively a SILA theory of admissibility. As a consequence, many of the military judge's findings and much of his analysis are not particularly germane to the issue now before us.

Factual Background

¹ The issue appealed is: "Under *United States v. Robinson*, 414 U.S. 218 (1973), and *United States v. Curtis*, 44 M.J. 106 (C.A.A.F. 1996), the Government is entitled to make a full search of an arrestee incident to a lawful apprehension in order to safeguard and preserve evidence. The military judge correctly found that appellee was lawfully apprehended prior to being subjected to the Sexual Assault Nurse Examination. Did the military judge err by excluding evidence obtained during the search?"

² We commend appellate defense counsel for an exceptionally thorough, thoughtful, and well-written brief.

In our recitation of the military judge's findings below, we quote verbatim from the military judge's findings that are relevant to the theory now before us, but briefly summarize those findings relevant only to the issue of consent. We find that these findings of fact are not clearly erroneous, and we adopt them.

a. At approximately 0545 on 18 September 2011, members from Naval Air Station Sigonella Security (NASSIG) department discovered a vehicle in the middle of the road. MA2 Murray was observed unresponsive in the driver's seat. The keys were in the ignition and the engine was running. MA2 Murray was apprehended by NASSIG Security personnel and transported to the Security building.

b. At the Security building, MA2 Murray was advised that he was suspected of driving under the influence and subsequently he was given a breathalyzer. Prior to the breathalyzer, MA2 Murray was presented with a Permissive Authorization for Search and Seizure (PASS). This document detailed his rights, identified him as a suspect, and advised him that he was suspected of driving under the influence. The breathalyzer was given at approximately 0800 and revealed an alcohol content of .0117/210dL. Following the breathalyzer, MA2 Murray was driven from Security to Naval Hospital Sigonella by Master-at-Arms security personnel.

c. The government has not produced any evidence that MA2 Murray was advised by security personnel or Naval Criminal Investigative Service (NCIS) personnel that he was suspected of sexual assault prior to being transported to Naval Hospital Sigonella.

d. Special Agent (SA) Greg Harris, NCIS, had been informed that MA2 Murray was a suspect in a sexual assault and reported to Naval Hospital Sigonella on the morning of 18 Sept 2011, in order to collect evidence from MA2 Murray's SANE exam. SA Harris arrived at the hospital prior to MA2 Murray arriving. SA Harris observed MA2 Murray arriving at the hospital, under custody, escorted by two Master-at-Arms. SA Harris did not speak to MA2 Murray prior to the SANE examination.

e. MA2 Murray arrived at the hospital sometime before 1200 on 18 Sep 2011 and was presented to LCDR Laura McMullen, NC, USN. He underwent a four hour SANE exam conducted by LCDR Laura McMullen and LT Katie Schulz, NC, USN.

f.- j. (These findings detail the "Patient Consent" portion of the SANE report and highlight that LCDR McMullen gave conflicting testimony at the Article 32 hearing and at the motions hearing regarding whether she obtained consent from the appellee prior to the examination and that another nurse in attendance at the examination testified at the Article 32 hearing that no consent was required or obtained.)

k. SA Harris testified at the Article 32 hearing that as part of the SANE examination, it is the responsibility of the SANE nurse to tell suspects that the exam is consensual and that he made no effort to interact with MA2 Murray prior to the examination.

l. The government has produced no evidence that Security personnel, medical personnel, NCIS agents, other law enforcement personnel, nor anyone from MA2 Murray's chain of command attempted to obtain command authorization for the SANE exam conducted on MA2 Murray on 18 September 2011.

Appellate Exhibit VII at 1-3.

