UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CHRISTOPHER M. KHAMIR
United States Air Force

ACM 35374

25 January 2005

Sentence adjudged 7 June 2002 by GCM convened at Yokota Air Base, Japan. Military Judge: David F. Brash.

Approved sentence: Bad-conduct discharge, confinement for 30 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Antony B. Kolenc.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major Kevin P. Stiens.

Before

ORR, GRANT, and ZANOTTI
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

ZANOTTI, Judge:

The appellant was tried by a general court-martial composed of officer and enlisted members at Yokota Air Base, Japan. Pursuant to his plea, the military judge found the appellant guilty of willfully disobeying an order of his superior commissioned officer, in violation of Article 90, UCMJ, 10 U.S.C. § 890. Additionally, the panel of members found him guilty of stealing golf clubs and assorted golf equipment, and unlawful entry into a store owned by the 374th Services Division, specifically the Par 3

Golf Course,[1] in violation of Articles 121 and 130, UCMJ, 10 U.S.C. §§ 921, 930. The court members sentenced him to a bad-conduct discharge, confinement for 30 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the adjudged sentence.

The appellant appeals his conviction on three grounds. First, he contends the military judge erred in denying his challenge for cause against a court member. Second, he argues that he was illegally punished under Article 13, UCMJ, 10 U.S.C. § 813, by not being offered the opportunity to participate in a medical evaluation board (MEB) solely because he was facing court-martial charges. Third, he argues that he was prejudiced when the military judge did not sua sponte declare a mistrial after a prosecution witness commented on his right to refuse consent to a search of his automobile.[2] We find no merit to these assignments of error for the reasons set forth below and affirm.

Challenge for Cause

During voir dire, the assistant trial defense counsel questioned the members on the degree of credibility they would attribute to certain witnesses based solely on their status as security forces members. He asked the members, "Is there anyone else here who would believe that a Security Forces member is more credible based solely on their status alone, than another witness?" One member, Lieutenant Colonel (Lt Col) Haefner, was individually questioned by the military judge about his response:

> MJ: All right. Based upon what the prosecutors told us, apparently there may be some folks who are Security Forces members or Security Forces investigators that testify. If they take the stand, are you likely to give their testimony any more or less credibility based solely upon their status as a Security Forces member or investigator?
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> HAEFNER: From a standpoint that they are trained in observation and things of that nature--over and above someone who--you know an average person. In general, that's where I would--I would expect them to present the evidence in a more solid way, I guess, than just I think or I suspect, or I imagine or things like that. So I think from that aspect. Not the fact that they are--you know more from the training, more from the profession, if you will.
>
> MJ: Okay.
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> HAEFNER: Than the individual themselves.

[1] The Par 3 Golf Course is Yokota Air Base's "Pro" shop, in which golfing merchandise is displayed for purchase.
[2] The second and third issues are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

MJ: And I want to make sure I am clear. It sounds like you draw a distinction between their ability to utilize their training in marshaling the evidence, and whether or not they are more believable than somebody else. Do you see a distinction there?

HAEFNER: Yes. Yes, Sir.

MJ: Okay.

HAEFNER: I sure do. And I wouldn't say that they are any more believable. I guess my expectation would be that they would have done their homework.

MJ: Sure.

HAEFNER: More so than an average person.

MJ: Understood.

HAEFNER: So I think from that aspect, again. Not that they are any more believable.

MJ: In evaluating the testimony of any witness, I assume though that you consider their perspective as they viewed something; the time that has passed; prior statements, if any; things like that?

HAEFNER: Yes, Sir. Yes, Your Honor. You bet.

MJ: Same with Security Forces members?

HAEFNER: Yes, Sir.

Lt Col Haefner also knew one of the prosecution witnesses, Major (Maj) Quattrone, who was the security forces commander. Lt Col Haefner would see Maj Quattrone about three to four times a week at various staff meetings, but there was no social relationship between them. Lt Col Haefner denied that there was anything about his professional relationship with Maj Quattrone that would cause him to attribute greater weight to Maj Quattrone's testimony.

When it was time to make challenges for cause, the assistant trial defense counsel argued that Lt Col Haefner should be excused because he indicated he finds security forces members to be more credible. Trial counsel argued that Lt Col Haefner focused

more on their abilities as security forces members, and would not attach more weight to their testimony because of their status as security forces members. The military judge made this finding:

> I will deny the Defense challenge for cause against Lieutenant Colonel Haefner. I have evaluated Lieutenant Colonel Haefner's responses both in terms of actual and implied bias. In terms of actual bias I have considered his demeanor. I have considered his eye contact with the Court when providing responses to my questions. And most importantly I have considered the distinction he has drawn between training and credibility of the witness. He talked merely about those things he would expect a Security Forces member to do in terms of training, versus the believability of the witness. So I am satisfied there is no actual bias. Moreover I am satisfied there's no implied bias. I don't believe given his responses that a reasonable person would question the fairness or legality of the proceedings based upon the responses. So the Defense challenge against Lieutenant Colonel Haefner is denied.

Thereafter, the assistant trial defense counsel exercised his peremptory challenge against Lt Col Haefner, noting that he would have used it against another member had the challenge for cause been granted.

