UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain JOHN M. STALLENS III
United States Air Force

ACM 34203

15 January 2002

Sentence adjudged 14 January 2000 by GCM convened at MacDill Air Force Base, Florida. Military Judge: William E. Orr.

Approved sentence: Dismissal and forfeiture of all pay and allowances.

Appellate Counsel for Appellant: Captain Kyle R. Jacobson (argued), Colonel James R. Wise, and Lieutenant Colonel Timothy W. Murphy.

Appellate Counsel for the United States: Major Jennifer R. Rider (argued), Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major Bryan T. Wheeler.

Before

YOUNG, SCHLEGEL, and BURD
Appellate Military Judges

OPINION OF THE COURT

SCHLEGEL, Senior Judge:

The appellant was convicted by court members of wrongfully using cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. His approved sentence was a dismissal and forfeiture of all pay and allowances.[1] The appellant raises seven errors for our review. We heard oral argument on this case at the United States Air Force Academy. We affirm the findings, but grant sentence relief on the forfeiture of pay and allowances because the appellant was never confined.

[1] Trial concluded on 14 January 2000. The forfeitures were deferred until the date of the action. The convening authority's action is dated 14 August 2000.

I. Background

The appellant was a dentist assigned to MacDill Air Force Base (AFB), Florida. On 25 August 1999 at 0740, he was notified that he had been randomly selected to participate in a urinalysis. He reported for the urinalysis at 0908 but did not provide a sample until 1451, almost six hours later. During this interim period, he was seen at various locations in the hospital, met with friends, and had lunch in the hospital dining facility. At the drug-testing laboratory, the appellant's urine sample tested positive for a metabolite of cocaine at a concentration of 2061 nanograms per milliliter (ng/ml). The Department of Defense (DoD) cutoff for reporting a positive urinalysis is 100 ng/ml

At trial, the appellant conducted a broad attack on the urinalysis program, including the training of the monitors and observers, the mechanics and logistics of the collection and shipment of the sample, the testing methodology and integrity of the process at the drug testing laboratory, and the interpretation of the results in his case. Although the appellant did not testify, his defense team advanced the propositions that the positive result was due to contamination of his sample, error during testing at the drug lab, or unknowing ingestion. The members rejected all of these eggs from different baskets and convicted the appellant.

On appeal, the appellant avers the judge erred because he failed to suppress a statement the appellant made to a friend and denied a request for a new court-martial panel. He also contends that he is entitled to a new trial because a court member did not disclose that his nephew died as a result of his sister-in-law's cocaine abuse while the nephew was in utero. In addition, the appellant complains the part of the adjudged and approved sentence, which provides for forfeiture of all pay and allowances, is illegal because he was never confined. Finally, the appellant, relying on *United States v. Campbell*, 50 M.J. 154 (1999), *supplemented on reconsideration*, 52 M.J. 386 (2000), alleges his conviction is factually and legally insufficient, the judge erred by failing to give an instruction on findings requested by him, and the use of the permissive inference, concerning his knowledge of the presence of a drug as the result of its presence in his body, violates due process under the 5th Amendment of the United States Constitution.

II. The Appellant's Statement

The appellant developed a friendship with Captain (Capt) (Dr.) Pinon that began in Commissioned Officer Training (COT) upon learning they both would be assigned to the medical group at MacDill AFB. After arriving at the base, they regularly ate lunch together in the hospital dining facility, went fishing together almost every weekend, played cards, and cooked for each other at their homes. Capt Pinon testified the appellant was his "best friend" at the base.

The record contains no characterization of their relationship by the appellant. However, on the day of his urinalysis, the appellant ate lunch with Capt Pinon and confided that he was going to "blow off as much as I can [of] the day [before I give the urine sample] because I don't want to go back to see patients." Capt Pinon saw the appellant around the hospital throughout the day. Capt Pinon also testified that the appellant often talked with him about problems he was having at the dental clinic. When the appellant was apprehended after his urinalysis was reported as positive, he called Capt Pinon's wife and the three went out for dinner that night. These facts demonstrate that the appellant thought Capt Pinon was a close friend.

Convinced of the appellant's innocence, Capt Pinon was his biggest supporter. Upon learning the deputy staff judge advocate for the base was in the hospital for an immunization, Capt Pinon sought him out in an attempt to convince him that the base had the wrong man based on "just one test."[2] During the ensuing conversation, the deputy staff judge advocate explained the testing process and methodology. As a result of this discussion, and because he knew the appellant delayed giving the urine sample, Capt Pinon began to entertain the thought that the appellant lied to him. After discussing the situation with his wife for a few days, Capt Pinon decided to talk to the appellant again about the urinalysis. During this discussion with the appellant, Capt Pinon explained what he learned about the urinalysis process from the deputy staff judge advocate. Once again, the appellant denied using cocaine. However, he told Capt Pinon that in addition to trying to avoid patient care that day, he delayed providing the urine sample because he had been drinking beer the night before the urinalysis and wanted to let the alcohol clear out of his system.