Conclusions of Law

In his written Discussion and Conclusions of Law, the military judge again focused primarily on the theory of consent. His two Conclusions of Law relevant to the SILA theory were:

b. The SANE exam conducted by LCDR McMullen and LT Schulz was not an authorized search incident to a lawful apprehension under Mil. R. Evid. 314(g). Such searches are limited in scope, and conducted primarily to ensure the safety of the law enforcement personnel conducting the apprehension. A SANE exam conducted hours after apprehension and miles from the location of the apprehension is clearly outside the scope of such a search.

c. This case does not represent exigent circumstances that demanded governmental intrusion without obtaining the consent of the suspect. *Schmerber v. California*, 384 U.S. 757 (1966) holds that "the interests of human dignity and privacy which the Fourth Amendment protects forbid (bodily) intrusions on the mere chance that evidence might be obtained. *Id.* at 770. Even though in *Schmerber* the Supreme Court ultimately allowed the blood draw from an apparently intoxicated driver while he was at the hospital for treatment, the exigent circumstances of the alcohol disappearing from his blood stream and minimal intrusion into his privacy are not present in this case. *Schmerber* does not authorize a four-hour SANE exam where an accused is disrobed, swabbed, prodded with needles and photographed. In any case, the Military Rules of Evidence provide for specific protections against nonconsensual searches that certainly prohibit nonconsensual SANE exams.

Id. at 3.

Standard of Review

When reviewing matters under Article 62(b), UCMJ, we act only with respect to matters of law. *United States v. Baker*, 70 M.J. 283, 287-88 (C.A.A.F. 2011) (citing *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004)). "When a court is limited to reviewing matters of law, the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are 'firmly supported by the record.'" *Gore*, 60 M.J. at 185 (quoting *United States v. Burris*, 21 M.J. 140, 144 (C.M.A. 1985)). When reviewing a ruling on a motion to suppress, "we consider the evidence in the light most favorable to the prevailing party." *United States v. Cowgill*, 68 M.J. 388, 390 (C.A.A.F. 2010) (citation and internal quotation marks omitted).

We review a military judge's ruling on a motion to suppress for abuse of discretion. *Baker*, 70 M.J. at 287 (quoting *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004)). In reviewing a military judge's ruling on a motion to suppress, we review factfinding under the clearly-erroneous standard and conclusions of law under a *de novo* standard. *Baker*, 70 M.J. at 287 (quoting *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). Said differently, a military judge abuses his discretion if his findings of fact are clearly erroneous or his

conclusions of law are incorrect. *Ayala*, 43 M.J. at 298. The abuse of discretion standard calls "for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *Baker*, 70 M.J. at 287 (quoting *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010)).

Discussion

We turn now to the Government's assertions on appeal regarding the military judge's misstatements of facts and misapplications of law. First, the Government asserts that the military judge misstated the facts in his conclusion that "*Schmerber* does not authorize a four-hour SANE exam where an accused is disrobed, swabbed, prodded with needles and photographed." Specifically, the Government asserts that: "Nothing in the Record suggested the Appellee was ever 'prodded with needles and photographed' during the SANE examination. There are no photographs in the Record; and if photographs were taken during the exam, then nothing supports the Military Judge's inference that they were taken in an unreasonable or unprofessional manner." Government's Brief of 19 Jul 2012 at 20. The Government continues by noting that there was no evidence that the appellee was "prodded by needles," only that his finger was pricked for a blood draw. *Id.*

The record amply supports the military judge's conclusion that this was an intrusive examination. On the comparatively innocuous issue of photographs, the record clearly establishes that the SANE nurse took photographs of the appellee with a camera provided to her by NCIS: the examination form filled out by the nurse itself details at least thirteen photographs that were taken of appellee's body. Record at 39, 41; AE I, Attachment 4 at 18 and Attachment 6. In addition to photographs, however, the record clearly establishes that the SANE nurse collected the following evidence during her examination: penile swabs; scrotal swabs; finger swabs; fingernail scrapings and clippings; a blood sample; pubic hair combings; a pulled pubic hair; a mouth swab; and, all of the clothes that he was wearing. AE I, Attachments 6 and 7.

We turn next to the Government's argument that the military judge misapplied the law in ruling that this physical examination exceeded the scope of a search incident to lawful apprehension. In its interlocutory appeal, the Government now avers that each of the aspects of the physical examination detailed above falls within the ambit of the SILA exception to

the warrant requirement, as articulated both in case law and in MIL. R. EVID. 314(g), and that the military judge applied an unduly restrictive definition of the law of SILA. At trial, however, the trial counsel simply asserted that the entirety of the SANE exam was admissible as a search incident to the appellee's apprehension, with no particularized attention to the individual components of the exam and no evidence as to the two components of the SILA analysis: safety of the arresting officers or the preservation of destructible evidence.

