UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain PATRICIA C. MADIGAN
United States Air Force

ACM 35087

17 February 2005

Sentence adjudged 13 November 2001 by GCM convened at Lackland Air Force Base, Texas. Military Judge: Patrick M. Rosenow (sitting alone).

Approved sentence: Dismissal and confinement for 7 months.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Jefferson B. Brown, and Major Maria A. Fried.

Appellate Counsel for the United States: Colonel LeEllen Coacher and Lieutenant Colonel William B. Smith.

Before

MALLOY, JOHNSON, and GRANT
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MALLOY, Senior Judge:

Protected by a pretrial agreement (PTA), the appellant entered mixed pleas in a general court-martial composed of a military judge sitting without members. Under the terms of the PTA, the appellant was allowed to enter conditional guilty pleas to six specifications (including, inter alia, wrongful use and possession of controlled substances), charged under Articles 92, 112a, and 123, UCMJ, 10 U.S.C. §§ 892, 912a, 923, to preserve two suppression motions she raised before pleas. *See* Rule for Courts-Martial (R.C.M.) 910(a)(2). In the PTA, the convening authority agreed not to approve confinement in excess of 12 months. The military judge sentenced the appellant to a dismissal and confinement for 7 months. The convening authority approved the sentence

as adjudged. On appeal, the appellant raises two errors related to her conditional guilty pleas: (1) Whether the military judge correctly ruled that the appellant's 29 March 2000 confession was admissible; and (2) Whether the military judge correctly ruled that the positive blood test for Diazepam[1] was admissible.

We have examined the record of trial, the assignment of errors, and the government's reply thereto. We hold that the military judge did not err in admitting the appellant's statement to Sergeant David Trevino, Texas Department of Public Safety, and in admitting the results of a blood test indicating that the appellant had used Diazepam, even though the remainder of the blood sample had been inadvertently destroyed before the appellant had the opportunity to retest it.

Admission of the Appellant's Confession

The issue whether a confession is voluntary is a legal one that requires our independent determination. *United States v. Benner*, 57 M.J. 210 (C.A.A.F. 2002). *See also United States v. Ford*, 51 M.J. 445, 451 (C.A.A.F. 1999). In undertaking this task, we rely on the military judge's findings of fact to the extent that they are not clearly erroneous. *Id.* (citing *United States v. Cottrill*, 45 M.J. 485, 488 (C.A.A.F. 1997)). Here, we find that the military judge's findings of fact are clearly supported by the evidence offered by the parties on the motion. Based on those facts, we find that the appellant's inculpatory statement to Sergeant Trevino was voluntary under the totality of all the surrounding circumstances. *Benner*, 57 M.J. at 214 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)).

This issue involves a noncustodial interview that took place in the appellant's civilian attorney's office. The appellant was advised of her constitutional rights under the Fifth Amendment. She elected to cooperate with Sergeant Trevino after consulting with her attorney who was present during the interview. Faced with the prospect of immediate civilian arrest for forging a prescription for a controlled substance and almost certain disclosure of this misconduct to the Air Force, the appellant elected to cooperate with Sergeant Trevino in the hope that she could keep the information from the Air Force long enough to be administratively discharged.

At the time of the interview, the appellant, a nurse, was pending court-martial on various drug-related charges and had submitted a Request for Resignation in Lieu of Court-Martial (RILO). *See* Air Force Instruction (AFI) 36-3207, *Separating Commissioned Officers*, ¶ 2.22 (9 Jun 2004). This was the second time that the appellant had submitted a RILO. Although her first request was disapproved, the government had advised her that there had been a change in its position due to the discovery of new evidence and that a new RILO would receive favorable support from command. The

[1] Diazepam, also known as Valium, is a Schedule IV controlled substance.

appellant hoped that her immediate cooperation with Sergeant Trevino would forestall the Air Force from learning of her additional criminal conduct until after the RILO's approval, and thus, would give her the best opportunity to protect her nursing license.

As she explained in her testimony on the motion to suppress, she weighed her options and gambled on the fact that she could better deal with the matter as a civilian issue where it would not have "the same level of severity" as with the Air Force. Unfortunately for the appellant, the Air Force discovered the misconduct when the appellant and her civilian attorney failed to provide Sergeant Trevino with a follow-up written statement.[2] That the appellant's effort to keep her additional criminal conduct from the Air Force failed does not, in our view, provide a post hoc justification for finding her otherwise voluntary statement involuntary. We hold that the military judge correctly ruled that the statement would have been admissible in a litigated trial under Mil. R. Evid. 305.

