UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant EDDIE J. ROGERS
United States Air Force

ACM 36768

27 February 2008

Sentence adjudged 03 February 2006 by GCM convened at Fort Meade, Maryland. Military Judge: Donald A. Plude.

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-4.

Appellate Counsel for the Appellant: Captain Lance J. Wood (Argued), Lieutenant Colonel Mark R. Strickland, and Captain Christopher L. Ferretti.

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

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges

OPINION OF THE COURT

BRAND, Judge:

Contrary to his plea, the appellant was convicted of one specification of divers uses of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a.[1] The adjudged and approved sentence consists of a bad-conduct discharge, confinement for 6 months, and reduction to E- 4.[2]

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[1] He was acquitted of four specifications (indecent assault, indecent exposure, and two solicitations) in violation of Article 134, UCMJ, 10 U.S.C. § 934.

[2] Mandatory forfeitures were deferred and waived for the maximum period allowable.

The appellant raises two issues on appeal. The first issue is whether the military judge erred in denying the appellant's motion to suppress the hair test results when the information presented to the military magistrate improperly referenced a prior positive urinalysis and failed to provide probable cause that the evidence sought could be found on the person or in the place to be searched. The second issue is whether the evidence is legally and factually sufficient to sustain the appellant's conviction for wrongful use of cocaine on divers occasions in the time frame charged.

Enlightening oral arguments were presented on 16 Jan 2008.

Background

At the time of trial, the appellant was 43 years old and was assigned as the NCOIC of the Command Support Staff for the 29th Intelligence Squadron (IS) at Ft Meade, MD. He had been on active duty almost 19 years. He was engaged and had a young son.

On 28 Apr 2005, there was a document missing in the 29th IS orderly room. As a result, Senior Airman (SrA) T, also assigned to the 29th IS orderly room, was told by another member in the orderly room to call the appellant. The appellant was on emergency leave. The appellant requested that SrA T stop by his house during the lunch hour to discuss the situation, and she did. Upon her return to the orderly room, SrA T reported actions that she said occurred while she was at the appellant's house. The next day, she provided a statement to the Office of Special Investigations (OSI). The charges in this case were based upon actions that SrA T reported occurred at the appellant's house.

Among other events, SrA T reported seeing the appellant use cocaine. The OSI, on 2 May 2005, interviewed the appellant who denied the allegations and consented to a urinalysis. He would not consent to providing a hair sample for analysis. The urinalysis came back on 17 May 2005 as negative. Eventually, on 20 June 2005, the OSI approached the commander of the appellant to obtain, and did obtain, authorization to seize the appellant's hair for analysis.

At trial, the defense made a motion to suppress the results of the hair analysis based upon lack of probable cause. The military judge denied the motion and made extensive findings of fact and conclusions of law.

Motion to Suppress Hair Analysis

Authorization to search may be granted by an "impartial individual," who may be a commander, military magistrate or military judge, in accordance with the underlying constitutional requirement that a search authorization be issued by a "neutral and

detached" magistrate. Mil. R. Evid 315(d); *United States v. Maxwell*, 45 M.J. 406, 423 (C.A.A.F. 1996). Probable cause exists when there is sufficient information to provide the authorizing official a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. Mil. R. Evid. 315(f)(2). There must be a "substantial basis" on which to conclude probable cause existed. *United States v. Figueroa,* 35 M.J. 54, 56 (C.M.A. 1992). "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying the hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Determination of probable cause by a neutral and detached magistrate is entitled to substantial deference. *United States v. Maxwell*, 45 M.J. 406, 423 (C.A.A.F. 1996).

The OSI agent involved in this case reviewed the statement of SrA T, corroborated some of the facts contained in the statement,[3] consulted with the legal office, and consulted with an OSI forensic science consultant. He prepared an affidavit[4] and presented it to the commander. Additionally, he briefed the commander for 20-30 minutes on the case.

When the defense makes a motion at trial to suppress evidence under Mil. R. Evid. 311(d), the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure. Mil. R. Evid. 311(e). "The duty of the military judge is to simply ensure that the magistrate had a 'substantial basis for . . .concluding' that probable cause existed." *United States v. Carter*, 54 M.J. 414, 418 (C.A.A.F. 2001); *Gates*, 462 U.S. at 238-39 (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)).

