

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Senior Airman JOSH R. LEAVITT
United States Air Force**

ACM 33681 (f rev)

27 March 2003

Sentence adjudged 4 March 1999 by GCM convened at Elmendorf Air Force Base, Alaska. Military Judge: Michael J. Rollinger.

Approved sentence: Bad-conduct discharge, confinement for 3 years, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Lieutenant Colonel Timothy W. Murphy, Major Jeffrey A. Vires, Major Thomas R. Uiselt, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Linette I. Romer.

Before

BRESLIN, EDWARDS, and BILLET
Appellate Military Judges

**OPINION OF THE COURT
UPON FURTHER REVIEW**

BRESLIN, Senior Judge:

This case is before our Court on remand from the United States Court of Appeals for the Armed Forces. We are directed to inquire into the existence of a report of inquiry into allegations of prosecutorial misconduct, and its possible effect upon the trial of this case.

The appellant was one of eight service members in the 19th Fighter Squadron at Elmendorf Air Force Base (AFB) involved in the use and distribution of illegal drugs.

Acting on information provided by two informants, agents from the Air Force Office of Special Investigations (AFOSI) and the Anchorage Police Department apprehended the appellant and others shortly after they had purchased and used marijuana. Seven of the eight service members confessed, either orally or in writing. The appellant provided three separate written confessions to the AFOSI.

The government prosecuted the offenders at Elmendorf AFB, Alaska. In most cases, the accused service members pled guilty pursuant to the terms of pretrial agreements, which also required the accused to cooperate with the prosecution in later courts-martial. The appellant had a similar pretrial agreement that limited his confinement to 10 months, however on the morning of his scheduled trial the appellant withdrew from his pretrial agreement. The government conducted a formal pretrial investigation as required by Article 32, UCMJ, 10 U.S.C. § 832. Authorities preferred additional charges relating to the use, distribution and manufacture of marijuana at the appellant's previous assignment.

The appellant was convicted, in accordance with his pleas, of using marijuana, cocaine, and methamphetamine, possessing marijuana, and distributing marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. He was also convicted, contrary to his pleas, of distributing marijuana, cocaine, and methamphetamine, and manufacturing marijuana. A general court-martial consisting of officers and enlisted members sentenced the appellant to a bad-conduct discharge, confinement for 36 months, and reduction to E-1. The convening authority approved the sentence as adjudged, and forwarded the record for review by this Court under Article 66(c), UCMJ, 10 U.S.C. § 866(c).

After trial, the appellant was confined with other service members involved in related cases. They discussed their cases amongst themselves, and with Airman Basic (AB) Jonathan A. Campbell, one of the convicted service members. AB Campbell sent a letter to a member of the United States Senate alleging that the prosecutors had pressured witnesses to testify falsely at his trial.

In response to these allegations, the staff judge advocate, Pacific Air Forces, directed an inquiry into the allegations of prosecutorial misconduct in the prosecution of Airman Basic (AB) Campbell. The detailed officer completed the inquiry, expanding it somewhat to include other similar allegations concerning related cases.

On appeal at this Court, the appellant filed an affidavit alleging prosecutorial misconduct. The appellant swore that, during their confinement, AB Ethan Smith and AB Stephen Hicks told him that prosecutors pressured them to lie in their testimony at the appellant's trial by threatening to take away the benefits of their pretrial agreements. This Court accepted the affidavit, but declined to accept unsworn statements from others involved in similar proceedings.

The appellant also asked that this Court order the production of the report of the inquiry into allegations of prosecutorial misconduct. The Court of Appeals for the Armed Forces granted the appellant's petition for extraordinary relief and ordered this Court to reconsider its decision denying production of the report. This Court reconsidered its earlier determination and, after reviewing the testimony of the witnesses in related cases, determined it was unnecessary to order production of the report. *United States v. Leavitt*, ACM 33681 (A.F.Ct. Crim. App. 28 March 2001). The Court of Appeals for the Armed Forces granted the appellant's petition for review, and remanded the case to this Court. By its remand order, the Court required us to determine whether the report exists and, if so, order it produced and attach it to the record under seal. The Court also required us to determine whether the report is relevant to the appellant's assignment of errors and, if additional factual inquiry is necessary, to order a hearing under *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967). Thereafter, we must reconsider the appellant's claim of prosecutorial misconduct under Article 66(c), UCMJ.