Before this Court, the appellant argues that actual bias exists because Lt Col Haefner believed that security forces witnesses were more credible than "average witnesses," because of their skills in observation and recall. The appellant also argues that implied bias exists because the public perception of unfairness due to credibility assessments is intensified when Lt Col Haefner's contact with Maj Quattrone is considered.

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). Military judges should be "liberal in granting challenges for cause." *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998) (citing *United States v. Smart*, 21 M.J. 15, 21 (C.M.A. 1985)).

The test for actual bias is whether any bias "is such that it will not yield to the evidence presented and the judge's instructions." *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987) (citing *United States v. Davenport*, 17 M.J. 242, 245 (C.M.A. 1984)). "Actual bias is a question of fact. Accordingly, the military judge is given great deference on issues of actual bias, recognizing that he or she 'has observed the demeanor of the' challenged party." *United States v. Warden*, 51 M.J. 78, 81 (C.A.A.F. 1999)

(quoting *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997)). *See also United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993). We will reverse only if there has been a "clear abuse of discretion." *Id.* Issues of actual bias are viewed subjectively, "through the eyes of the military judge or the court members." *United States v. Schlamer*, 52 M.J. 80, 93 (C.A.A.F. 1999) (quoting *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996)).

Applying the foregoing principles, we hold that the military judge did not abuse his discretion in denying the assistant trial defense counsel's challenge for cause. The military judge found that Lieutenant Colonel Haefner drew a distinction between the training and credibility of witnesses. Even if the distinction was developed through questions by the military judge, we find nothing improper in the dialogue or the ruling. Reading the answers from the cold record, we see that the military judge identified the inference to training, and followed up accordingly. It is the military judge's duty to clarify responses to test the member's ability to consider the evidence and the instructions of the military judge. *See United States v. Jefferson*, 44 M.J. 312, 318 (C.A.A.F. 1996); R.C.M. 912(d) and its Discussion. Moreover, this member said he would consider a variety of factors, regardless of the status of the witness, such as ability to observe, the passage of time (speaking to recall), and prior statements (impeachment).

The military judge determined that Lt Col Haefner was free of actual bias, and was qualified to sit. We find that the military judge did not abuse his discretion in denying the challenge for cause on the basis of actual bias.

We now turn to the issue of implied bias. This Court gives the military judge less deference on questions of implied bias, as the focus of the objective test "is on the perception or appearance of fairness of the military justice system." *Napoleon*, 46 M.J. at 283 (quoting *United States v. Dale*, 42 M.J. 384, 386 (C.A.A.F. 1995)). *See also United States v. Youngblood*, 47 M.J. 338, 341 (C.A.A.F. 1997). Implied bias exists when "most people in the same position would be prejudiced." *Daulton*, 45 M.J. at 217. It should rarely be invoked. *United States v. Lavender*, 46 M.J. 485, 489 (C.A.A.F. 1997).

We find no error under this theory, either. Retaining Lt Col Haefner as a member would not have challenged the perception or appearance of fairness of the military justice system. Lt Col Haefner said that he would expect trained security forces personnel to "have done their homework." This is what the public would expect as well. Likewise, there is nothing about Lt Col Haefner's professional acquaintance with Maj Quattrone that frustrates the appearance of fairness of the military justice system, standing alone or in combination with his statements about witness credibility. We hold that the military judge did not err when he denied the appellant's challenge for cause against Lt Col Haefner on the basis of implied bias.

Illegal Pretrial Punishment Under Article 13, UCMJ

The appellant argues that he was illegally punished in violation of Article 13, UCMJ. He alleges that the illegal punishment occurred when he was denied the opportunity to have an MEB evaluate his case solely because he was pending court-martial charges.[3] He seeks 94 days of credit for the time period between preferral of charges on 6 March 2002 and announcement of sentence on 7 June 2002.

This issue came before the military judge when the trial defense counsel advised the Court, pursuant to *United States v. Grill*, 48 M.J. 131 (C.A.A.F. 1998), that if the case were to proceed to the sentencing stage, and if the appellant elected to make an unsworn statement, he may elect to comment that the medical group would have ordered an MEB for headaches and other medical problems had he not been under court-martial charges. The military judge asked whether trial defense counsel was alleging unlawful pretrial punishment under Article 13, UCMJ. Trial defense counsel first stated that he was not. The military judge then directed trial defense counsel to thoroughly advise the appellant on the law of pretrial punishment, as he intended to inquire of the appellant whether he believed, independent of beliefs held by his trial defense counsel, and regardless of Air Force instructions as to eligibility for MEB processing, that he had been subjected to unlawful pretrial punishment.