The assertion of error that the affidavit, which was prepared by an OSI agent and presented to the commander, improperly referenced a prior urinalysis is without merit. This information was not used to support the inference that the appellant had recently used cocaine but was used to show that SrA T had knowledge of a fact that was not well known and it corroborated her version of the underlying events, the illegal cocaine usage. Additionally, it was relevant on the issue of chronic use. The commander knew this prior urinalysis was old, came back positive, and the appellant was acquitted of that charge, wrongful use of cocaine.

This Court reviews a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). An abuse of discretion occurs when the military judge's findings of fact are clearly erroneous or if the decision is influenced by an erroneous view of the law. *United States v. Quintinilla*,

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[3] There are some facts he was unable to corroborate.

[4] Although not the most thorough affidavit, it contained essential information. Additionally, although the agent consulted with the legal office, he did not show them the final affidavit.

63 M.J. 29, 35 (C.A.A.F. 2006); *see also United States v. Bethea*, 61 M.J. 184 (C.A.A.F. 2005) (courts must look at the information made known to the authorizing official at the time of the decision). However, we review the legal question of sufficiency for finding of probable cause de novo, based on the totality of the circumstances. *United States v. Leedy*, 65 M.J. 208, 212 (C.A.A.F. 2007) (citing *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996)).

The military judge in the case sub judice made extensive findings of fact which are supported by the record and he applied the correct standard of law. The military judge did not abuse his discretion in denying the defense motion to suppress the hair analysis results. Additionally, we find there is probable cause under the totality of the circumstances in this case.

Legal and Factual Sufficiency

The test for factual sufficiency is whether this Court is convinced beyond a reasonable doubt of the appellant's guilt, after weighing all the evidence and making allowances for not having personally observed the witnesses. *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987). Legal sufficiency requires, considering the evidence in the light most favorable to the government, any reasonable fact finder could have found all of the essential elements beyond a reasonable doubt. *Id*; *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we] find[] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c).

The primary evidence of the appellant's cocaine use was provided by an eye witness, SrA T. She testified the appellant had a substantial amount of a powdery substance on a sturdy paper plate which he inhaled. He inhaled about three lines of the substance. He did this over a very short period of time. The hair analysis expert opined the results of the hair analysis were consistent with multiple uses or a single significant use. The only evidence of multiple uses was equivocal at best and it does not rise to the level of beyond a reasonable doubt. Accordingly, Specification 1 of Charge I must be amended to strike the words "on divers occasions."

The sentence must be reassessed in light of our modification of Specification 1 of Charge I, supra. If we can determine that, "absent the error, the sentence would have been at least of a certain magnitude," then we "may cure the error by reassessing the sentence instead of ordering a sentence rehearing." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)). We can make such a determination here. After carefully reviewing the record of trial, we are convinced beyond a reasonable doubt the members would have imposed at least a

bad-conduct discharge, confinement for 6 months, and reduction to the grade of E-4. *See Doss,* 57 M.J. at 185.

The approved findings as modified, and sentence as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings, as modified and sentence, as reassessed are

AFFIRMED.

HEIMANN, Judge (dissenting):

I respectfully disagree with the majority opinion on the validity of the search and would reverse.

This is a clear case of a military commander failing to fulfill his obligations when making his determination that a "substantial basis for ... concluding that probable cause existed."[5] *See United States v. Figueroa*, 35 M.J. 54, 56 (C.M.A. 1992). He failed in two ways. First, he never established any basis for accepting the credibility of a junior enlisted informant who was making allegations against an immediate supervisor who was a senior noncommissioned officer. Second, he failed to establish a basis for his conclusion that a search of the appellant's hair at the time of the warrant would produce evidence that a crime had occurred 53 days prior to the test. A complete review of the facts and law is necessary to show why the commander failed to properly apply the law in his determination of probable cause and how the military judge abused his discretion in admitting the evidence.

Factual Background

In support of the search, the prosecution presented the affidavit provided to the search authority, supplemented with testimony from the requesting agent and the search authority. The requesting agent testified he reviewed the affidavit, one the military judge found less than adequate[6], with the search authority and he also provided the search authority verbal information at the time of the request.[7] Finally, the commander who authorized the search testified as to his limited recollections of the information presented and the basis for his decision when he approved the search authorization.

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[5] The search was approved by a commander pursuant to Mil. R. Evid. 315(d)(1). The commander was not a search magistrate.

[6] Specifically the Judge found the OSI Agent "left out some information that the Court believes a military magistrate should be informed of when a search authorization in sought."

