UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	)	**Misc. Dkt. No. 2010-11**
Appellant	)	
	)	
v.	)	
	)	**ORDER**
Staff Sergeant (E-5)	)	
JOSEPH P. RETTINGHOUSE,	)	
USAF,	)	
Appellee	)	**Panel No. 1**

On 19 July 2010, counsel for the United States filed an appeal under Article 62, UCMJ, 10 U.S.C. § 862, in accordance with this Court's Rules of Practice and Procedure.

The appellee faces charges of forcible sodomy, assault with intent to commit sodomy, indecent acts, and assault consummated by a battery relating to his two stepdaughters, who were both under the age of 12 years at the time of the alleged offenses, in violation of Articles 125, 128, and 134, UCMJ, 10 U.S.C. §§ 925, 928, 934. The military judge dismissed with prejudice two of the indecent acts specifications based on the statute of limitations.

Background

During an Article 39(a), UCMJ, 10 U.S.C. § 839(a), hearing held on 25 May 2010, the military judge granted a defense motion to compel disclosure of notes taken by the government counsel and paralegals present during interviews of the alleged victims. His ruling followed an *in camera* review of the notes and a determination that the notes revealed inconsistencies by the alleged victims that should be disclosed to the defense as exculpatory material under *Brady v. Maryland*, 373 U.S. 83 (1963). We note that the procedure adopted by the military judge for determining whether witness interview notes taken by members of the prosecution team should be disclosed is in accord with the procedure suggested by our superior court in *United States v. Romano*, 46 M.J. 269, 275 (C.A.A.F. 1997). After his ruling on this issue and other matters, the military judge recessed the court-martial to await the court members. The government counsel did not indicate any intent to appeal this ruling and the notes were, in fact, provided to the defense counsel.

Some five hours later, the military judge reconvened the Article 39(a), UCMJ, session. During the lengthy recess, the trial defense counsel reviewed the interview notes and alerted the judge in a Rule for Courts-Martial (R.C.M.) 802 conference that, based

upon their review of the interview notes, they needed time to evaluate possible additional motions and other requests for appropriate relief. When the Article 39(a), UCMJ, session reconvened, the defense counsel moved to dismiss the charges based on the government's failure to previously disclose the exculpatory material contained in the interview notes. The senior trial counsel disputed the remedy requested by the defense but, again, did not indicate any intent to appeal the military judge's ruling directing disclosure. To the contrary, the senior trial counsel stated her intent to call as a witness the former deputy staff judge advocate at Dyess Air Force Base, Texas, who had taken some of the notes to "explain in her own words what her notes mean." Following testimony of a nurse who interviewed one of the alleged victims, the military judge recessed the Article 39(a), UCMJ, session for the evening to await the availability of the former deputy staff judge advocate, Major P.

On 26 May 2010, Major P testified by video teleconference concerning the notes that she took during her interviews of the alleged victims. Neither side called additional witnesses on the motion to dismiss. The senior trial counsel argued against the requested remedy, primarily based on the fact that the trial defense counsel had knowledge of prior inconsistencies in the witnesses' statements. Again, however, she did not indicate any intent to appeal the ruling that compelled disclosure of the notes. In detailed findings of fact and conclusions of law, the military judge denied the defense motion to dismiss as well as a motion to prohibit one of the alleged victims from testifying. The case was then continued until 7 June 2010.

When the Article 39(a), UCMJ, session reconvened on 7 June 2010, the senior trial counsel asked for clarification of the military judge's earlier ruling concerning the extent of exculpatory material in the interview notes which had been disclosed to the defense on 25 May 2010. After an in-depth clarification of his earlier ruling, the military judge asked the senior trial counsel if she had a motion to reconsider. She declined, stating that her preference was to move on to a motion to compel witnesses. She explained that her request for clarification was "just a clarification process for the government to be able to answer questions." In response to the defense request to compel the appearance of the legal office personnel who took the notes previously disclosed to the defense, the senior trial counsel asserted, "It's still the government's belief that this is attorney work product." She then stated that the government would not produce any of the witnesses and reiterated her disagreement "with the court's ruling."[1]

