UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman BRIAN A. JOHNSON
United States Air Force

ACM 36909

17 December 2008

Sentence adjudged 18 October 2006 by GCM convened at Buckley Air Force Base, Colorado. Military Judge: Maura T. McGowan.

Approved sentence: Dishonorable discharge, confinement for 1 year, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major John N. Page, Captain Griffin S. Dunham, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Donna S. Rueppell, and Captain Coretta E. Gray.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

PER CURIAM:

In accordance with his pleas, the appellant was convicted by a general court-martial of one specification of wrongfully using cocaine on divers occasions and one specification of wrongfully leaving the scene of an automobile accident without making his identity known, in violation of Articles 112a and 134, UCMJ, 10 U.S.C. §§ 912a, 934. A panel of officer members sentenced the appellant to a dishonorable discharge, one year of confinement, forfeiture of all pay and allowances, reduction to E-1, and a reprimand. The convening authority approved the sentence as adjudged.

The appellant assigns two errors on appeal. First, he asks this Court to find that the military judge erred in denying the trial defense counsel's challenge for cause against Colonel (Col) A. Second, he asserts that the inclusion of a dishonorable discharge in his sentence renders the sentence inappropriately severe. We find merit in the second assignment of error only, and approve the findings, but modify the sentence.

Background

The appellant plead guilty to cocaine use on divers occasions and fleeing the scene of an accident where he left an uninjured bicyclist on the road.[1] During voir dire, Col A disclosed that he was a police officer after he graduated from college and prior to serving on active duty.[2] He also stated that he had a favorable disposition toward law enforcement personnel "because they're needed." He later clarified that he would not give extra credibility toward law enforcement personnel simply because they are law enforcement. Trial counsel asked the members if they knew or had contact with any of the witnesses, including an Airman Basic (AB) M. Col A and the other members indicated that they did not know AB M. Neither party initially challenged Col A.

During sentencing, the government called AB M as their first witness. He testified that after failing his own drug test, he agreed to act as a government informant in order to avoid being court-martialed.[3] AB M admitted that he worked with law enforcement to set up an operation at his girlfriend's apartment. After the appellant and several other airmen used cocaine at the apartment, law enforcement officials came through the door and arrested the appellant.

As the government's second witness, the bicyclist who had been hit by the appellant, took the stand, another court member, Major (Maj) W, informed the court that he realized he had been a victim of a "hit and run" in college but forgot about the incident during voir dire. During an immediate session pursuant to Article 39(a), UCMJ, 10 U.S.C. § 839(a), the military judge granted the trial defense counsel's challenge for cause and excused Maj W from the proceeding.

Almost immediately after Maj W was excused, Col A asked to be heard and made the following statement:

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[1] The bicyclist testified at the sentencing proceeding about how he was riding his bike on the left side of the road when the appellant struck him and his bike with a car. After being struck by the car, the bicyclist stood up and banged on the appellant's window, telling him that he would record his license plate if he drove off. The bicyclist was surprised to find that he was not injured.

[2] Colonel (Col) A clarified that he was actually on "beach patrol" and that beach patrol did not have any serious crimes. Although no law enforcement personnel testified during the appellant's court-martial, we weighed this information in determining whether the military judge erred in denying the appellant's challenge of Col A. *See United States v. Strand*, 59 M.J. 455, 456 (C.A.A.F. 2004) (challenges for implied bias are evaluated under the totality of the circumstances).

[3] Airman Basic (AB) M received punishment under Article 15, UCMJ, 10 U.S.C. § 815.

> MEMBER [Col A]: Your Honor, may I ask -- I have a statement to make before he continues his testimony. My name is [Col A]. During the voir dire process earlier, the question was asked if I had prior information about any drug case regarding what happened with -- uh, the last name for some reason -- [M]. I did have a conversation with -- I think it was the last trial, I was coming into work and I think it was the presiding judge in that case and another member of the legal office walked out. We had this conversation about how'd it go, what happened that kind of conversation -- normal banter -- the normal excitement afterwards. I don't know -- for some reason his name started flagging that conversation during that process.