[7] The OSI agent was never asked if he was administered an oath when he briefed the commander. In light of all of the testimony surrounding the approval of the warrant, I have concluded as a matter of fact that the verbal information was *not* provided under oath.

In admitting the evidence, the military judge made thirteen separate findings of fact upon which he based his findings of law. With respect to these findings of fact, I find they are supported by the record and I accept them as my own. I note the findings do not contain certain facts that were told or not told to the authorizing commander some of which I find significant. Therefore, with respect to the findings, I also point out additional facts that are supported by the record but not delineated by the military judge and which I consider material to this case and why reversal is appropriate.

Turning now to the information presented to the search authority in the affidavit.

The search affidavit reads:

> I, [BM], Special Agent, United States Air Force Office of Special Investigations (AFOSI), being duly sworn, do depose and state:
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> 1. I have been a Special Agent with the AFOSI Detachment 202 since 19 Apr 04. To become a Special agent with AFOSI, I completed training at the United States Air Force Special Investigations Academy (USAFSIA) at the Federal Law Enforcement Training Center, Glynco, GA. I am conducting an investigation involving the wrongful use and possession of a controlled substance, a violation of Article 112a, UCMJ. The person I believe to be involved in this offense is identified as Eddie J. Rogers, Male Born: 1 Jan 62, GA, TSgt, [SSN removed] 29th Intelligence Squadron (ACC), Fort George G. Meade, MD. This affidavit is prepared in support of the issuance of a Search Authority that will permit AFOSI special agents to obtain a sample of hair from TSgt Rogers. The following sets forth the facts and circumstances upon which this request for a search authority is based.
>
> a. On 29 Apr 05, SA [M] and I conducted an interview with SrA [T] concerning an incident that occurred on 28 Apr 05 at TSgt Rogers' residence. During the interview, SrA [T] stated that TSgt Rogers asked her if she gets "high." SrA [T] then witnessed TSgt Rogers enter the kitchen and retrieve a white paper plate containing a white powdery substance resembling flour or corn starch. TSgt Rogers then asked SrA [T] if she wanted to get a "bump or this" and referred to the white powdery substance as "powder." SrA [T] recalled the powder was divided into three lines. She witnessed TSgt Rogers inhale the lines of powder through his nose using a cut-off soda straw to aid inhalation. Approximately five minutes after consuming the powder, SrA [T] noticed [that] TSgt Rogers started to sweat a little bit, his eyes became glassy in appearance, he seemed to speak more rapidly, and he became sexually aggressive towards SrA [T]. SrA [T] asked TSgt Rogers if he cared about coming up positive on a urinalysis.

TSgt Rogers replied by saying he took a substance that could clear his system. TSgt Rogers also informed SrA [T] he got in trouble for drug use at his last assignment but got out of it because his commander and co-workers stood up for him.

b. SrA [T], upon returning to work after the incident, immediately reported this situation to individuals within her chain of command. Interviews conducted with the individuals she reported the incident to corroborated her story. SrA [T] also reported the incident to AFOSI the following day. A review of records maintained in the Automated Military Justice Administration Management System (AMJAMS) revealed TSgt Rogers, in January 2004, provided a urinalysis that came back positive for cocaine. TSgt Rogers was stationed at Maxwell AFB, AL when this incident occurred. SrA [T]'s prompt notification to authorities and knowledge of TSgt Rogers' incident at Maxwell AFB deemed her as being credible.

c. SA [M] consulted with SA [G], Forensic Science Consultant, who advised the chances of finding traces of cocaine in SUBJECT hair is likely if he is a chronic user, and if he consumed a considerable amount. Given the information provided, SA [G] opined TSgt Roger's actions were consistent with those of a chronic user.

2. On 13 June 05, I briefed Capt [S], Staff Judge Advocate, 70th Intelligence Wing, on the information detailed above. Capt [S] opined that, based on the information I had provided, that it was reasonable to believe that a violation of Article 122a, wrongful use and possession of a controlled substance had occurred, and that TSgt Rogers had committed the offense. Capt [S]'s opinion was that probable cause existed to conduct a search of TSgt Roger's person for the seizure of his hair.

3. In view of the foregoing, I respectfully request issuance of a Search Authority to conduct a search of TSgt Roger's person, and seize a sample hair belonging to TSgt Rogers.

