UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class AARON G. POLINARD
United States Air Force

ACM 35806

24 March 2006

Sentence adjudged 18 March 2003 by GCM convened at Fairchild Air Force Base, Washington. Military Judge: Timothy D. Wilson.

Approved sentence: Bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, Major Sandra K. Whittington, and Major L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Major John C. Johnson, Major C. Taylor Smith, and Major Steven R. Kaufman.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

OPINION OF THE COURT

MOODY, Senior Judge:

A general court-martial consisting of members convicted the appellant, contrary to his pleas, of one specification of wrongful distribution of ecstasy, wrongful introduction of ecstasy onto an armed forces installation, wrongful possession of ecstasy, wrongful introduction of psilocin mushrooms onto an armed forces installation, and wrongfully endeavoring to impede a trial by court-martial, in violation of Articles 112a and 134, UCMJ, 10 U.S.C. § 912a, 934. The members sentenced the appellant to a bad-conduct

discharge, confinement for 12 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the findings and sentence as adjudged.

The appellant has submitted five assignments of error. We address only one: Whether the military judge erred by permitting the prosecution to present evidence that the appellant had made incriminating statements and had invoked his right to counsel during an interrogation. Finding error, we order corrective action.

The evidence presented by the prosecution included a deposition of Special Agent (SA) Steven Grabosky of the Air Force Office of Special Investigations (AFOSI). This deposition related investigatory steps which the AFOSI had taken in the appellant's case. SA Grabosky stated that he interviewed the appellant following an advisement of rights. During this interview the appellant made statements that were potentially incriminating, including a comment to the effect that he had used mushrooms "once upon a time." During the deposition SA Grabosky testified that after informing the appellant of various information the AFOSI had, the appellant asked if he could get a "deal." SA Grabosky responded that he "can't make any deals on behalf of the government." At that point the appellant requested legal counsel.

Prior to the introduction of evidence, trial defense counsel moved to exclude the phrase about having used mushrooms "once upon a time" and the military judge granted the motion. Subsequently, out of the hearing of members, the defense counsel brought to the military judge's attention the fact that the deposition referred to the appellant's invocation of his right to counsel. Trial counsel agreed that this reference was improper and advised the military judge that he would not present that statement to the members.

During the prosecution's case-in-chief, the trial counsel and assistant trial counsel read the deposition to the members, the trial counsel reading the questions and the assistant trial counsel reading the answers. However, unaccountably, they included both the admission of having used mushrooms and the invocation of the right to counsel. There was no objection by the defense. Before the two trial counsel had completed reading the deposition, the National Anthem played over the installation loud speaker, and a court member stated that he had not been able to hear the entire document. At the direction of the military judge, the trial counsel reread the last few paragraphs of the deposition, and again included the two suppressed statements. Again there was no objection. The military judge did not sua sponte instruct the members to disregard the statements, nor did he take any other corrective action. The record has been certified as accurate by counsel for both sides and by the military judge. Therefore, we presume that it correctly reflects the trial proceedings.

Both the appellant and the government use a plain error analysis in addressing this issue. This is appropriate when there has been no objection at trial to the contested evidence. While, as stated above, the defense counsel did not object when the trial

counsel read the offending statements, we consider his prior motions in limine to have preserved the issue. Therefore, we will perform a harmless error analysis. Article 59a, UCMJ, 10 U.S.C. § 859a.

It goes without saying that the presentation of these two statements was erroneous. Although, standing alone, the error as to the statement about mushroom use was probably harmless, given its rather ambiguous nature, we must apply a more stringent test to the invocation of the right to counsel. For errors of a constitutional dimension, the test is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967). *See also Neder v. United States*, 527 U.S. 1, 19 (1999).

"It is the well-settled law of this Court that it is improper to bring to the attention of the triers of fact that an accused, upon being questioned on an occasion prior to trial, asserted his rights to counsel or to remain silent." *United States v. Moore*, 1 M.J. 390, 391 (C.M.A. 1976). *See also United States v. Sidwell*, 51 M.J. 262 (C.A.A.F. 1999); *United States v. Riley*, 47 M.J. 276 (C.A.A.F. 1997). The reason for this prohibition is "that to many, even to those who ought [to] know better, the invocation by a suspect of his constitutional and statutory rights to silence and to counsel equates to a conclusion of guilt—that a truly innocent accused has nothing to hide behind assertion of these privileges." *Moore*, 1 M.J. at 391.

In examining the prejudice at issue here, we note first of all that the offending statement was read aloud to the members, twice, by the assistant trial counsel himself. While the military judge instructed that the members were to evaluate the deposition as if SA Graboski were actually testifying, we cannot but conclude that the assistant trial counsel's voice lent the statement a measure of credibility beyond what it otherwise might have possessed, especially in view of the silence of the military judge, which would convey to a reasonable panel that it was proper to consider the statement. In addition, we have taken into account the quality of the government's case. The military judge himself expressed doubt as to the sufficiency of the evidence as to the introduction of mushrooms. The remaining drug specifications relied to a large extent on the testimony of other drug users, who testified under grants of immunity or pursuant to pretrial agreements, factors which are relevant in evaluating their credibility. Therefore, as to the drug specifications, we are not able to conclude beyond a reasonable doubt that the evidence in question was harmless. *See Chapman*, 386 U.S. at 24.

We reach a similar conclusion on the Article 134, UCMJ, offense. The gravaman of that charge was that the appellant made false statements about his drug use during pretrial interviews with prosecutors in companion cases. An element of this offense is that the appellant acted with the intent to impede the administration of justice. We are unable to conclude beyond a reasonable doubt that the appellant's invocation of his right to counsel did not play a role in the members' evaluation of this element. Therefore, we

hold that the admission of the contested statement materially prejudiced the appellant's substantial rights.

The findings and sentence are set aside. A rehearing is authorized.

OFFICIAL

ANGELA M. BRICE
Clerk of Court