The military judge excused the members so that counsel could conduct an individual voir dire of Col A. The following colloquy occurred between the trial defense counsel and Col A:[4]

> DC: [W]hat was the nature of that discussion?
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> MEMBER (Colonel A): Just knew there was a trial going on, court members were involved -- just completed and they were walking out and I noticed Captain [A], and I just said, "Hey, how'd it go?"
>
> DC: What triggered you about [AB M] then?
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> MEMBER [Colonel A]: I do not know that fact. I don't know if that name was brought up -- I was recollecting back and perhaps it was during voir dire, if we had any prior information regarding that -- that I was considering, going back in memory and I just remembered a discussion of a drug case -- a discussion with the 566th [Information Operations Squadron] and I cannot separate the difference where I saw his name up in lights, regarding during the Wing Standup Status Discipline briefings for association with that case.[5]

Additionally, Col A stated that "maybe [Maj] [W] had the same," indicating that he may have thought Maj W was released from the panel because he too recognized the name.

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[4] Col A did not say that he recognized AB M's name, only that he recognized his surname. The discussions therefore surrounded Col A's belief that he recognized AB M's surname.

[5] Both AB M and the appellant were assigned to the 566th Information Operations Squadron at Buckley Air Force Base, Colorado.

Col A further stated that he did not discuss AB M's case with the commander of the 566th Information Operation Squadron, nor did he discuss the details of the case with Captain A or the military judge. He further stated that during the Status of Discipline briefings every month, personal information was not discussed; slides only identified individuals and actions taken.

Col A was excused and the trial defense counsel challenged him based on "one comment." Specifically, the trial defense counsel noted Col A's account of his passing encounter with a trial counsel and military judge following a recent court-martial, which the trial defense counsel described as "a discussion . . . [about] the success they had had." The record indicates the trial defense counsel's focus was on Col A's alleged use of the word "success." Col A was recalled and questioned about using the word "success." Col A did not recall using the word "success," and, in our review of the record, we do not find that Col A used the word "success" in relating his encounter. He did agree with the trial counsel that he viewed a "success" in the context of a court-martial as "a completely impartial and fair hearing where the evidence is played and whatever decision is made as long as the process was followed." Col A also put the conversation with the military judge and trial counsel in the context of making small talk and stated he did not know any of the details of the trial. The trial counsel objected to the challenge and stated that Col A had been properly rehabilitated, noting that Col A did not recall using the word "success," and that Col A agreed "a success is a completely fair and impartial hearing for the accused." The military judge denied the defense challenge of Col A without going into a complete analysis on the record, instead stating she would "adopt the government's position."

Discussion

I. Challenge for Cause

The appellant contends that the military judge abused her discretion when she denied the appellant's challenge for cause against Col A when he stated that he had a law enforcement background, that he realized he had some prior knowledge of one of the main witnesses against the appellant, and that he had briefly spoken with a military judge and a trial counsel following a prior court-martial.

A court member must be removed for cause when the removal is "in the interest of having the court-martial free from substantial doubt as to legality, fairness and impartiality." Rule for Courts-Martial (R.C.M.) 912(f)(1)(N). Our superior court has applied two separate legal tests, actual and implied bias, when interpreting this mandate. *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004). Actual bias is bias that "will not yield to the evidence presented and the judge's instructions." *United Sates v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997) (quoting *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987)). Actual bias is viewed "subjectively, 'through the eyes of the

military judge.'" *United States v. Warden*, 51 M.J. 78, 81 (C.A.A.F. 1999) (quoting *Napoleon*, 46 M.J. at 283). By contrast, implied bias is viewed objectively, through the eyes of the public, and exists where "most people in the same position would be prejudiced." *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996) (quoting *United States v. Smart*, 21 M.J. 15, 20 (C.M.A. 1985)).

