UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic BRANDON C. PELEKAI
United States Air Force

ACM S30421

20 March 2006

Sentence adjudged 13 June 2003 by SPCM convened at Sheppard Air Force Base, Texas. Military Judge: Gregory E. Pavlik.

Approved sentence: Bad-conduct discharge and confinement for 180 days.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Lieutenant Colonel Mark R. Strickland, Major Terry L. McElyea, Major Sandra K. Whittington, and Captain David P. Bennett.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major John C. Johnson.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT

JACOBSON, Judge:

The appellant was tried by a special court-martial composed of officer members at Sheppard Air Force Base (AFB), Texas. He was convicted, in accordance with his pleas, of one specification of willfully disobeying an order from a superior noncommissioned officer (NCO), disrespect towards two superior NCOs, dereliction of duty by drinking alcohol while underage, resisting apprehension, assault consummated by a battery, and assault upon an Air Force Security Forces NCO who was in the execution of his duties, in violation of Articles 91, 92, 95 and 128, UCMJ, 10 U.S.C. §§ 891, 892, 895, 928. He

was sentenced to a bad-conduct discharge and confinement for 180 days. The convening authority approved the findings and sentence as adjudged.

On appeal, the appellant asserts that the military judge erred when he denied the trial defense counsel's request for appointment of a confidential expert consultant in psychology or psychiatry. We agree, find that the military judge abused his discretion, and order a rehearing on sentencing.

Background

At the time of his trial, the appellant was an 18-year-old airman basic assigned to the 360th Training Squadron at Sheppard AFB, Texas. He had been on active duty for approximately six months.

The appellant entered active duty on 26 November 2002 and apparently made it through basic training without any problems. He arrived at Sheppard AFB on 13 January 2003 for follow-on training. In mid-February 2003, he began exhibiting behavior incompatible with military service and received three letters of reprimand (LOR) in a 12-day period. On 4 March 2003, after the third LOR, the appellant was placed into Transition Flight (T-Flight), which is a subunit of the training wing reserved for members pending certain administrative actions, including administrative discharge. Discharge proceedings were subsequently initiated against the appellant. On 21 March 2003, the appellant's commander imposed nonjudicial punishment[1] for underage drinking and assault. When he appeared before his commander for his punishment, he asked her if there was any way he could stay in the Air Force. She told him that she was proceeding with his administrative discharge. Two days later the incident that led to this court-martial occurred.

On Sunday, 23 March 2003, the appellant left the T-Flight dormitory on Sheppard AFB without permission. The NCO on duty became concerned and contacted the NCO with overall responsibility for T-Flight. The two NCOs suspected that the appellant might have gone to a barbeque that was being held in "Central Park," an area on Sheppard AFB. When they arrived at the barbeque, the NCOs spotted the appellant amongst a crowd of 100-150 party participants. By this time, according to the appellant's statements made during the providence inquiry, he had consumed vodka, whiskey and 14 beers. One of the NCOs approached the appellant and asked him to return to the T-Flight dormitory. The appellant was initially unresponsive, then slammed down a plastic bottle from which he was drinking and at the NCO's request, started walking toward the parking lot. The NCO told the appellant that he would give him a ride back to the T-Flight dormitory in his truck, which was in the parking lot. In fact, however, the NCO's truck was not in the parking lot—the NCO was just saying that to try to get the appellant

[1] Pursuant to Article 15, UCMJ, 10 U.S.C. § 815.

away from the crowd and into an area where he could be easily controlled. Unbeknownst to the appellant, the second NCO had called Security Forces and asked for an emergency response. As the appellant moved toward the parking lot he heard the sirens approaching and realized that the NCOs had lied to him. At that point, he assumed a "fighting stance." When Security Forces personnel arrived they ordered the appellant to lie on the ground. When he refused, they sprayed pepper spray in his face. Security Forces personnel then forced him to the ground by striking him in the testicles with a baton and tackling him. The appellant continued to resist by biting, spitting, kicking, and head-butting his captors. As the above-described events were transpiring, a large crowd of Airmen looked on - many were yelling and screaming and a few attempted to get involved.

On 8 May 2003, the appellant's case was referred to a special court-martial. All of the charges preferred against the appellant were based on the above-described incident at Central Park on 23 March 2003. On 23 May 2003, the trial defense counsel submitted a request to the convening authority for an expert consultant in clinical psychology or psychiatry. As justification, trial defense counsel stated that an expert was needed to explore the appellant's significant anger management issues and possible "personality disorders, including depression, suicidal ideations, and anti-social personality disorders." Trial defense counsel also noted the appellant's family history of alcoholism and the appellant's recent alcohol-related incidents. The trial defense counsel specifically expressed a need for an expert consultant to explore matters in mitigation and extenuation. He did not request a specific individual as a consultant. When the convening authority did not act on the appellant's request by 29 May 2003, trial defense counsel filed a motion to compel stating he did not believe a sanity board was necessary, but reiterated the justifications for the request he initially made to the convening authority.

On 30 May 2003, the convening authority denied the defense request for an expert consultant on the grounds that no showing of necessity had been made and that such a request was premature in light of the option for a sanity board. On 6 June 2003, the military judge also denied the request for a consultant. In a brief written-ruling, the military judge provided no grounds for his decision and made no findings of fact. In this document, the military judge briefly recited some background on the defense's request and the government's opposition, and then concluded as follows: "The motion to compel an expert consultant is denied. If in fact the defense wants a sanity board, I will grant that request. If the defense requests an expert witness, I will consider that request." The military judge did not elaborate on his ruling during the subsequent court-martial.

