UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant ALBERTO C. RAMOS JR.
United States Air Force

ACM 36830

25 February 2008

Sentence adjudged 12 July 2006 by GCM convened at Langley Air Force Base, Virginia. Military Judge: Thomas Cumbie.

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

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Griffin S. Dunham.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Major Carrie E. Wolf.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

OPINION OF THE COURT

SOYBEL, Judge:

Contrary to his pleas, the appellant was found guilty of one specification alleging a single use of cocaine in violation of Article 112a UCMJ, 10 U.S.C. § 912a. On appeal, he asserts for the first time that his rights under Military Rule of Evidence (Mil. R. Evid.) 504, the husband-wife privilege, were violated because trial counsel elicited from a witness that the appellant's wife was uncooperative with investigators and argued that she was protecting him.

Suspicion first fell upon the appellant after he tested positive on two random urinalysis tests given within days of each other. In an interview with the Air Force Office

of Special Investigations (OSI), the appellant told the investigating agent, Special Agent (SA) Allen, that he attended a party with his wife hosted by one of her civilian co-workers. He said the party was either in Norfolk or Virginia Beach, Virginia, but didn't know which one. Laying the groundwork for an innocent ingestion defense, the appellant told the investigator he believed there were drugs at the party because he could smell marijuana burning and some of the people there looked "shady."

At trial, the appellant's trial defense attorney challenged the thoroughness of the OSI's investigation, hitting hard on the fact that the OSI never interviewed anyone at the party, particularly the host. On the redirect examination of SA Allen, trial counsel brought out that the reason the agent did not interview the host of the party was because he was unable to locate his address using either the phone book or a law enforcement database called AutoTrack.

SA Allen also testified he attempted to locate this individual's location through the appellant's wife (Mrs. Ramos), but she had no address or phone number for him and only knew how to drive to his house. Finally, he testified that he tried to elicit help from Mrs. Ramos to find the host of the party, but was unsuccessful. Responding to a question from trial counsel, SA Allen agreed he couldn't find the individual "due to a lack of cooperation" from Mrs. Ramos. There was no objection by the defense to this question or response. Likewise, there was no objection when trial counsel highlighted Mrs. Ramos' lack of cooperation during closing argument and suggested she was protecting her husband.

On appeal, the appellant avers it was plain error for the military judge not to have corrected trial counsel's "misconduct"[1] sua sponte. We find no merit in the appellant's argument.

The standard of review when there was no objection at trial is whether there was plain error. Thus we must determine whether error occurred, whether it was plain or obvious, and whether the error resulted in material prejudice to a substantial right of the accused. *United States v. Tyndale*, 56 M.J. 209, 218 (C.A.A.F. 2001).

Mil. R. Evid. 504 governs the husband-wife privilege in the Armed Forces. It is a two–part privilege. The first part protects one spouse from being compelled to testify against the other spouse. Mil. R. Evid. 504(a). It does not apply to confidential communications, which are covered by the second part of the privilege. The only person with the right to assert the first component of the privilege is the spouse who would be testifying. The person against whom the testimony would be given has no standing to assert this portion of the privilege. *Trammel v. United States*, 445 U.S. 40, 53 (1980).

[1] We question the appropriateness of the use of this term.

The second component of the husband-wife privilege, Mil. R. Evid. 504(b), involves confidential communications between spouses. These are communications not meant to be shared by anyone else except perhaps a third person needed to actually transmit the communication from one spouse to another. Mil. R. Evid. 504(b)(2). These are afforded substantial protection under the law. Mil. R. Evid. 504(b)(1) permits either spouse to assert the privilege and protect the confidential communications. Mil. R. Evid. 504(b)(3). The spousal privilege, as it relates to these communications, generally does not extend to mere acts, unless those acts are communicative in nature. *United States v. Martel*, 19 M.J. 917, 927-28 (A.C.M.R. 1985).

The appellant relies on *United States v. Cannon*, 33 M.J. 376 (C.M.A. 1991) to support his position. *Cannon* is a case where a third witness was allowed to tell the court about statements, made by the appellant's wife, that were incriminating to the appellant. The Court discussed the first part of the privilege that allows a person to refuse to testify against their spouse. Under the facts of that case, the Court found the government had "smuggled [in] . . . out-of-court assertions of a declarant who could not be compelled to testify . . . [against their spouse]." *Id.* at 385. This was done over defense objections to the evidence.

The instant case is distinguishable. First, the government was careful not to have SA Allen mention the appellant's wife in direct examination. The only exception to this was when the agent recounted statements made by Mrs. Ramos that the appellant himself had brought up during their interview. Second, it was the defense that attacked the quality of the OSI's investigation, especially their failure to interview the host of the party. This opened the door for the government to explain the reason for not interviewing the host.

Finally, there were no out-of-court *statements* smuggled into the trial through another witness. Rather, the subject of this appeal is Mrs. Ramos' actions, which were clearly non-communicative. *Cf. Martel*, 19 M.J. at 927-28. In fact, what the appellant actually seems to be challenging now is trial counsel's *characterization* of Mrs. Ramos' actions as uncooperative, a characterization to which the defense did not object. SA Allen initially testified he tried to have Mrs. Ramos help him find her co-worker who hosted the party but was unsuccessful. If left alone, the defense might have argued there could be neutral reasons why the two could not mutually arrange a meeting.

It was the defense counsel who, on re-cross examination, brought out Mrs. Ramos' failure to meet with SA Allen to show him where the host of the party lived. The defense also highlighted the fact that SA Allen went to Mrs. Ramos' house at least twice to get her to help him locate her co-worker, but each trip resulted in an apparent failure. It seems a bit of an overreach now for the defense to claim they were the victim of plain error, when it was they who tried to use the failure of SA Allen to find Mrs. Ramos' co-worker to impugn the thoroughness of OSI's investigation. Certainly it may have been a

valid trial tactic at the time, but it leaves little room to make an about face on appeal and now claim the appellant was victimized by that very tactic.

Given the above, we find no merit in the appellant's argument. No statement made by Mrs. Ramos was used against the appellant. Trial counsel's characterization of Mrs. Ramos' actions, during closing argument, as protecting her husband, did not draw an objection and was not plain error as no material prejudice occurred. This is obvious in light of the fact that the appellant's conviction was supported by two positive urinalyses taken right after he spent four hours at a party where he admitted drugs were present.

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, GS-11, DAF
Clerk of the Court