UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CARL L. KEY
United States Air Force

ACM 34965 (f rev)

12 July 2006

Sentence adjudged 24 October 2001 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: Rodger A. Drew, Jr. and Jennifer A. Whittier (*DuBay* hearing).

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Colonel Carlos L. McDade, Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Terry L. McElyea, Major Jennifer K. Martwick, and Captain Christopher S. Morgan.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Gary F. Spencer, Lieutenant Colonel Lance B. Sigmon, Lieutenant Colonel Robert V. Combs, Major Shannon J. Kennedy, Major Kevin P. Stiens, and Major Steven R. Kaufman.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

STONE, Senior Judge:

A panel of officer and enlisted members convicted the appellant of a single wrongful use of ecstasy,[1] and on 24 October 2001, sentenced him to a bad-conduct

[1] *See* Article 112a, UCMJ, 10 U.S.C. § 912a.

discharge and reduction to the grade of E-1. His case is before us on further review. In our initial consideration of this case, this Court: (1) concluded the military judge did not err in admitting uncharged misconduct against the appellant and (2) denied the appellant's request for post-trial discovery. *United States v. Key*, ACM 34965 (A.F. Ct. Crim. App. 29 Oct 2003) (unpub. op.).

The appellant raised both issues in a petition to the Court of Appeals for the Armed Forces (CAAF). On 6 May 2004, CAAF granted review on one of the issues, specifically:

> WHETHER APPELLANT IS ENTITLED TO POST-TRIAL DISCOVERY IN ORDER TO DETERMINE WHETHER HE IS ENTITLED TO A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE THAT THE PRIMARY PROSECTUION WITNESSS WAS PAID BY THE AIR FORCE OFFICE OF SPECIAL INVESTIGATIONS FOR HER TESTIMONY.

United States v. Key, 60 M.J. 43 (C.A.A.F. 2004).

On 10 March 2005, CAAF concluded that post-trial discovery "would have produced information relevant to whether Appellant should be granted a new trial and that additional discovery is necessary." *United States v. Key*, 61 M.J. 52 (C.A.A.F. 2005). Accordingly, our superior court returned the record of trial to the Judge Advocate General of the Air Force for a hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967). The *DuBay* hearing was held on 8 August 2005, and on 6 February 2006, the appellant filed a brief with this Court with the following assignments of error:

> I.
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> WHETHER THE MILITARY JUDGE ERRED BY NOT PERMITTING THE DEFENSE, AT A FACT FINDING HEARING, TO CALL APPELLANT'S PRIOR TRIAL DEFENSE COUNSEL TO TESTIFY AS TO HIS PRETRIAL INTERVIEW OF THE GOVERNMENT'S CONFIDENTIAL INFORMANT.
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> II.
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> WHETHER APPELLANT IS ENTITLED TO A NEW TRIAL.

After the *DuBay* hearing, the appellant's initial trial defense counsel submitted an affidavit to this Court explaining in detail what he would have testified to at the post-trial hearing had he been allowed to do so. We granted the appellant's motion to submit the

affidavit and will consider the affidavit to resolve the issue of whether the appellant is entitled to a new trial. Consequently, Issue I is moot.

Trial Proceedings

On 26 April 2001, the appellant's entire squadron was assembled and ordered to provide urine samples for drug testing. Tests of the appellant's urine substantiated the presence of 3,4-methylenedioxymethamphetamine, a metabolite of ecstasy, in the amount of 8322 nanograms per milliliter.[2]

The primary evidence against the appellant was scientific. A forensic toxicologist explained the scientific principles behind urinalysis drug testing. The toxicologist and other witnesses verified that proper chain of custody and handling procedures were followed. The government also presented three witnesses who testified about the appellant's nervous and agitated demeanor at the collection site on 26 April 2001.

One of these witnesses was Staff Sergeant (SSgt) L, a single mother with more than nine years of military service, who volunteered to serve as an undercover informant for the Air Force Office of Special Investigations (AFOSI) after learning that some of her squadron members might have been using drugs. She was present at the collection site and testified about a comment the appellant made that morning indicating the appellant had a guilty conscience.

She also provided testimony on a separate line of inquiry. She testified that about four weeks prior to the squadron urine inspection, she received a phone call from one of the appellant's friends. He told her the appellant had nine ecstasy pills. She testified that the appellant then got on the phone and responded affirmatively when she asked him if he had some pills. She then advised the appellant she would drive to the apartment where they were staying.

However, after hanging up, she contacted her AFOSI handlers to see if they wanted to set up an operation to obtain the ecstasy pills at his apartment. They were unable or unwilling to do so under the circumstances. SSgt L testified that, in order to avoid any suspicion about not going to the apartment, she moved her vehicle in the event the appellant or some of her friends drove by and saw her vehicle there. She further testified that after returning from moving her vehicle, she had a voice mail message stating, "[T]his is Key. I was just calling to see what was taking you so long."

