UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class KARLOS D. MCMAHON
United States Air Force

ACM S31268

12 September 2008

____ M.J. ____

Sentence adjudged 08 September 2006 by SPCM convened at Altus Air Force Base, Oklahoma. Military Judge: Maura McGowan.

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

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Megan E. Middleton.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

HEIMANN, Senior Judge:

Consistent with his conditional plea, the appellant was convicted of one specification of wrongful use of marijuana on divers occasions. Contrary to his plea, the appellant was also convicted of one specification of wrongful distribution of marijuana on divers occasions. Both specifications are in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged and approved sentence consists of a bad-conduct discharge, confinement for 3 months, and reduction to E-1.

The appellant raises one issue on appeal.[1] He claims the military judge erred in failing to suppress his urinalysis results and a subsequent confession when the magistrate authorizing the search of his urine was never informed of the identity of the confidential informant. The appellant's attack on the subsequent confession relies exclusively on a conclusion that the search authorization is defective.

Background

On 21 February 2006, Special Agents from the Air Force Office of Special Investigations (AFOSI) interviewed Airman First Class (A1C) JM, concerning his positive urinalysis.[2] During the course of the interview, A1C JM admitted that the appellant provided marijuana to an active duty airman on 16 February 2006.[3] In addition, A1C JM told the AFOSI he had observed the appellant drive his vehicle to McDonald's in Altus, Oklahoma and obtain up to a half an ounce of marijuana from an unidentified source.

As a result of his statements, the AFOSI asked A1C JM if he would become a confidential informant. A1C JM agreed. The next day A1C JM participated in an AFOSI controlled buy-walk[4] purchase of marijuana, during which A1C JM provided a drug dealer $60.00 and the dealer gave A1C JM .79 ounces of marijuana. A1C JM told the AFOSI that the appellant was the drug dealer. Two days after the drug buy, A1C JM provided the AFOSI with a sworn statement that on the evening prior, the appellant brought marijuana to A1C JM's home and smoked it at his residence.

Based upon these facts, the AFOSI prepared an affidavit and sought a search authorization from the military magistrate seeking the appellant's urine for drug testing. Prior to briefing the magistrate, the AFOSI agent briefed the Chief of Military Justice at the legal office and was told that probable cause existed to search the appellant's urine for evidence of a crime.

At trial, the defense made a motion to suppress the results of the urinalysis and the subsequent confession, attacking the basis for the search authorization. Specifically, the defense contended that the failure of the affidavit to identify the name of the confidential source made it impossible for the magistrate to make an independent determination as to

---

[1] While not raised by appellate counsel, we note that the Personal Data Sheet fails to show the appellant served in Iraq for six months. While we believe the error is harmless because the appellant mentions it in his clemency submission to the convening authority, the better practice is for the Staff Judge Advocate to mention it to the convening authority in the Staff Judge Advocate Recommendation.

[2] A1C JM was an Airman Basic at the time of trial.

[3] Based upon the sworn statements, it is apparent that A1C JM was the actual recipient of the marijuana, but the affidavit did not include this detail.

[4] A buy-walk operation is when the informant is instructed to purchase the drugs and return to the agents. No arrest takes place at the time of the sale.

the reliability of the informant and thus undermined the magistrate's conclusion that probable cause existed.

In response to the defense's motion, the prosecution offered the affidavit and the search authorization itself. The affidavit indicated, as noted above, that the confidential source had seen the appellant purchase marijuana, that the source had successfully conducted a buy-walk operation against the appellant, and that the appellant had used marijuana at the source's house two days prior. Because the requesting agent and the military magistrate were deployed at the time of the trial, the prosecution called only one witness, the Chief of Military Justice at the legal office.[5] He testified that he received a call from the magistrate at the time the AFOSI was requesting the search authorization. He added that when he was asked by the magistrate if there were "any questions he should be asking AFOSI," he advised the magistrate to ask the AFOSI "why he thought that the source was reliable in this case?" On cross-examination, the Chief of Military Justice admitted that he does not know what actually transpired between the AFOSI and the magistrate.

In response to the prosecution's evidence, trial defense counsel called an AFOSI agent who participated in the buy-walk drug purchase. This agent admitted that during the drug purchase, the AFOSI was never in a position to identify the appellant. Trial defense counsel thus argued that the buy-walk could not be used as "independent verification of the reliability of the confidential source." In response, the prosecution argued that the informant's reliability is established by the buy-walk drug purchase. Citing the *Aguilar-Spinelli* test, the prosecution argued that when the informant indicated he could purchase drugs and did so two days later, both the knowledge and the reliability elements of the test had been met. *See Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969).

