

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman Basic DAVID C. FARROW
United States Air Force**

ACM S31666

31 January 2011

Sentence adjudged 18 February 2009 by SPCM convened at Tinker Air Force Base, Oklahoma. Military Judge: Ronald A. Gregory.

Approved sentence: Bad-conduct discharge, confinement for 12 months, and forfeiture of \$933.00 pay per month for 12 months.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford, Major Shannon A. Bennett, Major Darrin K. Johns, Major Reggie D. Yager, and Major David P. Bennett.

Appellate Counsel for the United States: Lieutenant Colonel Jeremy S. Weber, Major Charles G. Warren, and Gerald R. Bruce, Esquire.

Before

BRAND, ORR, and ROAN
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

ROAN, Judge:

Pursuant to his pleas, a special court-martial composed of officer members convicted the appellant of one specification of negligent dereliction of duty, one specification of wrongful introduction of a controlled substance (ecstasy) onto a military installation with the intent to distribute the said controlled substance, one specification of wrongful distribution of ecstasy on divers occasions, one specification of wrongful use of ecstasy, and one specification of wrongful use of marijuana on divers occasions, in violation of Articles 92 and 112a, UCMJ, 10 U.S.C. §§ 892, 912a. The adjudged

sentence consists of a bad-conduct discharge, 12 months of confinement, and forfeiture of \$933.00 pay per month for 12 months. The convening authority approved the findings and sentence as adjudged. On appeal, the appellant argues the military judge erred in failing to grant defense counsel's challenge for cause against a court member based on implied bias. We find no error that materially prejudices a substantial right of the appellant and affirm.

Background

During voir dire, trial counsel asked, "Have any of you had someone close to you have an experience with illegal drug use?" Both Major (Maj) W and Captain (Capt) C responded affirmatively. During individual questioning, the following colloquy with Maj W took place:

ATC: [Maj W], you indicated someone close to you was involved with some illegal drug use. Could you please go into a little bit about that?

[Maj W]: Sure. My first cousin—she was involved with drugs really bad. I'm trying to think—at least two of my cousins were involved with marijuana, cocaine—yeah, my stepfather—actually, my stepfather used marijuana. With the exception of cousins, stepfather, and I've had friends that used it before—well, I actually had one of my troops, but he was not my direct subordinate.

....

ATC: Sir, do you know what kind—what kind of drugs for like your cousins and your stepfather? What were they involved in?

[Maj W]: Marijuana was the main one. That was the most common one.

ATC: How close are you to those family members?

[Maj W]: I am very close with them.

ATC: Have they ever been arrested for drug use?

[Maj W]: My cousin was—male—he was arrested for it.

ATC: Do you know what happened with that arrest?

[Maj W]: He remained incarcerated for—I don't know if it was a couple of years or a couple of months, and then finally, he was released.

ATC: Sir, with all that taken into account, can you set all that aside and view the facts as presented to you today and decide this case without thinking about anything from your family or your prior troop?

[Maj W]: Absolutely.

The defense counsel then questioned Maj W as follows:

DC: Sir, in regards to what you discussed with trial counsel, you mentioned your family members. How recent were these incidents that occurred with your family members?

[Maj W]: Ooh—years ago. This was when I was growing up. Yeah, I would say from when I was five until—yeah, that’s about as early as I can remember—six—seeing them. Obviously, as I grew older, I was not exposed to that anymore.

DC: What did you remember seeing, sir?

[Maj W]: The marijuana—that’s the only one I remember seeing. I’d never seen cocaine used before.

DC: Was there any impact upon your family at all with family members being involved?

[Maj W]: No. Like I said, a couple of those individuals—my mom really tried to keep me and my brother and my sister away from that. Ultimately, my mother and my father—well my stepfather ended up divorcing so—

DC: Did they divorce because of that, sir?

[Maj W]: A number of issues—no—I don’t think that was the main reason.