The affidavit was signed by SA M and co-signed by Col M, 70th Operations Group Commander, under the phrase "sworn and subscribed to me on 20 Jun 05, at Fort George G. Meade, MD."

In addition to the search affidavit, the military judge heard testimony from the requesting agent and the search authority. The military judge made the following additional findings of fact regarding essential facts relevant to the meeting between the requesting agent and the authorizing commander:

6. Since SrA [T] was alleging she was the victim of an indecent assault, Agent [M] treated her as a victim, consistent with OSI policy, rather than as an informant and accepted what she told him as true. Consequently, when he interviewed SrA [T]'s coworkers about what she told them regarding the events of 28 April, he didn't ask their opinion on her character for truthfulness. Based upon everything he knew about the case, Agent [M] believed that SrA [T]' account of what occurred at the accused's house was credible.

. . . .

9. On 13 June, Agent [M] discussed whether there was probable cause for a hair analysis with Capt [S], Staff Judge Advocate, for the 70th Intelligence Wing. She opined there was. Thereafter, Agent [M] prepared an affidavit to present to a military magistrate to obtain a search authorization for the hair analysis. This was the first time Agent [M] had been involved in obtaining a search authorization. Consequently, he prepared the affidavit involved in the case . . . with the assistance of the OSI detachment's OIC, Agent [O]. However, neither ran the finished affidavit by the legal office for review before Agent [M] presented it to the military magistrate.

10. [T]he affidavit didn't include some important information that was then known by Agent [M]. Specifically it didn't note that a court-martial at Maxwell AFB acquitted the accused in April 04 of using cocaine; nor did it mention that the accused gave a urine sample on 2 May 05 that later tested negative for cocaine and that he denied the allegations made by SrA [T]. However, Agent [M] testified he orally discussed all these matters with Col [M]. Col [M] testified that Agent [M] orally summarized the affidavit and he asked the agent about the Maxwell urinalysis and some other questions, but he recalls few other details of what they discussed. Although the defense sought to attack the credibility of Agent [M], the Court finds his testimony credible and find that he orally informed Colonel [M] of the previously noted details that were missing from the affidavit.

11. The only information Agent [M] discussed with Col [M] regarding hair analysis testing is what's contained in paragraph (c) of the affidavit. However, Col [M] had a general knowledge of hair testing from some scientific reading he did on the subject in the late 1980s. Specifically, he knew that the military was pursuing other scientific means for testing for drugs and that hair and fingernails were believed to retain evidence of drugs use for a much longer period of time than urine.

12. Although Col [M] didn't have any information on the background or

qualifications of Agent [G], he was aware that OSI agents assigned as forensic science consultant are considered as experts on a wide range of scientific matters including DNA and hair testing. Consequently, he gave Agent [G]'s opinion on the likelihood of finding traces of cocaine in the accused's hair a lot of weight.

I make the following additional findings of fact based upon the record:

a. The appellant made and signed a sworn denial of the allegations when questioned by the OSI on 2 May 05. In the sworn statement he agrees he had asked SrA T to come to his home to discuss his concerns that an intermediate supervisor had discovered a "letter and a group of other things that had been signed and needed to go to the MPF the week prior" on SrA T's desk.

b. The appellant had previously counseled and reprimanded SrA T for similar breaches regarding processing of paperwork and that paperwork was pending to place the latest reprimand in SrA T's UIF.

c. SrA T admitted that she was told to go to the appellant's house to discuss the missing paperwork and the appellant discussed his concerns with her prior to the alleged misconduct. SrA T did not mention "cocaine" to her supervisors when she first reported the incident. The cocaine allegation *only* came in subsequent complaints to the supervisors.

d. The authorizing commander had received only general training on the authority of a commander to grant a search authorization and there was no testimony that he had received any training on what the standard was for granting a search authorization. The authorizing commander had never given a search authorization in his career prior to this request. The authorizing commander was not appointed or trained as a magistrate.[8]

e. The authorizing commander had been previously informed of this allegation by both the appellant's squadron commander and the OSI in the weeks prior to being asked to grant search authority.

f. The authorizing commander did not ask questions about the credibility or reliability of the informant when presented with this request.

g. The authorizing commander's personal research on hair testing did not include any information on the distinction between one-time users versus

[8] Although the commander was "briefed on procedures" at Squadron Commander School and Group Commander School, he did not receive any formal training. Further, since he was not designated as a magistrate, logically, he would not have received training as a search magistrate.

multiple uses. The authorizing commander has never been involved in hair testing at any time prior in his career.

h. The authorizing commander's belief that evidence of cocaine use stayed longer in hair than urine was based upon his own independent study over 20 years prior, and based upon what SA M had relayed to him from the OSI forensic consultant.