Consistent with the evidence received, the military judge gave abbreviated treatment to the SILA arguments advanced by trial counsel before moving on to the theory of consent primarily relied upon by the Government. His conclusion that such searches are intended "primarily" to ensure the safety of the arresting officers is not entirely correct. The search-incident-to-arrest exception to the Fourth Amendment's warrant requirement, as defined in *Chimel v. California*, 395 U.S. 752 (1969), serves both safety and evidentiary purposes. Incident to a lawful arrest, "it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *Id.* at 763. See also MIL. R. EVID 314(g)(2). Nothing in the SILA line of cases makes the safety interest paramount or diminishes the evidentiary justification for the rule, although *Arizona v. Gant*, 556 U.S. 332, 335 (2009) limited the evidentiary justification, at least in vehicle searches, to "evidence of the offense of arrest" and placed a more restrictive interpretation on the area that could be searched.

Although the military judge placed undue weight on the safety concerns of the SILA exception over the evidentiary concerns, he nevertheless also discussed the risk that evidence might disappear, and that those circumstances could justify a search, citing to *Schmerber v. California*, 384 U.S. 757 (1966). He concluded that those considerations do not apply to this situation in which the appellee was subjected to a four-hour SANE exam conducted by a nurse hours after apprehension under a dubious consent pretext, and that such a search was well-outside the scope of MIL. R. EVID. 314(g)'s exception to the warrant requirement. The trial judge perhaps should have discussed more thoroughly the "destructible evidence" justification for the SILA exception to the warrant requirement, and articulated more careful consideration of whether the evidence seized during the SANE exam was "destructible evidence" within the meaning of MIL. R. EVID. 314(g). Nonetheless, we do not find his conclusion of

law that the SANE exam was outside the scope of the SILA exception to be incorrect. *Ayala*, 43 M.J. at 298.

Nothing in the record indicates that, at the time the SANE examination was conducted, law enforcement personnel believed that the physical examination of the appellee was actually being conducted as a search incident to his apprehension. Special Agent (SA) Harris, the NCIS agent waiting at the hospital for the completion of the exam, believed that it was a consent search, with the consent to be obtained by the SANE nurse conducting the exam. AE I, Attachment 4 at 14-15. Likewise, the SANE nurse testified at the motions hearing that it was a consent exam, and that she was "required to have either the suspect's consent or . . . [the] equivalent to a warrant from NCIS to gather the evidence." Record at 23. If the appellee had not consented, LCDR McMullen would have "stepped out of the room, and . . . gone to NCIS and said, "I cannot proceed without that search order." *Id.* at 30, 64-65.

Obviously, the nurse's understanding of the basis for the search is in no way dispositive of its admissibility. For that matter, the NCIS agent's understanding of the basis of the search is not necessarily dispositive. The fact that the SANE exam was conducted with the nurse and the agent believing they had the appellee's consent does not necessarily preclude its admissibility as a search incident to the appellee's apprehension. Nevertheless, what the military judge was faced with, and what we are now faced with, is a two-fold problem.

First, because law enforcement thought that the nurse was conducting the exam pursuant to the patient's consent, they clearly did not establish any "destructible evidence" limits to that search. The SANE nurse testified consistently throughout the Article 32 hearing and the motions session that her "head to toe" examination was driven by two considerations: the requirements of the sexual assault kit, which details what specimens to collect, and the victim's narrative, which further informs the examining nurse "where on the suspect to look for evidence and to obtain samples." AE I, Attachment 2 at 3, 13; Record at 31, 46. The record indicates that the SANE nurse's examination of the appellee was a process devoid of oversight or direction by law enforcement, for the simple reason that security department and NCIS personnel did not contemplate that the search was being conducted under those auspices.