Capt Pinon testified no one asked or encouraged him to question the appellant but he did so because he was no longer sure of his friend's innocence. Capt Pinon also felt that if the appellant was innocent, then there was some kind of "intrinsic flaw" in urinalysis testing, and he had a duty to ensure innocent people were not falsely accused. He also said that he was concerned because he had entrusted the appellant with his car and the safety of his family. If the appellant admitted using cocaine, Capt Pinon believed, as a physician, he had a duty to report that fact because he could not allow someone who was impaired to take care of patients.

Sometime after speaking with the appellant, Capt Pinon was informed that the Air Force Office of Special Investigations (AFOSI) was looking for individuals who saw the appellant on the day of the urinalysis. In addition to himself, Capt Pinon knew another member of the medical group saw the appellant around the hospital that day. He reported this to a colonel in the medical group, and informed him the appellant said he delayed giving the sample to avoid seeing patients and to allow alcohol to be eliminated from his

[2] The appellant's urine was retested at private drug testing lab where it once again tested positive for the presence of a metabolite of cocaine at a slightly higher concentration level.

body. The appellant complains his statement to Capt Pinon about the alcohol was inadmissible because Capt Pinon never advised him of his rights under Article 31(b), UCMJ, 10 U.S.C. § 831(b).

The judge found Capt Pinon had not been asked to act as an agent of the commander or by any law enforcement agency. He also found Capt Pinon was not acting in a disciplinary or law enforcement capacity. In denying the appellant's motion to suppress his statement, the judge concluded Capt Pinon was acting primarily for personal reasons.

Analysis

Article 31(b), UCMJ, provides that no person subject to the Code may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation, advising him that he does not have to make any statement regarding the offense of which he is accused or suspected, and that any statement made by him may be used as evidence against him in a trial by court-martial. *See also* Mil. R. Evid. 305(c).

The standard of review on a judge's ruling denying a motion to suppress evidence is abuse of discretion. *United States v. Beckett*, 49 M.J. 354 (1998). We review the judge's factual findings under a clearly erroneous standard, and his legal conclusion de novo. *United States v. Swift*, 53 M.J. 439. 446 (2000) (citing *United States v. Ayala*, 43 M.J. 296, 298 (1995)). The determination as to whether Article 31(b), UCMJ, rights should have been given "may also require de novo review." *United States v. Ruiz*, 54 M.J. 138, 140 (2000). "On questions of fact, [we ask] whether the decision is *reasonable*; on questions of law, [we ask] whether the decision is *correct*." 2 Steven A. Childress & Martha S. Davis, *Federal Standards of Review* § 7.05 (3d ed. 1999) (emphasis in original). In analyzing whether a military member should be advised of his Article 31(b), UCMJ, rights it is necessary for us to determine,

> (1) whether a questioner subject to the Code was acting in an official capacity in his inquiry or only had a personal motivation; and
>
> (2) whether the person questioned perceived that the inquiry involved more than a casual conversation.
>
> Unless both prerequisites are met, Article 31(b) does not apply.

United States v. Duga, 10 M.J. 206, 210 (C.M.A. 1981) (citation omitted). *Cf. Swift*, 53 M.J. at 446 (another test is whether the person is a suspect at the time of questioning and whether the questioner is participating in an official law enforcement or disciplinary investigation or inquiry).

We agree with the judge that Capt Pinon's motivation in questioning the appellant was purely personal in nature. The evidence is uncontroverted that no one, including law enforcement personnel, asked him to question the appellant. Rather, the evidence shows Capt Pinon's questioning of the appellant, subsequent to his conversation with the deputy staff judge advocate, was motivated by his own personal curiosity based upon their friendship. Moreover, like the facts in *Duga*, it is clear in the case sub judice the appellant viewed Capt Pinon as a friend. They were medical group peers, identical in rank, and at ease with each other. The appellant trusted Capt Pinon enough to confide in him, on the day of the urinalysis, that he was delaying in order to avoid seeing patients. There is absolutely no evidence that the appellant thought this conversation with Capt Pinon was any different from all their prior discussions as friends.

We find *Duga* controlling and conclude the judge did not err in failing to suppress the appellant's statement to Capt Pinon.[3] The evidence shows Capt Pinon was neither acting in an official capacity nor that the appellant believed their conversation was anything but a casual exchange between friends. The essence of any friendship is truth and trust. This is what motivated Capt Pinon's questions and the appellant's willingness to answer him.

III. Court Member Failed to Disclose Significant Information during Voir Dire

The appellant was tried by a panel of officers. One of the court members was Lieutenant Colonel (Lt Col) Fernandez. During general voir dire, Lt Col Fernandez indicated he could give the appellant a fair trial and adjudge an appropriate sentence. He responded that no member of his family had been charged with a similar offense. He also said that there was nothing of a personal or professional nature that would prevent him from giving the trial his full attention, nor was he aware of any matter that would raise substantial questions about his service as a court member. Neither side challenged him.