Discussion

Based upon these facts the commander must have had a "substantial basis" for determining that probable cause existed. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).[9] While I accept the general legal premises set forth by the majority, they failed to note that the Supreme Court has also highlighted "mere conclusory statement that give the magistrate no basis at all for making a judgment" are insufficient. *Gates*, 42 U.S. at 233 (citing *Nathanson v. United States*, 290 U.S. 41 (1933)).

Looking beyond the mere conclusions of the affidavit, I am left to conclude there was no substantial basis for the existence of probable cause in this case for several reasons. First is the lack of any scrutiny by either the requesting agent or the commander of the reliability of the informant. When the OSI agent testified, he stated he did not question the informant's truthfulness and simply accepted it as true. When the agent was asked on cross examination, he testified:

Q. Did it seem important to you to look into the fact about whether Airman [T] may have a motive for lying about what she saw Sergeant Rogers do?

A. It did.

Q . And did you do that?

A. No. I didn't

Later the military judge asked:

Q. You talked about talking to Senior Airman [T's] coworkers; did you ask them any questions regarding her truthfulness?

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[9] Although this Court applied the substantial basis standard of review, this search authorization raises the question of whether search authorizations by a commander should be given *de novo* review under the logic articulated by Judge Wiss in his concurring opinion in *United States v. Figueroa*, 35 M.J. 54, 57 (C.M.A. 1992). Note also Judge Sullivan's concurring opinion in *United States v. Light*, 48 M.J. 187, 192 (C.A.A.F. 1988).

A. They were pretty much based on…

Q. It was a "yes" or "no" question. Did you ask the coworkers if she was truthful?

A. No, sir.

Despite the agent's belief that the informant's truthfulness was relevant, he did not question it and simply presented the allegation as believable to Col M. The judge's finding that the existence of an OSI policy that they do not "question" the reliability of a complainant of sex abuse does not negate the constitutional requirement to consider the "veracity" and "reliability" and the "basis of knowledge" of the informant's allegation if that allegation is going to be used to support a search authorization. As the Supreme Court noted in *Gates* these factors are "relevant considerations in the totality-of-the-circumstance analysis that traditionally has guided the probable-cause determinations . . ." *Gates*, 42 U.S. at 232. At the same time when the search authority was questioned regarding the reliability of the informant, his testimony was as follows:

Q. Now sir, was it important to you as to what her credibility was, the reporting witness?

A. I didn't note any blatant credibility issues with her. She was not on my radarscope for being in trouble in any way. So I didn't see any – yes, to a certain extent her credibility is based on you know, my perception of if she had been in trouble, in serious trouble at the time as well, then that would have – but I didn't see any reasons why she would have made all this up. *I saw a person who went to a party*, witnessed something and then came back and gave fairly good details about what had happened. (emphasis added)[10]

Q. Did you ask Agent [M] about questions about whether he looked into the reporting witnesses' credibility?

A. I don't recall. I don't think so.

Q. Did it concern you at all that she was being supervised by the person she was accusing of committing a crime?

A. I don't recall that that was discussed.

Q. Did it bother you at all that she had actually received paperwork from

[10] The allegation does not allege a party.

the person she was accusing of committing a crime?

A. I'd say if she had, I wasn't aware of if it and it didn't rise above a Letter's of Reprimand then it probably was not – it really wouldn't have made any difference.

Q. Did it concern you at all sir that she may have possibly had a motive to lie because she was unhappy with his supervision?

A. I was not aware of any motives she might have to lie.

Q. So you were never informed of anything by the investigators?

A. Not that I recall, no. I don't recall that.

Simply put, the commander assumed that the reporting witness was credible, because he was unaware of any misconduct. This conclusion is flawed for two reasons. First, he failed in his duty as a commander to reach his own conclusions on credibility and second, the informant did in fact have a disciplinary track record that was relevant to her credibility. The failure to evaluate the credibility of the informant is legally defective when you have an informant who is an immediate subordinate of the appellant and the appellant had recently counseled and reprimanded the informant for poor duty performance twice prior to her allegation. This short coming is more problematic when the informant's allegation of misconduct by the appellant arises out of an additional counseling session that clearly suggested even more disciplinary action may be forthcoming. The search authority blindly accepted the credibility of one service member but declined to even consider the fact that the allegation is being levied against an 18-year noncommissioned officer who had no disciplinary record.[11] *See United States v. Miller*, 925 F.2d 695, 698 (4th Cir. 1991), *cert. denied*, 502 U.S. 833 (1991). ("An informant's tip is rarely adequate on its own to support a finding of probable cause.")