The trial defense counsel pointed out that the judge had granted the defense motion to compel disclosure, highlighting this rather salient point: "[W]e already have the documents. The court's already turned them over. So that's water under the bridge." The senior trial counsel agreed, stating, "I think that we're past the point of what the court considers work product compared to what either party does. Certainly, we are on the Motion to Compel which is dealing with whether or not we are going to produce the

[1] We note that the military judge's ruling regarding work product was made 12 days earlier, and the government filed no notice of appeal of that ruling despite the senior trial counsel's apparent disagreement with it.

witnesses." The senior trial counsel later appeared to acknowledge some error in her litigation of the earlier motion when she told the military judge that "the government is not going to make the same mistake as it did in the *Brady* motion, and come up with something out of the hat without having time to prepare."

The military judge made detailed findings of fact and conclusions of law concerning the production of the witnesses at issue. As to statements made by the alleged victims during their January 2010 interviews with the prosecutors, which Doctor S and prosecution paralegals attended, the military judge ordered:

> [T]he court will give defense counsel leave to interview [the alleged victims] to determine whether there is a need for extrinsic evidence of their prior statements made to trial counsel, [Doctor S] and various paralegals. Should the witnesses not admit to the prior statements, I direct that the government make either [Doctor S] or Technical Sergeant [D] and Staff Sergeant [F] available to testify.
>
> Or, in the alternative, that the government enter into a Stipulation of Fact, admitting that the witnesses made the inconsistent statements chronicled in [Doctor S]'s, Technical Sergeant [D]'s and Staff Sergeant [F]'s notes.

Concerning interviews of the alleged victims by the former deputy staff judge advocate, the military judge ordered:

> [A]s with the January trial counsel interviews, I will grant the defense leave to interview [the alleged victims] and determine whether they will admit to making the prior inconsistent statements to Major [P]. In the event they do not, I compel that the government either provide Major [P] to testify or in the alternative to enter into a Stipulation of Fact, admitting that the witnesses made the inconsistent statements recorded in Major [P]'s notes.

He specifically limited his ruling to potential witness testimony regarding what was in the previously disclosed notes.

In response to the military judge's order, the senior trial counsel announced, "[T]he fact of the matter is now that you've issued that order the government will not provide or produce any of the paralegals or Major [P] to be interviewed by the defense, or to testify about any attorney work product." The military judge responded, "I've already ruled that there's no attorney work product in there, so that doesn't seem to be an issue." Rather than making an attempt to counter this important procedural point, the senior trial

counsel simply repeated her earlier response: "But the government still will not produce those witnesses, sir."

After some discussion on the record concerning alternatives to witness testimony, the trial defense counsel renewed their motion to compel the appearance of Major P, Doctor S, Technical Sergeant D, and Staff Sergeant F. The military judge again clarified that the purpose of these witnesses would be to impeach the alleged victims with the prior inconsistent statements made to these witnesses, as reflected in the previously disclosed notes, if the alleged victims denied making the statements. He again ordered the government to make available Major P and Doctor S or, as an alternative to Doctor S, Technical Sergeant D and Staff Sergeant F. During a discussion that followed, the senior trial counsel conceded that Doctor S's testimony was not protected by any work product privilege, but stated that Doctor S was unavailable because of a scheduling conflict with another trial. She maintained that the government would refuse to comply with the order to produce any of the witnesses. The defense asked the military judge to dismiss the case or, in the alternative, abate the proceedings. The senior trial counsel argued that "abatement as opposed to dismissal is proper." The military judge abated the proceedings until such time as the government complied with the order to produce the witnesses. On 9 June 2010, the government filed a notice of appeal under Article 62, UCMJ, of the "Military Judges [sic] decision to abate or terminate the proceedings."