Pursuant to the terms of the remand, we ordered production of the report of inquiry, and attached it to the record under seal. We reviewed the report to determine its relevance to the appellant's claim of prosecutorial misconduct. The report contains statements of individuals that seem to support the appellant's allegations that prosecutors pressured witnesses into testifying falsely; therefore we must conclude that the report is relevant to the appellant's assignment of error. The report also contains evidence indicating the complaining witnesses are not credible, however our superior court has determined we are not empowered to make determinations of credibility based upon conflicting affidavits submitted post-trial. *United States v. Ginn*, 47 M.J. 236, 242 (1997).

The remand order also requires this Court to determine whether additional factual inquiry is necessary in order to consider the appellant's claim of prosecutorial misconduct. The appellant avers that AB Hicks and AB Smith testified falsely against him at his trial, and that they later told him that prosecutors forced them to lie.¹ In a statement in the report of inquiry, AB Hicks alleges that during pretrial discussions prosecutors pressured him to lie in his testimony in the trials of *United States v. Campbell* and *United States v. Leavitt*.² However, the inquiry officer did not ask AB Hicks whether he actually testified falsely at the trial of *United States v. Leavitt*, or, if so, what parts of his testimony were not true. The report of inquiry also contains a summarized statement from AB Smith that does not clearly resolve the disputed issue. AB Smith's statement indicates that the prosecution "pressured" the witnesses to "say what they wanted us to say and not necessarily the truth." However, he also indicated that, "I wouldn't say . . . that they went so far as trying to get me to go on the stand and lie," and "they weren't

¹ The appellant also alleges that AB Aguiar testified falsely against him, and speculates that it must have been because of prosecutorial misconduct. In this regard, the appellant's affidavit "does not set forth specific facts but consists instead of speculative or conclusory observations," *Ginn*, 47 M.J. at 248, and we reject it on that basis.

² The report also demonstrates that the appellant did not testify in the trial of *United States v. Campbell*.

asking me to make stuff up just to make their case.” We conclude that additional factual inquiry is required to resolve this issue.

Ordinarily, a court of criminal appeals has the “discretion . . . to determine how additional evidence, when required, will be obtained, *e.g.*, by affidavits, interrogatories, or a factfinding hearing.” *United States v. Campbell*, 57 M.J. 134, 138 (2002) (quoting *United States v. Lewis*, 42 M.J. 1, 6 (1995)). However, the remand order in this case provides that a *DuBay* hearing is our only option. When a case is returned to this Court on remand, we can only take action that conforms to the limitations and conditions prescribed by the remand. *United States v. Montesinos*, 28 M.J. 38, 44 (C.M.A. 1989).

The record of trial is returned to The Judge Advocate General for referral to a convening authority for purposes of directing a hearing pursuant to *United States v. DuBay*. The specific issue is whether prosecutors pressured AB Hicks or AB Smith to testify falsely against the accused in this case, as alleged in the appellant’s affidavit dated 1 May 2000, and whether any action by the prosecutors produced false testimony.

The report of inquiry into allegations of prosecutorial misconduct remains sealed. However, the military judge presiding over the *DuBay* hearing may review the materials, and may authorize such further release to those directly involved in the case as may be required in the interests of justice. We anticipate that the accused, counsel representing the parties at the *DuBay* hearing, and counsel advising the convening authority would be authorized access to the materials, but would not be allowed to release the documents outside further proceedings of this case. Should the counsel find it necessary during the *DuBay* hearing to use materials contained in the report of inquiry for evidentiary, impeachment, or other purposes, the military judge may issue such further protective orders as may be appropriate in the interests of justice.

The government will return the record of trial, together with the record of the *DuBay* hearing and any additional matters, to this Court for further review within 180 days from issuance of this opinion, unless an enlargement of time has been granted. Thereafter, Article 66(c), UCMJ, shall apply.

OFFICIAL

DEIRDRE A. KOKORA, Major, USAF
Chief Commissioner