UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman NICHOLAS B. CRUZ
United States Air Force

ACM 36954

11 August 2008

Sentence adjudged 07 December 2006 by GCM convened at Minot Air Force Base, North Dakota. Military Judge: Steven J. Ehlenbeck.

Approved sentence: Bad-conduct discharge, hard labor without confinement for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Griffin S. Dunham.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Jason M. Kellhofer.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

PER CURIAM:

Contrary to the appellant's pleas, a panel of officers sitting as a general court-martial convicted the appellant of two specifications of larceny of non-military property, in violation of Article 121, UCMJ, 10 U.S.C. § 921. His adjudged and approved sentence consists of a bad-conduct discharge, three months hard labor without confinement, and a reduction to the grade of E-1. On appeal the appellant asserts two errors: (1) his Article 41, UCMJ, 10 U.S.C. § 841 right to exercise his peremptory challenge was violated when he exercised his peremptory challenge to excuse a member the military judge should have excused for cause; and (2) the military judge abused his discretion by not granting the

appellant's challenge for cause against Lieutenant Colonel (Lt Col) GS. Finding no error, we affirm.

Background

In August 2005, the appellant began an elaborate scheme wherein he ostensibly auctioned off, on eBay, a 2004 Nissan 350z automobile and 2004 BMW 545i automobile for prices well below their market value. Mr. CW was the "winning bidder" of the Nissan with a winning bid of $7500. Mr. TR was the "winning bidder" of the BMW with a winning bid of $8600. As part of his winning bid, the appellant required Mr. CW to make a $2000 down payment; Mr. CW promptly sent the appellant a $2000 down payment. The appellant also required Mr. TR to send the appellant an $8600 cashier's check before delivering the vehicle.

After receiving Mr. CW's down payment, the appellant informed Mr. CW that the $2000 down payment was not a down payment on the automobile but was simply a payment to receive the telephone number of the vehicle's "true" owner. The appellant also advised Mr. CW that he would need to pay an additional $10,500 if he wanted the automobile; Mr. CW promptly sent the appellant an additional $10,500. After the appellant received both Mr. CW's and Mr. TR's payments, he failed to deliver the vehicles and instead made promises to deliver the vehicles.

After weeks of haggling with the appellant to no avail, Mr. CW and Mr. TR filed individual complaints with the Federal Trade Commission's Internet Fraud Complaint Center (IFCC) against the appellant. The IFCC, in turn, informed the Ward County (North Dakota) Sheriff's Office, which opened a fraud investigation against the appellant. In the ensuing weeks, the appellant returned $10,500 to Mr. CW, but initially refused to return the $2000 down payment. Approximately two months before the preferral of court-martial charges, the appellant fully reimbursed Mr. CW and began reimbursing Mr. TR.

At trial, the appellant exercised a challenge for cause against Lieutenant Colonel (Lt Col) GS. The basis for the appellant's challenge was that Lt Col GS had three negative experiences (fraud experiences) while shopping on eBay and would have difficulty giving the appellant a fair and impartial hearing. After hearing argument, the military judge denied the appellant's challenge for cause against Lt Col GS. The appellant exercised his peremptory challenge against Lt Col GS and Lt Col GS was excused.

Discussion

Abuse of Discretion

For ease of analysis, we address the appellant's abuse of discretion claim first. The appellant asserts the military judge abused his discretion by not granting the appellant's challenge for cause against Lt Col GS. A military judge's ruling on a challenge for cause is reviewed for abuse of discretion. *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997). However, Rule for Courts-Martial (R.C.M.) 912(f)(4) specifically states "When a challenge for cause has been denied the successful use of a peremptory challenge by either party, excusing the challenged member from further participation in the court-martial, shall preclude further consideration of the challenge of that excused member upon later review."* Since the appellant exercised his peremptory challenge against the challenged member, Lt Col GS, in accordance with R.C.M. 912(f)(4), we will not address the appellant's claim that the military judge abused his discretion by not removing Lt Col GS for cause.

Article 41, UCMJ, Violation

The appellant asserts that his Article 41, UCMJ, right to exercise his peremptory challenge was violated when he exercised his peremptory challenge to excuse Lt Col GS, a member who the military judge should have excused for cause. We disagree. Peremptory challenges are a creature of statute, in this case 10 U.S.C. § 841, and a denial or impairment of such will only occur if the appellant does not receive what the statute provides. *Ross v. Oklahoma,* 487 U.S. 81, 89 (1988). Article 41(b)(1), UCMJ, simply provides that every accused is entitled to one peremptory challenge of the members of the court.

In the case *sub judice*, the appellant had three options when the military judge denied his challenged for cause against Lt Col GS. He could have: (1) exercised his peremptory challenge against another member and preserved the causal challenge issue; (2) chosen not to exercise his peremptory challenge and thus waived the causal challenge issue; or (3) chosen, as he did, to exercise his peremptory challenge against Lt Col GS. "A hard choice is not the same as no choice." *United States v. Martinez-Salazar*, 528 U.S. 304, 315 (2000). In an attempt to obtain a fair and impartial panel, the appellant made a tactical decision to exercise his peremptory challenge against Lt Col GS. In doing so, he not only waived the causal challenge issue but exercised his right to a peremptory challenge. Such an election does not amount to a denial of his peremptory challenge. *Id.* at 315-16.

* Effective 13 November 2005 pursuant to Exec. Order No. 13,387, 70 Fed. Reg. 60,698 (Oct. 18, 2005).

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court