In ruling in the prosecution's favor, the military judge concluded that the magistrate had been provided all of the facts outlined above. She also concluded that the magistrate was not advised of the name of the informant but that he had approved the search authorization. Based upon these conclusions, the military judge also concluded that she found the informant reliable and "inferred" that the magistrate did as well. Finally, the military judge indicated that she adopted the prosecution's rationale in upholding the search authorization.

Motion to Suppress Urinalysis

Probable cause exists when there is sufficient information to provide the authorizing official a "reasonable belief that the person, property, or evidence sought is

[5] The prosecution made several attempts to have the magistrate testify by phone, but ultimately was unable to complete the call.

located in the place or on the person to be searched." Mil. R. Evid. 315(f)(2). There must be a "substantial basis" on which to conclude probable cause existed. *United States v. Figueroa,* 35 M.J. 54, 56 (C.M.A. 1992). "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). A neutral and detached magistrate's determination of probable cause is entitled to substantial deference. *United States v. Maxwell*, 45 M.J. 406, 423 (C.A.A.F. 1996).

When the defense makes a motion at trial to suppress evidence under Mil. R. Evid. 311(d), "the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure." Mil. R. Evid. 311(e). "The duty of [the military judge] is simply to ensure that the magistrate had a 'substantial basis for . . . concluding' that probable cause existed." *United States v. Carter*, 54 M.J. 414, 418 (C.A.A.F. 2001) (quoting *Gates*, 462 U.S. at 238-39 (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960))).

This Court reviews a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). An abuse of discretion occurs when the military judge's findings of fact are clearly erroneous or if the decision is influenced by an erroneous view of the law. *United States v. Quintanilla*, 63 M.J. 29, 35 (C.A.A.F. 2006); *see also United States v. Bethea*, 61 M.J. 184, 187 (C.A.A.F. 2005) (courts must look at the information made known to the authorizing official at the time of the decision). However, we review the legal question of sufficiency for finding of probable cause de novo, based on the totality of the circumstances. *United States v. Leedy*, 65 M.J. 208, 212 (C.A.A.F. 2007) (citing *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996)).

Analysis

We begin by concluding that the affidavit alone established the existence of probable cause to search the appellant's urine. At the time of the request, the AFOSI had a statement implicating the appellant in both use and distribution of marijuana. In implicating the appellant, the source provided credible details of observing the appellant purchase up to a half ounce of marijuana from an unidentified source. In addition, after having agreed to work as an informant, the source successfully initiated and completed a controlled buy-walk purchase of marijuana and identified the appellant as the dealer. Finally, the source provided a sworn statement implicating the appellant in the use of marijuana at the source's on-base residence the evening prior to the statement. Taken together, the sworn statement and actions by the informant establish both his veracity and basis for knowledge sufficient to establish that a fair probability existed that the appellant

had used marijuana less than 48 hours prior to the date of the requested search authorization.

In reaching our conclusion, we place considerable significance on the fact that the source had successfully executed a buy-walk drug purchase for the AFOSI. His ability to execute the purchase within a day of initially identifying the appellant is significant. *See United States v. Phinizy*, 12 M.J. 40, 42-43 (C.M.A. 1981). In addition, we find it significant that the informant indicates that the drug usage occurred in base quarters. It is well established that informants who are military members have an increased degree of accountability. *See United States v. Tipton*, 16 M.J. 283, 287 (C.M.A. 1983). While we acknowledge that the affidavit does not expressly indicate that the informant was a military member, the logic of giving this informant increased reliability remains the same. Whenever an informant alleges in a sworn statement that drug usage occurs in their on-base quarters, such a statement has increased indicia of reliability because of the fact that the statement is inherently against their interest and exposes the informant to scrutiny of federal authorities. Thus, the name of the informant is not of particular significance. It is his actions that control. Even if AFOSI agents had told the magistrate the name of the informant, it is probable that he would have had no personal knowledge of this particular Airman First Class and would have relied on exactly the same factors we do in concluding the informant was reliable.