Further, the unquestioned acceptance of the informant's credibility is not salvaged here because the agent "corroborated" her story. The OSI agent simply states "corroboration" as a mantra in his affidavit. He says the coworker's corroborated the story but he testifies that he never asks them about her credibility. It is well accepted that a prior consistent statement by a witness is not corroboration without an intervening bias.[12] The majority also says the informant was corroborated. This conclusion is flawed because it was the agent who corroborated the story. The commander is only told

[11] An acquittal for a charge of drug use 18 months prior to this allegation does not constitute a disciplinary record, particularly when there is no substantive evidence, known to either the OSI agent or the magistrate as to any facts and circumstance surrounding the allegation and acquittal.

[12] *See* Mil. R. Evid. 801(d)(1).

about one fact, the prior court-martial, as the basis for this conclusion. I find this single fact is inadequate corroboration to satisfy the level of specificity needed to bolster an unknown informant.[13] *See United States v. Lalor*, 996 F.2d 1578, 1581 (4th Cir. 1993), *cert. denied*, 510 U.S. 983 (1993). (The degree to which the report is corroborated is an important consideration when evaluating whether an informant's tip establishes probable cause). The fact that appellant had been previously acquitted at a court-martial, standing alone, is not corroboration.

Our superior court in *United States v. Leedy*, expressly found it significant that *only after* OSI "had assessed the information and was confident that [the informant's] concerns were bona fide and that he had no 'axe to grind' against Appellant that" OSI sought a warrant. *Leedy*, 65 M.J. at 217. Here, the requesting agent and the search authority not only failed to scrutinize the informant's credibility, they did so in the face of clear facts that the informant had a reason for undermining her supervisor's standing.

Yes, the commander has a right to believe one person over another, but when he is granting search authority, it must be an informed conclusion versus an arbitrary one made without any indication that he gave constitutional scrutiny to the question. Here the commander's testimony is that he did not know the informant. She also was not present at the time of the search request thus allowing the commander to make his own assessment of credibility. A search authority may not simply defer to the judgment of others when determining the reliability of an informant. *United States v. Wilhelm*, 80 F.3d 116, 120 (4th Cir. 1996). *See United States v. Lloyd*, 71 F.3d 1256, 1262 (7th Cir. 1995).

In addition to the lack of any scrutiny of the credibility of the informant, there is no substantial factual basis to support a conclusion by the commander that the approved search would produce evidence of a crime. As our superior court in *United States v. Lopez*, 35 M.J. 35, 39 (C.M.A. 1992) reminded us, factors to consider in evaluating the basis for a search are the relationship between the crime, the objects and the place to be searched. Here both the affidavit and the oral presentation to the commander consisted of simply conclusory statements as to the basis for concluding that probable cause existed to believe that a search of the hair would produce evidence of a crime. The allegation was that on 28 Apr 05 the appellant used cocaine. Subsequently on 5 May 2005 the appellant consented to a urinalysis and provided a sworn statement denying the allegations. The urinalysis reported a negative result on 17 May 2005. Yet it was not until 20 Jun 2005 that the requesting agent sought a probable cause search authorization. In support of his request, the requesting agent supplies merely conclusions in his affidavit to support a basis for why the search of appellant's hair will produce evidence of a crime. Specifically the affidavit states:

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[13] While there is a suggestion the existence of a scar also corroborates the story, this fact was not told to the commander so it is immaterial.

> c. SA [M] consulted with SA [G], Forensic Science Consultant, who advised the chances of finding traces of cocaine in SUBJECT hair is likely if he is a chronic user, and if he consumed a considerable amount. Given the information provided, SA [G] opined TSgt Roger's actions were consistent with those of a chronic user.

In his findings of fact, the judge concludes that "[t]he only information Agent [M] discussed with Colonel [M] regarding hair analysis testing is what's contained in paragraph 1(c) of the affidavit."