DC: Sir, you mentioned that it was your stepfather and a few cousins—have they since had families of their own? Has anything happened to their families?

[Maj W]: Let’s see—one of my cousins, she has kids. I’m not sure if they use—I’ve never seen them use illegal drugs before. My cousin, the male, he has maybe one or two kids, but to my knowledge, I have not—to my knowledge, they haven’t used any illegal drugs, and I have not seen them use illegal drugs.

DC: Do you remain close to those family members?

[Maj W]: I don't contact them regularly, but just because we grew up together, I'm close to them. As far as regular conversation, no, I don't.

DC: Do you have any strong opinions, either positive or negative on illegal drug use?

[Maj W]: They're wrong. They're wrong, and they should not be allowed.

DC: Should not be allowed how, sir?

[Maj W]: In society, the Air Force—it disrupts families. That's just how I feel about it.

Capt C was also individually questioned. Pertinent inquires and responses were as follows:

ATC: Sir, based on one of your answers, one of the questions I gave you was—[a]re you close with anyone who was involved with illegal drugs? You answered affirmatively. Could you please expound on that a little more?

[Capt C]: Yes. I had an uncle that—he used to have a cocaine habit, but he's been clean for years.

ATC: Do you know how many years, about?

[Capt C]: I'd say pushing ten years now.

ATC: First off, are you close to this uncle?

[Capt C]: Yes.

ATC: Were you close to him back then?

[Capt C]: Not geographically then, but we stayed in touch. He lives over in Arkansas now so I see him on occasion when we go—I've got several aunts and uncles in the northwestern Arkansas area so I see him now. I didn't see him that often then. He's my mother's youngest brother.

ATC: Sir, did anything happen to your uncle as far as being arrested ever?

[Capt C]: No.

ATC: Did his cocaine habit affect his life?

[Capt C]: Very much so.

ATC: How was that?

[Capt C]: He has two ex-wives and two sons that he hasn't talked to in about as many years, ten years. It was very destructive on his family.

ATC: Based on that experience, do you [have] an opinion on illegal drugs?

[Capt C]: I think they are illegal for a reason, and I think people need to obey the law, civilian and military. I am opposed to their use.

ATC: Now, sir, even with that opinion, can you separate your experience with your uncle? Can you set that aside and give the accused, Airman Farrow, a fair hearing based on the facts that are presented to you today?

[Capt C]: Yes, I can. I can separate those two incidents.

Defense counsel then questioned Capt C as follows:

DC: Just to follow up on what counsel discussed with you, you mentioned that this was your mom's youngest brother?

[Capt C]: Correct.

DC: Did this have any impact upon your mother?

[Capt C]: I mean we were all, obviously, disappointed. That's not the route you want to see any family member take, and she's kind of the matriarch. She's the oldest of five so, obviously, a big disappointment to her.

DC: Are you close to your mom?

[Capt C]: Very close.

DC: Did the fact that—I'll get to how it affected you, personally, after I ask this. How it affected your mom, did that have any impact upon you?

[Capt C]: Well, it was just a like reaction. I guess we just hated to see him going down this path in his life.

DC: Then what impact did it have on you, seeing your uncle like that?

[Capt C]: Well, I knew I didn't want to end up like that.

DC: You said that he had a habit or a problem?

[Capt C: Affirmative response.]

DC: Were you at all familiar with the intricacies of how bad or how low the habit was or—

[Capt C]: No, I was young at the time—teenager, teenage years. I mean specifics, no, I didn't know, you know, what he spent or where he got it. Details like that I don't know. I just know that he was an avid—or I guess you could say an addicted user of cocaine.

DC: You said your family was disappointed because of the path that he was taking and what was happening. What was your uncle going through? What happened?

[Capt C]: Well, as I stated earlier, he lost his family at the time. He lost a job. He just had many years of a tough road getting back on track. He's doing great now, by the way.

DC: You mentioned that he still doesn't speak to his family members. Is that correct?