[2] The Department of Defense cutoff for reporting a urine sample as positive for MDMA is 500 nanograms per milliliter.

The trial defense counsel vigorously challenged SSgt L's testimony and cross-examined her at some length. Among the things he cross-examined her about was whether she received any compensation from AFOSI. Specifically, he asked:

> Q: Did [AFOSI] ever just give you money so that you could go out and club hop?
>
> A [SSgt L]: Well, when you say give me money, you sound like as if they were paying me. They gave me money because I had to pay a babysitter, and also if I had to buy drinks for whoever was around, yes, I did get money for those things.

Trial defense counsel also submitted documents indicating AFOSI expended $206.25 on SSgt L's out of pocket expenses.

Post-Trial Proceedings

On appeal, trial defense counsel submitted an affidavit to this Court. He stated that after trial, he learned that SSgt L "was paid a significant amount of incentive money after the cases she worked were resolved." Pursuant to an order from CAAF, SSgt L elaborated on this payment through an affidavit. She stated:

> At the beginning of the cases [AFOSI] asked me if I wanted to work for them and that they would pay me to do so. I said no. Somehow, getting money for doing the right thing didn't feel right; it made me uncomfortable. As the case went along, I was given money on at least 3 different occasions. The first time I was given cash was to buy drinks at the bar and to get into the club; I ended up using the money for my first drug buy that was then immediately turned into the [AFOSI]. The second time I was given money to buy drugs, it was $80 dollars. The last time I was given money, it was to buy a large amount of drugs. That was when everyone was arrested.
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> [] During the time that I was working for [AFOSI], I was informed by [AFOSI], that I could get reimbursed for baby-sitting fees; I did not file for anything. It felt very uncomfortable to do so. When everyone was punished, I did receive a surprise from [AFOSI], they gave me some money, and I signed for it. I wasn't sure why, I was told it was for a job well done. I am not sure of the amount, but it was not a lot of money, maybe $100.

This affidavit prompted CAAF to order a *DuBay* hearing. At this hearing, SSgt L and three special agents from AFOSI testified.

Discussion

a. *Summary of Evidence*

Taking into account the entire record of trial, to include the trial defense counsel's post-*DuBay* hearing affidavit, the following is a summary of the relevant evidence needed to determine whether the appellant is entitled to a new trial.

1. SSgt L recognized the difference between reimbursement and incentive pay after she agreed to become an informant and before she engaged in any undercover activities. She reached this understanding after her initial meeting with two special agents from the AFOSI.

2. However, SSgt L was emphatic she did not want to be paid for her services as an informant. Because she believed she made it clear to her AFOSI handlers that she would refuse an incentive payment, she thought the possibility of receiving an incentive payment was a "dead issue."

3. Three of the four special agents who worked with SSgt L testified at the post-trial hearing. These three witnesses said they never advised SSgt L she might be eligible for an incentive payment until after all of the investigations and trials involving military members were completed.

4. SSgt L believed it was the fourth agent who informed her of incentive payments at her initial meeting. This agent retired soon after that initial contact and was not called to testify at the post-trial hearing. The other agent who was present at this initial meeting testified there was no discussion about the incentive payment.[3]

5. From the beginning, SSgt L felt "uncomfortable" with receiving any money for her undercover activities, to include both incentive and reimbursement payments. She never asked for reimbursement for her expenses. However, when later offered money to reimburse her out-of-pocket expenses, she accepted.

6. SSgt L also never asked for any incentive payments. The issue of incentive payments did not come up after her initial meeting with her AFOSI handlers until all the prosecutions arising out of her undercover work were completed. At a termination

[3] Despite various inconsistencies in the testimony provided by SSgt L, the special agents, and the trial defense counsel concerning the payment of incentive monies, the military judge who conducted the *DuBay* hearing concluded these inconsistencies were not the product of dishonesty. Rather, she believed they were due to differing recollections, the passage of time, and individual perceptions of events.

meeting with her handling agents, she received approximately $120 to $300 in cash as an incentive payment. She was "shocked" and "surprised" because it was not something she expected. Despite her previous position that she did not want to be "paid" for her work, she accepted the money because of the hardship her volunteer efforts had placed on her and her family.

7. Prior to the affidavit she provided pursuant to CAAF's order, SSgt L had not revealed her belief that she had been offered to be "paid" incentive money at her first meeting with AFOSI agents. She did not do so because she believed incentive pay was a "dead issue" and no one specifically asked her about it.