Admission of Blood Test

We next briefly turn to the appellant's motion to suppress the results of her blood test for Diazepam. Unlike in *United States v. Manuel*, 43 M.J. 282 (C.A.A.F. 1995), which the appellant relies on here, the scientific drug test in this case was not the only evidence of the appellant's drug abuse. The parties entered into a stipulation of fact that provided the factual background of why the appellant's blood was seized. To put the issue in context, we quote a portion of the stipulation of fact:

> On 17 May 99, the accused was scheduled for a procedure at same day surgery. The accused showed up late for her surgical appointment. During normal patient in-processing, the medical technician saw a catheter inserted in the accused's arm. The catheter was a heplock. Heplocks are used to keep veins open for repeated injections of medications or other fluids like an IV. It is not routine practice for a patient to arrive for surgery with a catheter already inserted. According to SrA Manalo, the technician who in-processed the accused, all female surgery patients of childbearing years are required to bring a urine sample with them the day of the surgery. The accused did not bring a sample. The purpose of the urine sample is to test for pregnancy prior to surgery. The urine is not tested for drugs.
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> Given the accused's behavior, her commander was informed and he contacted [the Air Force Office of Special Investigations]. Special Agent William Nix responded and ultimately obtained a search authorization for

[2] Sergeant Trevino intended to refer only one offense to the Bexar County District Attorney for prosecution. He wanted the written statement from the appellant to clear the books at pharmacies where the appellant may have written other fraudulent prescriptions, and to ensure that the appellant would not be able to use the prescription pad that she had stolen from a civilian physician while engaging in unauthorized off-duty employment.

> the accused's blood. The accused went to the laboratory where blood was drawn. The blood was secured in the laboratory and later packaged and sent by the lab technician, Fluer Singleton, to the Armed Forces Institute of Pathology (AFIP) for testing.

After performing all of the testing, the remaining portion of the sample was considered under AFIP protocols to be insufficient for retesting and was inadvertently destroyed. Both prosecution and defense experts testified that, based on their review of the AFIP testing procedures, a retest would have in all probability again been positive for Diazepam.

The military judge found that the blood sample was not "apparently exculpatory evidence" and, given the testimony of both experts, would have remained inculpatory after retesting. Accordingly, he declined to suppress the evidence. But he did provide the appellant with a remedy. The government was required to stipulate before the factfinder that the sample had been destroyed before the appellant had the opportunity to retest it. Rather than test this remedy, the appellant pleaded conditionally guilty to using Diazepam.

We review a military judge's ruling on a motion to suppress for abuse of discretion, and in reviewing such evidence "we consider the evidence 'in the light most favorable to the' prevailing party." *United States v. Rodriguez*, 60 M.J. 239, 246-47 (C.A.A.F. 2004) (quoting *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996)). We find no abuse of discretion.

As our superior court recently noted in *Rodriguez*, "Parties to a court-martial are entitled to an 'equal opportunity to obtain witnesses and other evidence[.]'" *Rodriguez*, 60 M.J. at 246 (quoting Article 46, UCMJ, 10 U.S.C. § 846). They also have the right to "compulsory process." R.C.M. 703(a). But they are not entitled to the production of evidence that has been destroyed, loss, or is not otherwise subject to compulsory process. R.C.M. 703(f)(2). In addition to these codal and *Manual* entitlements, a military accused has a constitutional right to the disclosure of "material" exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). When such evidence is not disclosed, the good or bad faith conduct of the government in losing or destroying it is irrelevant. *Illinois v. Fisher*, 540 U.S. 544, 547 (2004). Had the appellant's destroyed blood sample been this type of exculpatory evidence, suppression of the test results would have been an appropriate remedy.

The correctness of the military judge's ruling in this case turns on the question of whether the destroyed evidence was "material exculpatory evidence" or simply "potentially useful evidence" and whether AFIP personnel acted in bad faith in disposing of it. *Fisher*, 540 U.S. at 547-48. The distinction between these two types of evidence applies even where, as here, the appellant claims that retesting of the evidence was her

only hope for exoneration. *Id.* "Potentially useful evidence" includes evidence "of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Id*. (quoting *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988)). Such evidence must be suppressed only when the government acted in bad faith in losing or destroying it. *Id*.

In this case, it is crystal clear that the military judge found that the destroyed blood was no more than "potentially useful evidence" and that AFIP personnel had not acted in bad faith in disposing of the sample. This conclusion is clearly supported by his factual findings. Accordingly, we hold that he did not abuse his discretion in failing to suppress the evidence, and that his remedy compelling the government to stipulate that the evidence was destroyed before the appellant had the opportunity to retest it was adequate to ensure that she was not disadvantaged by the lack of that opportunity. *See Manuel*, 43 M.J. at 282.

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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved finding and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court