Discussion

A military judge's decision on requests for expert assistance are reviewed for abuse of discretion. *United States v. McAllister*, 55 M.J. 270, 275 (C.A.A.F. 2001).

The appellant relies on Article 46, UCMJ, 10 U.S.C. § 846, and Rule for Courts-Martial (R.C.M.) 703(d) as the premise for his claim that the military judge abused his discretion in not granting his request for an expert consultant. Although R.C.M. 703(d) does not specifically address expert consultants, our Court has recognized that this Rule is generally applicable to expert consultants in the same way it is applicable to expert witnesses. *See United States v. Warner*, 59 M.J. 573, 578 (A.F. Ct. Crim. App. 2003). The distinction between expert witnesses and expert consultants is not at issue in this case.

The appellant correctly points out that as a matter of due process, "servicemembers are entitled to investigative or other expert assistance when necessary for an adequate defense." *United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986). However, the accused is required to demonstrate the necessity for the services he is requesting. *Id*. at 291. In showing this necessity, the defense must be specific in defining the issues they hope to develop with expert assistance and must demonstrate that they have sufficiently educated themselves as to such potential issues that might be developed with expert assistance. *United States v. Tornowski*, 29 M.J. 578, 580 (A.F.C.M.R. 1989). The defense "must demonstrate something more than a mere possibility of assistance from a requested expert." *United States v. Gunkle*, 55 M.J. 26, 31 (C.A.A.F. 2001). In *United States v. Ford*, 51 M.J. 445, 455 (C.A.A.F. 1999), our superior court fashioned a three-pronged test for evaluating defense requests for expert assistance. The request must proffer:

> (1) Why the expert assistance is needed;
>
> (2) What the expert assistance would accomplish for the accused; and,
>
> (3) Why the defense counsel is unable to gather and present the needed evidence.

Id. at 455.

The appellant and the government both focus on the *Ford* three-pronged test in their respective arguments. The appellant argues that his request met all three prongs of the test. In doing so, he points out that his request cited his multiple anger management issues, his family history of alcohol abuse and violence, and his defense counsel's concern about the indications that the appellant suffered from depression, suicidal ideations, and anti-social behavior. The appellant also states that his counsel explained the need for an expert consultant to explore personality testing, in-depth clinical interviews, and what impact the appellant's personal and cultural background could have had on the circumstances leading up to the appellant's misconduct. He reminds us that his counsel specifically requested an inquiry into factors associated with rehabilitation potential, risk of recidivism, and other matters in extenuation and mitigation. Finally, he

asserts that his trial defense counsel explained in his request why he personally did not have the requisite expertise to analyze such information on his own.

The government, on the other hand, argues that the military judge was correct in not granting the trial defense counsel's request because the defense failed to articulate why an expert was necessary and failed to show that there was a reasonable probability that an expert's services would have provided meaningful assistance to the accused. In other words, the government attacks the first two prongs of the *Ford* test.

As our superior court recently pointed out in *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005), "[i]n determining whether the military judge abused his discretion in denying the defense's request for an expert consultant, each case turns on its own facts." Under the facts of this particular case, we find, after applying the *Ford* test, that the trial defense counsel adequately demonstrated the need for expert assistance, specifically for the purposes of developing extenuation and mitigation evidence for the purposes of the sentencing phase of the court-martial. Insofar as the defense's request applied to expert assistance in the findings phase, that issue was waived by the appellant's guilty pleas. However, the issue remained viable for purposes of sentencing, which was the primary focus of the trial defense counsel's request.

We have viewed the videotapes of the incident upon which all the offenses against the appellant are based. These tapes document the appellant's rather bizarre behavior during the incident and demonstrate how excessive alcohol intake and crowd incitement may have contributed to the appellant's actions. When these exhibits are considered in combination with the appellant's youth, personal history, and apparently mercurial descent from a normal high school student to Air Force technical school pariah, it is not surprising that the trial defense counsel sensed the need for expert assistance. It would have been helpful for the defense counsel and possibly to the sentencing authority to be provided with information regarding the appellant's mental state and potential for rehabilitation, as the trial defense counsel explained in his request and subsequent motion to compel.

We find that the military judge abused his discretion. *See United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004). The military judge made no findings of fact, and the substance of the motion was not discussed on the record during the court-martial. He simply notes in his ruling that the defense did not believe that a sanity board was necessary nor did they ask for a specific person to be their expert. He then denies the motion. The military judge concludes by stating that he would grant a request for a sanity board and consider a defense request for an expert witness, if submitted. There is no evidence in the record that the judge considered the proper factors in making his ruling or that he conducted the applicable *Ford* test. Whether or not a sanity board or an expert witness had been requested by the defense is certainly not the standard by which a request for expert assistance is evaluated; yet, it appears to be set forth by the military

judge as his justification for denial. *See Ford*, 51 M.J. at 455. The appellant's requested relief will therefore be granted.

The findings are correct in law and fact. The record of trial will be returned to The Judge Advocate General for remand to the convening authority. A rehearing on sentence is authorized.

OFFICIAL

ANGELA M. BRICE
Clerk of Court