In concluding that the search authorization is based upon a finding of probable cause, it is necessary to outline the standards of review under which we based our decision. First, we conclude that we will afford the magistrate no deference for his conclusion that probable cause exists. The appellant argues that the magistrate determination fails because we do not know how or if he reached the conclusion that the informant was reliable. The appellant places considerable emphasis on the fact that the military judge had to "infer" that the magistrate concluded the informant was reliable. The appellant's argument is particularly persuasive in light of the Supreme Court precedence which requires the magistrate to independently reach a conclusion that the informant was reliable. *See Gates*, 462 U.S. at 238-39. But unlike the appellant, we do not think the search authorization fails simply because of the unavailability of the magistrate.

Unaware of any military case in which neither the requesting agent or the magistrate were able to testify, we turned to the federal courts in reaching our conclusions on the significance of the lack of this critical testimony at trial. Under the federal system, Fed. R. of Crim. P. 41(d)(3)(B) requires the magistrate to "make a verbatim record of the conversation" when an agent is requesting a search warrant. These transcripts then become the evidence considered by the trial judge when addressing a suppression motion. This practice is necessary in federal courts because the number of warrants and the lengthy time lapses often make it impossible for the magistrate to recall the events surrounding the warrant at the time of the suppression hearing. But like our

case today, occasionally the federal prosecutor is unable to produce the record of the meeting between the magistrate and the requesting agent when faced with a suppression motion and is forced to rely upon the warrant affidavit alone. That is essentially what has occurred in this case.[6]

We agree with the federal courts' conclusion that the failure to provide either testimony or the recording from the magistrate does not *per se*, necessitate a conclusion that the prosecution has failed to meet its burden on the reliability of a warrant. *See United States v. Rome*, 809 F.2d 665, 669-70 (10th Cir. 1987); *see also United States v. Richardson*, 943 F.2d 547, 549 (5th Cir. 1991); *United States v. Larson*, 63 Fed. Appx. 416, 422 (10th Cir. 2003). We instead believe the correct approach is to begin by the trial court affording the search authorization no presumption of regularity and simply conduct a *de novo* review of the warrant. *See United States v. Chaar*, 137 F.3d 359, 362 (6th Cir. 1998). In conducting a *de novo* review, we believe the trial judge must apply the same constitutional scrutiny required of a magistrate and only suppress the search authorization if constitutional requirements have not been met, there is some evidence that the appellant has been clearly prejudiced by the inability of the magistrate to testify, or there is evidence of intentional and deliberate disregard for rules and processes regarding search authorizations. *See United States v. Stefanson*, 648 F.2d 1231, 1235 (9th Cir. 1981). As for the final two matters, we note no attacks by trial defense as to the neutrality of the magistrate or any claims of intentional or deliberate misconduct by either the agent or the magistrate in requesting or granting the search authorization.

In this case, the trial judge's findings of fact and law leave open questions regarding the standard of review she applied, the information she considered in upholding the search authorization, and whether she herself found the existence of probable cause. We are particularly bothered by her recitation of facts regarding the informant that are not included in the affidavit itself. Because such facts are not included in the search affidavit itself, we have no evidence to conclude the magistrate was aware of them when he made his determination. Unable to discern the precise basis of the military judge's ruling, we also afford her ruling no deference and complete our own *de novo* review, both on the law and facts. Having done so, for the reasons outlined above, we nonetheless find that the affidavit alone supported a finding of probable cause and that the reliability of the informant was adequately established by that affidavit.

Erroneous Court-Martial Order

We note that the court-martial order erroneously states the appellant was sentenced by a military judge rather than a panel of officer members. Preparation of a corrected court-martial order, properly reflecting the appellant was sentenced by a panel

[6] We would note, however, that under Mil. R. Evid. 104, the prosecution could have presented an affidavit from the magistrate outlining his recollections of the events surrounding the search authorization, and the judge could have considered the affidavit for the limited purpose of ruling on the suppression motion.

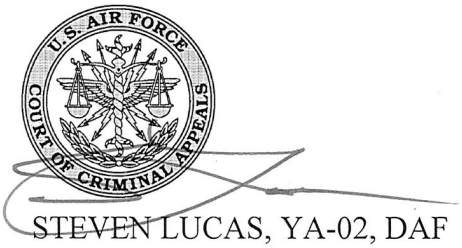
of officer members is hereby directed. *See United States v. Smith*, 30 M.J. 1022, 1028 (A.F.C.M.R. 1990).

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



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