8. Trial defense counsel did not recall specifically asking SSgt L if she had been offered an incentive payment prior to trial, but believed the nature and extent of his pretrial inquiries were "designed such that responsive answers would have elicited from [SSgt L] that the [AFOSI] had offered to pay her." In his pretrial interview with trial defense counsel, SSgt L "firmly denied she was going to get anything beyond expenses." The trial defense counsel's pretrial interviews with one of the agents "corroborated" what he learned in this interview.

b. Law

Article 73, UCMJ, 10 U.S.C. § 873 establishes the statutory basis for granting a new trial on the grounds of newly discovered evidence. This provision is further implemented through Rule for Courts-Martial (R.C.M.) 1210(f), which provides:

> (2) *Newly discovered evidence*. A new trial shall not be granted on the grounds of newly discovered evidence unless the petition shows that:
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> (A) The evidence was discovered after the trial;
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> (B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and
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> (C) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

"[R]equests for a new trial, and thus rehearings and reopenings of trial proceedings, are generally disfavored. Relief is granted only if a manifest injustice would result absent a new trial, rehearing, or reopening based on proffered newly discovered evidence." *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993). In carrying out this task, we

do not determine whether the proffered evidence is true, nor do we determine the historical facts. *United States v. Brooks*, 49 M.J. 64, 69 (C.A.A.F. 1998). We merely decide if the evidence is sufficiently believable to make a more favorable result probable. *Id. See also United States v. Johnson*, 61 M.J. 195, 199 (C.A.A.F. 2005) (holding military judge did not abuse his discretion in denying a request for a new trial even if newly discovered evidence amounted to substantial impeachment material or potential perjury by witnesses). We next turn to an application of these standards and rules.

c. *Analysis*

Based upon SSgt L's affidavit previously submitted to CAAF, as well as her testimony at the *DuBay* hearing, we readily conclude that the appellant has met his burden of establishing that SSgt L was aware that it was possible to receive an incentive payment from AFOSI and that she knew of this possibility prior to engaging in informant activities and before testifying at the appellant's trial. We further conclude the appellant has established that his counsel exercised due diligence in attempting to seek this information. Finally, we conclude this information was relevant to the appellant's defense at trial because it would have been admissible to impeach SSgt L at trial by establishing a possible financial motive for testifying against the appellant. Thus, we proceed to the next relevant inquiry under R.C.M. 1210(f) to determine whether, in light of all other pertinent evidence, this newly discovered evidence would have probably produced a substantially more favorable result for the appellant.

We begin by noting that the appellant challenged the government's case by contesting the reliability of the drug collection and testing process, but did not make much headway in identifying any serious errors or omissions. He also raised an innocent ingestion defense. In this regard, his long-time girlfriend testified that on the night prior to the squadron inspection, she and the appellant were at a bar where the appellant engaged in a night of heavy bourbon drinking. The girlfriend said the appellant complained of a headache, and she obtained what she believed were two aspirins from an unknown bar patron and gave them to the appellant. The conclusion the defense hoped to draw from this testimony was that the pills the girlfriend gave the appellant were actually ecstasy, unbeknownst to him.

In terms of the demeanor evidence provided by SSgt L, there were two other witnesses who provided similar testimony. Thus, we find the newly discovered evidence would have had minimal impeachment value as to this evidence because it was cumulative to the testimony of others.

We turn next to SSgt L's testimony concerning the late-night telephone call wherein the appellant and his friend asked SSgt L to come over to their apartment because the appellant had some ecstasy pills. SSgt L's testimony on this point was bolstered by testimony from the AFOSI agent she talked to that night indicating she made

a prior consistent statement about the telephone call. Moreover, the trial defense counsel thoroughly covered SSgt L's receipt of more than $200 in reimbursement for her expenses, so the potential for some financial gain to allow her to gain entry into bars and buy drinks had already been explored at trial. Finally, in assessing the impact of this newly discovered evidence, we have taken into account that its probative value is diminished by virtue of her likely testimony that she refused the initial offer of an incentive payment and that she was "shocked" when the agents provided her additional cash at the termination meeting. Even though, at trial, SSgt L was aware of the concept of incentive payments and that the possibility existed for her to be "paid" for her performance as an undercover informant, the effect of that potential cross-examination would have been minimized because: (1) she had consistently maintained that payment of any sort made her "uncomfortable"; (2) she initially refused to consider any kind of payment for her undercover efforts; and (3) she believed that the possibility of an incentive payment was a "dead issue."

In view of the overall solid evidence concerning the urinalysis testing, the demeanor evidence from witnesses other than SSgt L, and the relatively minimal impact the newly discovered evidence would have had in impeaching SSgt L's testimony concerning the telephone conversations involving the appellant, the newly discovered evidence fails to meet the criteria set forth in R.C.M. 1210(f) and the precedent of our superior court. We therefore conclude that it is not probable, in light of all other pertinent evidence, that the newly discovered evidence would have produced a substantially more favorable result for the appellant. The appellant is not entitled to a new trial.

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 findings and sentence are

AFFIRMED.

Judge Smith participated in this decision prior to his reassignment.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator