UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman KEITH L. PULLAM
United States Air Force

ACM S31118

24 September 2007

__ M.J.__

Sentence adjudged 8 December 2005 by SPCM convened at Brooks City-Base, Texas. Military Judge: Dixie A. Morrow.

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Chadwick A. Conn.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Donna S. Rueppell.

Before

WISE, BECHTOLD, and HEIMANN
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final publication.

HEIMANN, Judge:

Contrary to his plea, the appellant was convicted in a special court-martial of a single charge and specification of use of methamphetamines in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A panel of officer and enlisted members sentenced him to a bad-conduct discharge and reduction to E-1. The convening authority approved the sentence as adjudged.

On appeal, the appellant asserts two errors. The first is that the Staff Judge Advocate erred by stating in the Staff Judge Advocate's Recommendation (SJAR) that the maximum punishment in appellant's case included a *dishonorable discharge*, vice a bad-conduct discharge, and forfeiture of two-thirds pay *and allowances,* vice just two-thirds pay. The second is that the appellant was denied a fair trial when the military judge did not grant a mistrial following the discovery of evidence suggesting that the members may have voted three times in findings without announcing that reconsideration had been proposed. We have reviewed the record of trial, the assignment of errors, and the government's answer thereto. We address the issues in reverse order.

Denial of Motion for Mistrial

The facts surrounding the denial of the request for mistrial are undisputed. After completion of the entire case, including sentencing, the military judge properly convened an Article 39(a) session under Rule for Courts-Martial (R.C.M.) 1102(b)(2) to address evidence suggesting the members may have voted three times in findings without announcing that reconsideration had been proposed. The evidence raising this concern rests entirely on the post-trial Article 39(a) testimony of SSgt N, the bailiff, who was assigned the duty to destroy the panel members' notes following the trial. The relevant findings of fact reached by the military judge included the following:

> 11. SSgt N glanced at written material as he was feeding it into the shredder. The first "college-lined" sheet of paper he came upon "just caught (his) attention." He described this sheet of paper as follows: about ten (10) inches, lined, with annotations reading "first vote," "second vote," and "third vote" with "tally" (hash) marks next to "guilty" and "not guilty" for each of the three votes. SSgt N described the sheet of paper as being handwritten, with no name associating it with any member of the court. SSgt N did not recall anything else about this sheet of paper.
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> 12. After reading this sheet of paper, SSgt N shredded it.
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> . . .
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> 14. . . . . SSgt N estimated that he had shredded less than one-fourth of the stack of material retrieved from the deliberation room . . . . SSgt N did not recall seeing pieces of paper that purported to be individual ballots during his shredding of less than one-fourth of the gross material.
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> . . .
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> 17. Other than the opinion of SSgt N, based upon his glancing at the lined sheet of paper which he then shredded, there is no evidence before the court

regarding the voting procedures employed by the court members. Counsel for the Government and for the Accused affirmatively rejected any need to question members of the court about their voting procedures.

Based on the testimony of SSgt N, the trial defense counsel, in the post-trial session, petitioned the military judge to enter a finding of not guilty or, in the alternative, to direct a mistrial. The military judge denied both requests. On appeal, the appellant only asserts the military judge abused her discretion in denying the request to direct a mistrial. Specifically, the appellant asserts, citing R.C.M. 915(a), that a mistrial is appropriate when such action is "manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." The appellant further acknowledges that a declaration of a mistrial is a drastic remedy. *See United States v. Diaz*, 59 M.J. 79 (C.A.A.F. 2003).

In *United States v. Dancy*, 38 M.J. 1 (C.M.A. 1993), the Court of Appeals for the Armed Forces recognized that a mistrial is an unusual and disfavored remedy that should be applied only as a last resort to protect the guarantee of a fair trial. The Court further stated that a mistrial will be granted only to prevent manifest injustice against the accused and is appropriate only when circumstances arise that cast substantial doubt on the fairness or impartiality of the trial. *Id.* at 6. The Court also acknowledged that a military judge has "considerable latitude in determining when to grant a mistrial." *United States v. Seward*, 49 M.J. 369, 371 (C.A.A.F. 1998). Therefore, this Court will not reverse the military judge's decision absent clear evidence of abuse of discretion.

In this case, the appellant asserts ". . . it is not a far-fetched hypothetical based on the evidence that the first two votes by the members were believed to be binding at the time they were cast" and ". . . it is reasonable that what actually occurred was that the first two votes were believed to be binding and the votes resulted in the acquittal of Appellant." The Government replies by contending there is simply no "evidence" to support the speculations of the appellant. The government's argument is consistent with the trial judge's conclusion of law that "[t]he description of the contents of the lined sheet of paper supplied by SSgt N is not evidence that the court members failed to follow the court's instructions regarding the proper procedure for voting."

In denying the motion, it is apparent the military judge correctly placed considerable weight on the fact that the motion for mistrial involved an inquiry into the panel's deliberative process, in contravention of Mil. R. Evid. 606(b) and *United States v. Dugan*, 58 M.J. 253 (C.A.A.F. 2003). That Rule provides that court members are prohibited from testifying as ". . . to any matter or statement occurring during the course of the deliberations of the members of the court-martial or, to the effect of anything upon the member's or any other member's mind or emotions as influencing the member to assent to or dissent from the findings . . . ." It is long-settled that a panel member cannot be questioned about his or her verdict, but can be questioned about the introduction of

extraneous information into the deliberative process. *Tanner v. United States*, 483 U.S. 107 (1987); *United States v. Witherspoon*, 16 M.J. 252, 253 (C.M.A. 1983); Mil. R. Evid. 606(b). The restriction on impeaching panel findings is contained in R.C.M. 923. That Rule provides that findings may be impeached when "extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear upon any member, or unlawful command influence was brought to bear upon any member." Further, the discussion to R.C.M. 923 provides that, ". . . when a showing of a ground for impeaching the verdict has been made, members may be questioned about such a ground." The military judge determines, as an interlocutory matter, whether such an inquiry will be conducted and whether a finding has been impeached.

In this case, the military judge found as a matter of law that the testimony of SSgt N was not evidence that the court members failed to follow the court's instructions regarding the proper procedures for voting. While it is possible to interpret the testimony of SSgt N in any number of ways, the ultimate question centers on whether there was any evidence to suggest the findings could be impeached for one of the exceptions outlined in R.C.M. 923. SSgt N's testimony did not meet this threshold, regardless of what "interpretation" or weight one places on the testimony of the bailiff. When asked if anyone desired to question the members, both parties declined. Noting that neither trial defense counsel nor the appellant has shown a proper basis to question the panel's findings, we find the findings are valid on their face. Absent some showing of a proper basis under R.C.M. 923 to impeach the findings, the military judge did not abuse her discretion in denying the motion for a mistrial.

Staff Judge Advocate's Recommendation (SJAR)

The appellant also claims the SJAR was in error for misstating the maximum punishment. We review post-trial processing issues do novo. *United States v. Bakcsi*, 64 M.J. 544 (A.F. Ct. Crim. App. 2006).

In this case, the SJAR clearly misstated the maximum permissible punishment. The appellant and trial defense counsel responded to the SJAR, but did not object to the error, which waives the issue on appeal unless there is plain error. *See* R.C.M. 1106(f)(6); *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000).

The test for plain error is whether there was an error, whether it was plain and obvious, and whether it prejudiced a substantial right of the appellant. *United States v. Scalo*, 60 M.J 435, 436 (C.A.A.F. 2005) (citing *Kho*, 54 M.J. at 65).

The error certainly occurred and it was plain and obvious. The real issue is whether a substantial right of the appellant's was prejudiced. In this case, the only punishments imposed by the members were a reduction and a bad-conduct discharge. By

advising the convening authority that the appellant could have received a dishonorable discharge, the convening authority was misinformed as to the maximum possible punishment which could have been imposed by the members. This Court believes the convening authority was thus misled in how to appropriately assess the defense request to set aside the bad-conduct discharge. In evaluating the impact of the misstatement of the maximum possible punishment, this Court is also troubled by a panoply of errors noted in both the SJAR and the defense submission to the convening authority that ultimately completely undermined the ability of the convening authority to effectively exercise his responsibilities, to the prejudice of the accused. Of particular note, the Personal Data Sheet does not reflect the three deployments of the accused. *See United States v. DeMerse*, 37 M.J. 488, 492 (C.M.A. 1993). It is similarly troubling that trial defense counsel's response to the SJAR and submission to the convening authority refers to a non-existent pretrial agreement, with a promise to reduce non-existent confinement.

The convening authority is the appellant's "best hope for sentence relief." *United States v. Davis*, 58 M.J. 100, 102 (C.A.A.F. 2003). Further, the standard for meeting the test for prejudice is low in this area, requiring only "some colorable showing of possible prejudice." *Kho*, 54 M.J. at 65 (citing *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998)). Applying these precepts, we hold that there was plain error in this case and that the convening authority's action was taken without complete and accurate advice, to the substantial prejudice of the appellant.

Conclusion

The finding is 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). The action of the convening authority is set aside. The record of trial is returned to The Judge Advocate General for remand to the convening authority for post-trial processing consistent with this opinion. Thereafter, Article 66(b), UCMJ, 10 U.S.C. § 866(b), will apply.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court