Standard of Review

A military judge's denial of a challenge for cause will be reviewed for an abuse of discretion. *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005) (citing *United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000)). Military judges are afforded a high degree of deference on rulings involving actual bias. *Id.* (citing *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001)). "By contrast, issues of implied bias are reviewed under a standard less deferential than abuse of discretion but more deferential than de novo." *Id.* (citing *Strand*, 59 M.J. at 455). However, "deference is warranted only when the military judge indicates on the record an accurate understanding of the law and its application to the relevant facts." *United States v. Briggs*, 64 M.J. 285, 287 (C.A.A.F. 2007) (citing *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002)).

Actual Bias

A military judge's ruling on actual bias is afforded great deference "because 'the military judge has an opportunity to observe the demeanor of court members and assess their credibility during voir dire'" and such a challenge involves "judgments regarding credibility." *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007) (quoting *Daulton*, 45 M.J. at 217). After the voir dire following Col A's revelation that AB M's surname was familiar to him and that he had a passing conversation with a member of the legal office and a military judge after another case, Col A again affirmed that he could adjudicate this case based solely on the evidence presented and the military judge's instructions. Col A's statements, including his inability to articulate exactly how he knew of AB M's surname, lead us to conclude that the issue in this case is not one of actual bias, but one of implied bias.

Implied Bias

Implied bias is an objective test, "viewed through the eyes of the public, focusing on the appearance of fairness." *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998) (citing *United States v. Dale*, 42 M.J. 384, 386 (C.A.A.F. 1995)). Due to this, a military judge's denial of challenges based on implied bias are afforded less deference on appeal than rulings on actual bias. *Id.* (citing *Napoleon*, 46 M.J. at 283).

Our superior court has generally found that "when there is no actual bias, 'implied bias should be invoked rarely.'" *Strand*, 59 M.J. at 458 (quoting *Warden*, 51 M.J. at 81-

82). There is no requirement for "a new trial every time a juror has been placed in a potentially compromising situation." *Strand*, 59 M.J. at 458 (quoting *United States v. Lavender*, 46 M.J. 485, 488 (C.A.A.F. 1997) (additional citations omitted)).

The trial defense counsel challenged Col A's presence on the panel because of his alleged use of the word "success" in describing the results of another court-martial when he was voir dired by the trial counsel. The military judge did not put her reasoning on the record when she denied the objection. Since the military judge did not articulate for the record her understanding and application of the law and specifically the liberal grant standard, we do not give her ruling the deference that it would have been given if she had properly articulated her reasoning for the record. *Briggs*, 64 M.J. at 287 (citing *Downing*, 56 M.J. at 422); *Clay*, 64 M.J. at 277. Our superior court has stated that while they "do not expect record dissertations," the military judge should provide a "clear signal" on the record indicating that he or she "applied the right law." *United States v. Bragg*, 66 M.J. 325, 326 (C.A.A.F. 2008) (quoting *Clay*, 64 M.J. at 277). However, despite the lack of analysis on the record, we do not find the military judge erred in denying the trial defense counsel's challenge of Col A.

Upon careful review of the record, we do not find Col A stated he even used the word "success" during his brief discussion with a trial counsel and a military judge. Instead, he merely asked them, "Hey, how'd it go." He could not recall what the outcome of that case was, or who was involved. Col A only recalled that the military judge and counsel replied that they were glad it was over and it had "been a long three days." Clearly this discussion was of no consequence to the current case. *Cf. United States v. Martinez*, No. 08-0375/AF (C.A.A.F. 13 Nov 2008) (unpub. op.) (finding inadequate rehabilitation when member's responses to military judge were qualified and hesitant, and views went directly to what type of sentence should be imposed on appellant).

Since 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," we continue our analysis. *Strand*, 59 M.J. at 456.