What is particularly lacking here is any evidence as to what information was "provided" to SA G and the basis for SA G's opinion that a search will produce evidence of a crime.[14] The search authority is given a conclusion that traces of cocaine use are likely if the appellant is a "chronic user." This conclusion is from an OSI agent whom the military judge concludes the search authority has no "information on the background or qualifications of." There was no evidence presented to the magistrate as to the science of testing hair for evidence of drug use or of the retention times of cocaine metabolites in the hair. The requesting agent simply asked the search authority to rely upon the conclusion from an unknown agent who claimed there was a *"chance"* of finding traces of cocaine *if* the appellant was a "chronic user." (emphasis added). There is no evidence of what "chance" means and what the basis was for determining the suspect was a "chronic user." In fact the conclusion appellant was a "chronic user" is directly contradicted by his immediately preceding negative urinalysis. Finally, assuming SA G was simply told what SrA T offered, his conclusions are based upon the untested information provided by an informant whose credibility was not scrutinized.

In his findings the military judge concluded:

> Col [M] had a general knowledge of hair testing from some scientific reading he did on the subject in the late 1980s. Specifically, he knew that the military was pursuing other scientific means for testing for drugs and that hair and fingernails were believed to retain evidence of drug use for a much longer period of time than urine.
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> . . . .
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> Col [M] was aware that OSI agents assigned as forensic science consultants are considered as experts on a wide range of scientific matters including DNA and hair testing. Consequently, he gave Agent [G]'s opinion on the likelihood of finding traces of cocaine in the accused's hair a lot of weight.

[14] The requesting agent testified in court that he provided SA G with the information given him by SrA T. But he never testifies that he told the search authority the information provided.

While I do not disagree with these findings of fact, the law requires that the search authority make his own conclusions based upon the facts presented to him. The substantial basis requirement for seizing hair squarely rests on the science that underlines the proposed testing. Substantial basis requires the search authority be provided some evidence as to the nature, reliability and capability of hair testing. Here the search authority was given no factual basis for drawing an independent conclusion of what hair testing could accomplish. Reliance upon Col M's "general knowledge" is inadequate when you also consider his testimony on this subject. In cross-examination, the defense counsel asked:

> Q. You mentioned you had some hair knowledge from the 80's sir; could you give us a little more background on where that came from?
>
> A. I don't recall. It's possibly scientific articles talking about you know, where the military might be going in the future and with drug testing. And it talked about nails and hair holding the data for much longer but that cost was an issue.
>
> Q. Was there any description to you sir, or anything to your knowledge about hair holding a one-time use versus multiple uses?
>
> A. No. I don't recall anything like that.

So while the search authority did have some "general knowledge" of hair testing he clearly had no substantial basis for concluding that if he searched hair 53 days after a suspect is allegedly seen to use cocaine, during a single 15-minute period, there is probable cause to conclude that a search of hair would produce evidence of a crime. The lack of substantial basis is further supported by the fact that the subject's urine, tested seven days after the alleged use by a chronic user was negative. In addition, the reliance by the search authority on a positive urinalysis 18 months prior, to support the conclusion that the suspect was a "chronic" user is simply not reasonable, particularly when there is no information provided as to the facts of that case and the acquittal of the appellant of the charge. Finally, I do not believe these deficiencies are overcome by an affidavit that provides the search authority with the benefit of a training and experience of an expert in hair analysis. Here the expert was not available and the requesting agent simply provided no information on the basis for the conclusions of the missing "expert." *See United States v. Bethea*, 61 MJ 184, 185-86 (C.A.A.F. 2005) (affidavit for hair testing included greater detail explaining why and when hair would contain trace amounts of cocaine).

The United States district courts also agree that a search authority cannot rely upon an expert's opinion for probable cause. To issue "a search warrant based solely upon the self-avowed expertise of a law-enforcement agent, without any other factual

nexus to the subject property, would be an open invitation to vague warrants authorizing virtually automatic searches of any property used by a criminal suspect." *United States v. Rosario*, 918 F. Supp. 524, 531 (D.R.I. 1996); *see also United States v. Gomez*, 652 F. Supp. 461, 463 (E.D.N.Y. 1987) (same conclusion where supporting affidavit relied exclusively on the agent's expert opinion that "narcotics traffickers often keep records in their residences"). By failing to require the search authority to establish the factual nexus and permit him to rely upon an "expert opinion" of law enforcement officers, effectively creates probable cause upon a suspect's arrest.[15]