[Capt C]: Well, his two sons in North Carolina. His ex-wife has been very effective in keeping them apart.

DC: Do you know why she keeps them apart?

[Capt C]: It was a bitter divorce, and it's between them, other than I just think they split on poor terms.

DC: Do you have interaction with those cousins of yours?

[Capt C]: None.

The defense challenged both Maj W and Capt C for cause based on implied bias. Defense counsel argued that because Maj W had multiple family members involved with drug use, "if someone was reviewing this objectively, there would be a concern from the public perception." Defense counsel also noted Maj W opined that drug use was illegal not only in society but also in the Air Force and was disruptive to families. Likewise, defense counsel argued that Capt C had a close relationship with a former addict and saw the destruction that drugs cause for abusers and their families.

The military judge denied the challenge for cause against Maj W, but granted it against Capt C. He provided the following explanation:

First, concerning [Maj W], there is no challenge on actual bias, and I find no actual bias. On implied bias, I, obviously, carefully observed and listened to his responses. I was struck by how remote in time these incidents were for him. He specifically mentioned five or six years old a couple of times. That was, obviously, years ago, and that he did not equivocate at all in answering that this would have no impact on his decision in this trial concerning Airman Farrow. I saw no uncertainty in his demeanor or any hesitation in his answers, and I find that a reasonable disinterested person who had the opportunity I did to see and hear those responses would not have any substantial doubt as to the legality, fairness and impartiality of the trial. Of course, I am aware that I have to consider the liberal grant mandate and I have done so, but I don't find a challenge for cause based on implied bias lies with [Maj W].

Concerning [Capt C], as with [Maj W], I did, of course, carefully listen to his responses. Unlike [Maj W], whose family incidents seemed somewhat remote, if you will, [Capt C] caused me some concern in that these problems brought on by his uncle's cocaine addiction continue to affect the family. He appeared to know quite a bit about his mother's feelings about this and referenced the tough divorce that his uncle went through, the distance with the cousins and all these things. Unlike [Maj W, Capt C's] issue with his uncle on an implied bias basis seems to still resonate with him.

Based on that and applying the liberal grant mandate, I am going to grant on [Capt C]. Again, the key difference between the two, [Maj W]—his family issues seem quite remote and I saw no hesitancy at all in him saying that it didn't matter in this proceeding. [Capt C], on the other hand, his discussion about his uncle indicated that this still does, in my opinion, weigh on him and could have an impact. So on an implied [bias] basis, I'm going to grant the challenge on [Capt C].

The defense exercised its peremptory challenge against a different member of the panel.

Challenge of Maj W

An accused has a constitutional and regulatory right to a fair and impartial panel. *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004) (citing *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001)). Rule for Courts-Martial (R.C.M.) 912(f)(1)(N) provides: "A member shall be excused for cause whenever it appears that the member . . . [s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." The burden for establishing grounds for a challenge is "upon the party making the challenge." R.C.M.

912(f)(3). “Because ‘a challenge for cause for actual bias is essentially one of credibility,’ the military judge’s decision is given ‘great deference’ because of his or her opportunity to observe the demeanor of court members and assess their credibility” *United States v. Miles*, 58 M.J. 192, 194-95 (C.A.A.F. 2003). However, we give less deference to a military judge’s finding of implied bias because a finding on implied bias is objectively “viewed through the eyes of the public, focusing on the appearance of fairness.” *Strand*, 59 M.J. at 458 (quoting *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998)). “[I]mplied bias exists when, regardless of an individual member’s disclaimer of bias, ‘most people in the same position would be prejudiced [i.e. biased].’” *Id.* at 459 (second alteration in original) (quoting *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000)). “A military judge’s determinations on the issue of member bias, actual or implied, are based on the ‘totality of the circumstances particular to [a] case.’” *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007) (alteration in original) (quoting *Strand*, 59 M.J. at 456).