With respect to implied bias, we find that a "reasonable, disinterested [member of the public] would not see unfairness" in Col A's continued presence on the panel. *Napoleon*, 46 M.J. at 283 (quoting *United States v. Napoleon*, 44 M.J. 537, 541 (A.F. Ct. Crim. App. 1996)). Col A's prior knowledge of AB M was limited and general (that his name sounded familiar and that he may have heard AB M's surname in a Status of Discipline briefing), and it certainly did not exceed the scope of what was brought out during AB M's testimony.[6] Col A's prior law enforcement experience as a police officer

[6] During AB M's testimony, he openly discussed his involvement in drugs and that he had a "deal" with the government in order to receive punishment under Article 15, UCMJ, and avoid his own court-martial for drug use.

in his home town was minimal and no cause for challenge during voir dire. The argument that he allegedly used the word "success" when briefly exchanging comments about an unrelated court-martial does not rise to the level of exposing an implied bias on the part of this member.

We find that when discussing his previous interaction with a military judge and trial counsel, Col A was merely giving the court a candid statement, especially when viewed in context: moments earlier, another member had been excused for recalling a detail he had forgotten during voir dire, which prompted Col A to disclose that he, too, had his memory jogged, and proceeded to relate any and all potentially relevant information he had to the court.

We find that Col A was properly rehabilitated, as it was clear from the record that: 1) he did not really know how AB M's surname fit into either his brief discussion with the military judge and trial counsel, or the Status of Discipline briefings; 2) he would adjudicate this case on a fair basis; 3) he would be able to judge the appellant based solely on evidence presented in the case and the instructions of the military judge; and 4) his experience as a police officer "on beach patrol" in his home town for a few months would not cause him to favor one side over the other in the appellant's case.

We find this set of circumstances to be different from a case in which a member displays an inelastic attitude toward punishment, or has a strong bias for or against a witness in findings. Unlike the situation in *Clay*, Col A's comments did not go to the issue of credibility or to the issue of what sentence, if any, should be imposed on the appellant. Under these circumstances, we hold that the military judge did not abuse her discretion in denying the challenge of Col A.

For all the reasons stated above, Col A's statements would not cause a member of the public to doubt Col A's fairness or impartiality, and therefore, we do not find error.

II. Sentence Severity

This Court may affirm only so much of the findings and sentence as we find correct in law and in fact, and determine, on the basis of the entire record, should be approved. Article 66(c), UCMJ, 10 U.S.C. § 866(c). When considering sentence appropriateness, we should give "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

We possess de novo power for sentence review and may substitute our judgment for that of the trial court where we conclude that the sentence is inappropriately severe. *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). The appellant asserts that his

sentence to a dishonorable discharge is inappropriately severe. In support, he highlights the fact that he was twenty-two years old when he was convicted and he already served a fairly severe sentence of one year in confinement for his particular crimes. After careful consideration, we agree.

Our superior court has concluded that the Courts of Criminal Appeals have the power to, "in the interests of justice, substantially lesson the rigor of a legal sentence." *United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002) (quoting *United States v. Lanford*, 20 C.M.R. 87, 94 (C.M.A. 1955)).

A dishonorable discharge is the most severe form of punitive discharge. R.C.M. 1003(b)(8)(B) provides that "[a] dishonorable discharge should be reserved for those who should be separated under conditions of dishonor, after having been convicted of offenses usually recognized in civilian jurisdictions as felonies, or of offenses of a military nature requiring severe punishment." We note that the appellant's act of leaving the scene of an accident is a serious offense under the circumstances, and we are reluctant to disturb any sentence adjudged by members. We also note, however, that the maximum punishment for an Article 134, UCMJ, charge of fleeing the scene of an accident includes a bad-conduct discharge, not a dishonorable discharge. Given the appellant's conviction of an Article 112a, UCMJ, offense (divers uses of cocaine), a dishonorable discharge is a lawful option. However, while we are satisfied that the appellant deserves a punitive discharge, after a careful review of the entire record of trial, we conclude the appellant's sentence to a dishonorable discharge is inappropriately severe.

Conclusion

The findings and the sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). However, we affirm only so much of the sentence as includes a bad-conduct discharge, confinement for one year, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

Accordingly, the findings, as approved, and sentence, as modified, are

AFFIRMED.

Judge BRAND did not participate.

OFFICIAL

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