Expanding upon the single issue identified in the notice of appeal, the appellate government counsel raises a variety of alleged errors by the military judge for our consideration in its Article 62, UCMJ, appeal. In the first presented issue, the government alleges that the military judge erred as a matter of law by: (1) finding that the statements in the interview notes were inconsistent, (2) disclosing work product, and (3) ordering improper impeachment. The second presented issue alleges that, should this Court find that the statements are inconsistent, the military judge abused his discretion by limiting the cross-examination of Major P on those statements. The government seeks to tie these issues to the sole issue identified in the notice of appeal under Article 62, UCMJ, by arguing that these various errors precipitated the abatement order.

Law and Discussion

Given this procedural posture, we first must determine what is properly before us under this Article 62, UCMJ, appeal. Article 62(a)(1)(A), UCMJ, permits the government to appeal "[a]n order or ruling of the military judge which terminates the proceedings with respect to a charge or specification." Such an appeal requires written notice of appeal to the military judge within 72 hours of the order or ruling. Article 62(a)(2), UCMJ. The requirement to file a notice of appeal within 72 hours of the challenged ruling of the military judge "is mandatory, jurisdictional, and not subject to extension." *United States v. Flores-Galarza*, 40 M.J. 900, 905 (N.M.C.M.R. 1994). As this Court has observed

> Because [prosecution appeal] statutes compete with speedy trial and double jeopardy protection as well as judicial impartiality and piecemeal appeal policies, prosecution appeals are not particularly favored in the courts. . . . The statutes authorizing such appeals are construed strictly against the right of the prosecution to appeal.

United States v. Combs, 38 M.J. 741, 743 (A.F.C.M.R. 1993) (alterations in original) (quoting *United States v. Pearson*, 33 M.J. 777, 779 (N.M.C.M.R. 1991)).

As the calendar and the procedural history of this case make clear, any opportunity to appeal the military judge's 25 May 2010 ruling concerning disclosure of the interview notes has passed. The notes were disclosed some two weeks before the military judge issued the order now before us and were repeatedly discussed on the record. Indeed, the senior trial counsel even called one of the authors of the notes, Major P, to elaborate on "what her notes mean." Therefore, the only issue properly before this Court in this Article 62, UCMJ, appeal is whether the military judge erred by abating the proceedings after the government refused to comply with the court's order to produce certain witnesses for potential impeachment testimony.

We review a military judge's order of abatement for an abuse of discretion. *United States v. Ivey*, 55 M.J. 251, 256 (C.A.A.F. 2001) (citing *United States v. Richter*, 51 M.J. 213, 223 (C.A.A.F. 1999)). If the government refuses to produce a witness as ordered by the military judge, the proceedings "shall be abated." R.C.M. 703(c)(2)(D). Here, the military judge had previously ruled particular testimony relevant as impeachment. His order to produce the witnesses who could provide that testimony is not an abuse of discretion, and his order abating the proceedings for the government's refusal to comply is in accord with R.C.M. 703.

We will not—nor could we—expand the limited jurisdiction conferred by Article 62, UCMJ, to permit the government to relitigate on appeal rulings of the military judge that predate the required 72-hour notice of appeal by more than a week, particularly where the government's actions at trial in disclosing the interview notes at issue indicate no intent to appeal the ruling. Indeed, after the military judge ordered disclosure of the notes on 25 May 2010, both sides appeared ready to proceed to trial on the merits. If the government had refused to disclose the notes at issue based on work product and had the military judge then abated the proceedings on 25 May 2010, the issue of whether the work product rule protected disclosure of the interview notes in this case may have been a proper subject of appeal under Article 62, UCMJ, since the abatement would have directly resulted from the military judge's ruling concerning the applicability of the work product doctrine to potentially exculpatory material. Perhaps two weeks of retrospective examination of their litigation posture on the motion to disclose the notes caused the government to regret its earlier decisions, but such regret is not the proper subject of a government appeal under Article 62, UCMJ.

On consideration of the United States Appeal Under Article 62, UCMJ, it is by the Court on this 4th day of October, 2010,

ORDERED:

That the United States Appeal Under Article 62, UCMJ, is hereby **DENIED**.

FOR THE COURT

OFFICIAL

STEVEN LUCAS
Clerk of the Court