Based on the totality of the circumstances, we have no difficulty concluding the military judge did not abuse his discretion in denying defense counsel’s request to excuse Maj W for implied bias. Our superior court has determined there is no per se disqualification when an individual, or that individual’s family member or close friend, has been the victim of a crime similar to the one charged against the appellant. *Terry*, 64 M.J. at 303 (interpreting *United States v. Velez*, 48 M.J. 220, 223-24 (C.A.A.F. 1998)) (“[T]he fact that a member was close to someone who had been a victim of a similar crime is not grounds for per se disqualification.”); *United States v. Brown*, 34 M.J. 105, 110-11 (C.M.A. 1992) (the father of a victim of homosexual assault was not disqualified in a consensual sodomy case). Likewise, “[m]ere distaste for certain offenses is not automatically disqualifying.” *United States v. Schlamer*, 52 M.J. 80, 92 (C.A.A.F. 1999) (citing *United States v. Bannwarth*, 36 M.J. 265, 268 (C.M.A. 1993)).

In making his decision, the military judge specifically noted that a significant period of time had elapsed since members of Maj W’s family were involved in drug use, occurring when Maj W was only five or six years old. Further, there was no evidence these incidents were continuing to negatively impact Maj W or would adversely influence his ability to impartially sit as a court member. Likewise, Maj W neither equivocated on his answers nor indicated an inelastic predisposition to a particular sentence. *See United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007) (citing R.C.M. 912(f), Discussion). He indicated clearly that he would apply the military judge’s instructions and would not be influenced by the events that took place in his youth. Considering the totality of the circumstances in this case, including the military judge’s clear contemplation of both the remoteness in time and lack of continuing impact upon the member based on Maj W’s candid responses to both trial and defense counsel regarding the impact of drug use on his family, we find no reason to disturb the military judge’s conclusions as to Maj W’s fitness to serve on the appellant’s court-martial.

We note the military judge expressly indicated that he applied the liberal grant mandate when making his decision on whether to grant the defense counsel's challenges. A military judge who addresses implied bias by applying the liberal grant mandate on the record will receive more deference on review than one who does not. *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002) ("While not required, where the military judge places on the record his analysis and application of the law to the facts, deference is surely warranted."). As our superior court stated, "in the absence of actual bias, where a military judge considers a challenge based on implied bias, recognizes his duty to liberally grant defense challenges, and places his reasoning on the record, instances in which the military judge's exercise of discretion will be reversed will indeed be rare." *Clay*, 64 M.J. at 277; *but see United States v. Leonard*, 63 M.J. 398, 403 (C.A.A.F. 2006); *Wiesen*, 56 M.J. at 177.

The fact the military judge granted defense counsel's challenge for cause against Capt C merely reinforces our determination that he correctly applied the implied bias standard with respect to Maj W. After hearing Capt C's responses to the voir dire questions, the military judge believed Capt C continued to be adversely affected by his uncle's drug use. He specifically noted, "unlike [Maj W, Capt C's] issue with his uncle on an implied bias basis seems to still resonate with him. . . . [H]is discussion about his uncle indicated that this still does, in my opinion, weigh on him and could have an impact." It is obvious to us that the military judge understood the liberal grant mandate, carefully weighed the statements of both Maj W and Capt C, and made an informed and well-reasoned decision involving potential bias for both members.

Having reviewed the entire record, we are convinced an objective observer viewing appellant's court-martial would not call into question the fairness or integrity of the sentence as a result of Maj W's inclusion on the panel. In short, nothing about Maj W's particular circumstances suggest that he exhibited any bias, either actual or implied, against the appellant. Therefore, we find no error in the military judge's denial of the challenge for cause against Maj W.

Conclusion

The approved findings and sentence are correct in law and fact.

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 the sentence are

AFFIRMED.

OFFICIAL



A handwritten signature in blue ink, appearing to read "S. Lucas", is written over a faint, light blue circular stamp or watermark.

STEVEN LUCAS
Clerk of the Court