Having highlighted two critical shortcomings in the basis upon which this search authorization was granted, I turn to the trial judge's conclusions of law. In his conclusions, he clearly states the correct standard of law. Citing *Gates* he noted that the question is whether "under the 'totality of the circumstance' this information presented to the magistrate provided probable cause (i.e. reasonable belief) that the evidence sought could be found on the person or in the place to be searched." The judge's error for finding there was a substantial basis for probable cause is not rooted in errors in his findings of fact, but in his failure to consider important constitutional cornerstones of evaluating the totality of the circumstances. We have no effort to scrutinize the credibility of the sole informant upon which the warrant is based and further we have no evidence to support a scientific conclusion for believing that hair testing will show anything.

Thus, even when I consider the facts in the light most favorable to the prevailing party, I still conclude that the military judge abused his discretion when he found there was a substantial basis for this commander to determine that probable cause existed based upon the information provided to the commander.

Having concluded that no substantial basis existed for the granting of this search authorization, the question then becomes was the evidence admissible under Mil. R. Evid. 311(b)(3), the good faith exception.

The good faith exception is premised on the Supreme Court's holding in *United States v. Leon*, 468 U.S. 897 (1984). In *Leon* the Supreme Court identified four circumstances where the good faith exception would not apply: (1) a false or reckless affidavit; (2) a "rubber stamp" judicial review where the magistrate abandoned his judicial role; (3) a facially deficient affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; and (4) a facially deficient warrant. *Id.* at 914-15, 923.

The Military Rules of Evidence codify these circumstances in Mil. R. Evid.

[15] This is particularly the case when the "expert" is a law enforcement official vice a detached expert.

311(b)(3)[16] which provided as follows:

> Evidence that was obtained as a result of an unlawful search or seizure may be used if:
> (A) The search or seizure resulted from an authorization to search, seize or apprehend issued by an individual competent to issue the authorization under Mil. R. Evid. 315(d) or from a search warrant or arrest warrant issued by competent civilian authority;
> (B) The individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause; and
> (C) The officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith shall be determined on an objective standard.

In assessing the substantial basis element of this exception our superior court has held:

> "Substantial basis" as an element of good faith examines the affidavit and search authorization through the eyes of a reasonable law enforcement official executing the search authorization. In this context, the second prong of Mil. R. Evid. 311(b)(3) is satisfied if the law enforcement official had an objectively reasonable belief that the magistrate had a "substantial basis" for determining the existence of probable cause."

United States v. Carter, 54 M.J. 414, 422 (C.A.A.F. 2001).

In this case, we have an OSI agent presenting his first warrant ever to a commander who has never granted search authorization before and who has received no training on what equals probable cause. There is no evidence the agent, or the commander had ever been involved in hair testing prior. In the search affidavit, the agent fails to mention any facts that do not support the warrant.[17] No one questioned the reliability to the informant. Neither the agent nor the commander elected to include an attorney in on the meeting that forms the basis of request for a warrant.[18] The agent was never administered an oath when he presented information outside the bounds of the affidavit.[19] Finally, neither the agent nor the commander memorialized the information

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[16] *See United States v. Carter*, 54 M.J. 414, 419-20 (C.A.A.F. 2001).

[17] While the omissions may not arise to the level of that which is designed to "mislead" or that made in "reckless disregard of whether they would mislead" a magistrate they certainly undermine the rationale for granting a good faith exception. *See Mason v. United States*, 59 M.J. 416, 422 (C.A.A.F. 2004) (citing *Franks v. Delaware*, 438 U.S. 154, 171-72 (1978)).

[18] The affidavit references that an attorney, the week prior, concluded there was probable cause. This is irrelevant since it is impossible to determine what facts were presented to the junior attorney at the time the advice was given.

[19] In *United States v. Stuckey*, 10 M.J. 347, 364-65 (C.M.A. 1981) the court noted "A military commander who fails to obtain evidence under oath when it is feasible for him to do so has neglected a simple means for enhancing the reliability of his probable cause determination."

that was the basis for the warrant after the meeting.[20] Therefore, in light of all of these shortcomings, I am unwilling to find the good faith exception applies to this case. I would reverse.

OFFICIAL

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

[20] FED. R. CRIM. P. 41(d)(2)(C) requires that "[t]estimony taken in support of a warrant must be recorded by a court reporter or by a suitable recording device, and the judge must file the transcript or recording with the clerk, along with any affidavit."