During a subsequent session held pursuant to R.C.M. 802, trial defense counsel advised the military judge that the appellant now intended to raise a motion for relief under Article 13, UCMJ. However, at the prescribed time for taking up the issue on the record, the trial defense counsel advised the military judge that they would *not* be making a motion for relief under Article 13, UCMJ. The military judge asked counsel whether the appellant was ready to discuss the issue on the record, and was advised that he was. The military judge then instructed the appellant that he could seek relief for being subjected to unlawful pretrial punishment. The appellant affirmatively stated that he understood "what this concept [was] about." The appellant also affirmatively acknowledged that his lawyers had discussed the matter with him. The military judge invited the appellant to ask him questions on the subject. At this point, the appellant expressed uncertainty as to how the opportunity for relief was triggered. The military judge provided examples of certain actions that might constitute unlawful pretrial punishment, and while admitting that he couldn't be more precise because he did not know the basis for the complaint, he explained, "but if you believe after talking with your lawyers that somebody intended to punish you and one of the ways they sought to do that was to withhold some type of medical service, then your lawyers can file a motion and ask for relief in that regard." The accused admitted to understanding the military judge's instructions. He then affirmatively denied that he was subjected to unlawful pretrial

[3] *See* Air Force Instruction (AFI) 44-157, *Medical Evaluation Boards (MEB) and Continued Military Service* (12 Dec 2000).

punishment, and affirmatively denied wishing to raise a motion on the issue. Trial defense counsel acknowledged that he did not believe any further explanation was necessary and affirmatively waived the issue.

In light of the discussion above, we find that there is an "affirmative, fully developed waiver on the record" and, therefore, no relief is warranted. *United States v. Huffman*, 40 M.J. 225, 227 (C.M.A. 1994). *Huffman* was subsequently overruled by *United States v. Inong*, 58 M.J. 460, 464 (C.A.A.F. 2003), where our superior court held that Article 13, UCMJ, issues must be raised or waived, applying this rule prospectively. Even under *Huffman's* more forgiving application,[4] the appellant made an affirmative waiver, thoroughly explored by the military judge. *Huffman,* 40 M.J. at 227. Indeed, the sua sponte inquiry by the military judge in this case was the type of inquiry suggested by our superior court in *Inong* in its discussion overruling *Huffman. See Inong,* 58 M.J. at 465 ("we urge all military judges to remember that nothing precludes them from inquiring sua sponte into whether Article 13 violations have occurred, and prudence may very well dictate that they should").

But even in the absence of waiver, we find this issue to be without merit. At best, the argument is that the appellant was denied an administrative procedure. He was not confined or restricted in any way. Nor was he denied medical treatment. There is no evidence of an intent to punish the appellant on the part of anyone; nor is there a challenge speaking to the absence of legitimate, nonpunitive purposes behind the regulation. *See United States v. Palmiter,* 20 M.J. 90, 95 (C.M.A. 1985). Accordingly, we find no error.

Comment on the Appellant's Right to Refuse Consent

The appellant argues that he was prejudiced by the military judge's failure to sua sponte declare a mistrial when a government witness commented on the appellant's refusal to consent to a search of his vehicle. After considering the witness's testimony and the military judge's curative response, we find this issue to be without merit.

During the course of the investigation of the unlawful entry and larceny offenses occurring at the Par 3 Golf Course, Technical Sergeant (TSgt) Fearney, the Noncommissioned Officer in Charge of Security Forces Investigations, turned his focus toward Airman Basic (AB) Friday, the appellant's friend. Local golf shops had been advised of the larceny at the Par 3 Golf Course, and were asked to notify TSgt Fearney if anyone attempted to sell them merchandise from the inventory of stolen equipment TSgt Fearney had prepared. On 28 December 2001, Mr. Uchino, a Japanese National working at a local golf shop selling used golf clubs and other items, notified TSgt Fearney of an attempted sale of certain pieces of golf equipment. The attempt was made by AB Friday,

[4] *Huffman* was controlling law at the time of the appellant's court-martial.

which was established by a photocopy of AB Friday's driver's license that was obtained by Mr. Uchino and turned over to TSgt Fearney.

At this point, TSgt Fearney began efforts to locate AB Friday. During the course of this stage of the investigation, security forces personnel became interested in the appellant as a suspect as well. A short time later, both were found at the Noncommissioned Officer's Club, after traveling there together in the appellant's car. Upon contact, TSgt Fearney asked the appellant if he had his consent to search the vehicle, to which the appellant stated he did not. TSgt Fearney then sought and obtained probable cause search authorization and found golf clubs and golf equipment in the trunk of the appellant's car.

During the direct examination of TSgt Fearney, in response to trial counsel's question regarding what investigative steps he had taken, TSgt Fearney mentioned that he had asked and was denied consent to search the appellant's vehicle. Trial defense counsel made a timely objection. The military judge excused the members and a session was held pursuant to Article 39(a), UCMJ, 10 U.S.C. § 839(a). The military judge then asked trial defense counsel what relief he sought. The trial defense counsel asked that the testimony be stricken from the record, and agreed with the military judge that an instruction to the members to disregard the question and answer was an appropriate remedy. The military judge then instructed the members accordingly.

It is clear from the record that the trial counsel's transitional question was not intended to lead the witness into this area and that the witness's answer was inadvertent. In fact, the witness had already testified that he had obtained probable cause authorization to search the appellant's dormitory room and vehicle. The military judge provided a curative instruction, and we find that to have been more than adequate to avoid prejudice to the appellant. *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000).

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

ANGELA M. BRICE
Clerk of Court