Secondly, because trial counsel was seeking to admit this SANE exam primarily under a theory of consent, he established no

facts regarding the appellee's custodial status while undergoing the SANE exam and no facts regarding the need to preserve destructible evidence. The military judge made a finding that the appellee was apprehended at approximately 0545 on 18 September 2011, when members from the base security department discovered him unresponsive in the driver's seat of his vehicle, with the keys in the ignition and the engine running, and took him to security for a breathalyzer. That breathalyzer was administered at approximately 0800. AE VII at 1. The trial counsel presented no evidence regarding the appellee's status at the time of the later SANE exam, which took place from 1200-1640. The record is completely silent as to whether the appellee was under apprehension for DUI alone, or whether he was also apprehended for sexual assault. Similarly, the record is silent as to when his apprehension terminated.

In our military practice, whether a suspect is under "apprehension" is frequently less clear than the bright line of arrest in the civilian world. Here, where this evidence rises or falls on whether it was collected during a search incident to apprehension, the military judge received no direct testimony or evidence, and thus made no findings, that the appellee was even under a valid apprehension for sexual assault when a full SANE exam was performed upon him.

In its brief on interlocutory appeal, the Government has marshaled authority for its position that the SANE exam is admissible by analyzing several discrete components of the SANE exam. In arguing that the SANE package in its entirety is admissible, however, the Government is both stretching the facts of this case and pushing well past established precedents. For example, the Government cites to an evolving line of cases³ that allow law enforcement to collect the DNA of arrestees and pretrial detainees for identification purposes, and then use it for other purposes. The Government's reliance on that line of cases is misplaced in this context, as the blood draw and buccal swabs were taken not by law enforcement personnel in a custodial setting, as part of the process in which an arrestee is identified and fingerprinted, but by a SANE nurse in an exam that was repeatedly characterized by all parties as a "search." Moreover, as noted above, the appellee's status as an "arrestee" or as "under apprehension" at the time of the exam is far from established in the record. Likewise, the Government's reliance

³ *Haskell v. Harris*, 669 F.3d 1049 (9th Cir.2012), vacated, 2012 U.S. App. LEXIS 15378 (9th Cir. July 25, 2012); *United States v. Mitchell*, 652 F.3d 387 (3rd Cir. 2011), cert. denied, 132 S.Ct. 1741 (2012).

on cases involving prisoners and pretrial detainees⁴ to justify other intrusive aspects of the SANE exam is not helpful in the context of this case, in which the appellee was not confined, and not being processed for confinement.

Under this broad reading of the SILA exception urged upon us by the Government, a full physical examination would be authorized incident to every apprehension of a sexual assault suspect, notwithstanding that much of what is seized during these examinations is not easily destructible evidence (i.e., pubic hair, buccal swabs, blood draws for DNA). To read the SILA exception this broadly would untether the rule from the justifications underlying the *Chimel* exception. We reject this argument.

Some discrete piece, or pieces, of evidence seized during the SANE exam may very well be properly admissible under the line of SILA case law, assuming a valid apprehension of this appellee continued at the time of the SANE exam. A decision on any particular piece of evidence, however, is not ripe for review by this court, as the Government instead attempted at trial to shoehorn a full "head to toe" SANE exam in its entirety into the relatively narrow SILA exception to the Fourth Amendment. As the proponent of the evidence, the Government at trial is responsible for culling out the potentially admissible from the clearly inadmissible. See *United States v. Dimberio*, 56 M.J. 20, 25 (C.A.A.F. 2001).

Considering the evidence in the light most favorable to the prevailing party,⁵ we hold that the military judge did not abuse his discretion by suppressing the results of the SANE examination *in toto* as outside the scope of Mil. R. Evid 314(g). His findings of fact were supported by the evidence, and his action in excluding the SANE examination was not "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *White*, 69 M.J. at 239. Nor do we find his conclusion of law that the SANE exam was outside the scope of the SILA exception to be incorrect. *Ayala*, 43 M.J. at 298.

⁴ *Florence v. Board of Chosen Freeholders*, 132 S.Ct. 1510 (2012); *Bell v. Wolfish*, 441 U.S. 520 (1979).

⁵ *Cowgill*, 68 M.J. at 390.

Accordingly, we deny the Government's appeal and return the record to the Judge Advocate General for further proceedings not inconsistent with our opinion.

Chief Judge PERLAK and Judge WARD concur.

For the Court

R.H. TROIDL
Clerk of Court