Shortly after the appellant's trial, pursuant to a tasking by a commander, Lt Col Fernandez wrote an article for the base newspaper. The theme of the article was that using illegal drugs could destroy a career and impact others. He began the article by describing how he pitied the "weeping mother" of a court-martialed officer. (This was probably the appellant's mother.) He then transitioned into his experience with his nephew, Bobby. According, to the article, Bobby's death in 1995, at the age of 10, was due to his mother's use of cocaine while she was pregnant with him. Lt Col Fernandez described his nephew's health problems, death, and funeral. The article concluded that the momentary exhilaration from the use of an illegal drug was not worth the loss of a career or the effect it could have on others.

[3] We would reach the same result by applying the holding in *Swift*.

The appellant learned of this article and called it to the attention of the convening authority during the post-trial processing of his case. The convening authority ordered a post-trial hearing pursuant to Rule for Courts-Martial (R.C.M.) 1102. At that hearing, the appellant, on the record, affirmatively waived any further consideration of this issue. In fact, the appellant said he thought Lt Col Fernandez was qualified to sit on his court-martial. He also said that he would not have challenged Lt Col Fernandez even if he had known about his nephew at trial.

When questioned by the judge, Lt Col Fernandez testified that during the appellant's trial he never thought about his nephew because in the interim period between Bobby's death and the trial, his father and mother-in-law died, and his daughter was raped. The judge found Lt Col Fernandez to be credible. He concluded that Lt Col Fernandez was not affected by the circumstances surrounding his nephew's death, and that it had no effect on the appellant's trial. The judge also found the appellant made it "unequivocally clear" that he did not wish to pursue this matter any further. The appellant did not submit any matters to the convening authority after receiving the addendum to the staff judge advocate's recommendation that discussed the hearing.

The appellant claims Lt Col Fernandez's failure to disclose the information about his nephew was significant because it would have provided a valid basis for a challenge cause. In addition, the appellant argues Lt Col Fernandez also failed to reveal he had an undergraduate degree in criminal justice.

Analysis

R.C.M. 912(f) provides for the removal of court members for cause. It lists 14 grounds for challenge, specifies when a challenge must be made, establishes a procedure, and discusses waiver. Waiver is only applied when the accused knows or could have discovered through due diligence grounds for a challenge and then fails to raise it in a timely manner. R.C.M. 912(f)(4). *See United States v. Velez*, 48 M.J. 220, 222 (1998).

Our superior court adopted the Supreme Court's test for determining whether a new trial was required when a court member failed to disclose information during voir dire. "[A] party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *United States v. Mack*, 41 M.J. 51, 55 (C.M.A. 1994) (quoting *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 566 (1984)). *See also United States v. Ruiz*, 49 M.J. 340, 346 (1998). This issue involves mixed questions of law and fact. We review the factual determination by the judge using a clearly erroneous standard. *Mack* 41 M.J. at 55 n6. (citing *Wainwright v. Witt*, 469 U.S. 412, 435 (1985)). We review the application of the law on juror disqualification de novo. *Id*. We will only overturn a military judge's ruling on a challenge for cause for a clear abuse of discretion. *United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993).

First, with regard to Lt Col Fernandez's undergraduate degree in criminal justice, the appellant was in possession of that information prior to trial because it was contained on the court member information sheet provided to him. As a result, he has waived this issue by failing to challenge Lt Col Fernandez at trial. It is not surprising to us that Lt Col Fernandez failed to note this again during voir dire in response to a general question whether anyone had a "background in law enforcement." Lt Col Fernandez's entire career in the Air Force involved flight operations. Common sense indicates that a background in law enforcement would require that someone have practical experience in this field. Lt Col Fernandez had none. Finally, even under *McDonough* and *Mack*, we find that his undergraduate degree, obtained in 1982, would not have provided a basis for a valid challenge.

At the post-trial hearing directed by the convening authority, the appellant affirmatively waived Lt Col Fernandez's failure to disclose the facts about his nephew. The appellant told the judge he wanted to "waive" this issue. He also stated that after reading the newspaper article, he would not have challenged Lt Col Fernandez for cause, or peremptorily. We find that this is a knowing and intelligent waiver.

IV. Denial of the Appellant's Request for a Selection of a New Court-Martial Panel

Prior to entering pleas, the appellant moved for the selection of a new court-martial panel based on the fact that no captains and no officers from the medical group were nominated to serve as court members for his trial. The evidence showed the base staff judge advocate decided not to forward any captains for selection in order to completely avoid the possibility that an officer junior in rank to the appellant might sit in judgment of him. She felt it would be better to have only officers on the court-martial panel who were "visibly senior" to the appellant. She also testified no officers from the accused's unit were forwarded to the convening authority. She gave three reasons for this decision. First, she explained the medical group was prone to gossip and rumor. Thus, she believed most individuals within the unit were aware of the appellant's case or knew him. Second, in her opinion, the recent court-martial of an airman from the unit for using cocaine had polarized the organization. Like the appellant, the allegation against the airman was based on a urinalysis. The airman was acquitted, and the staff judge advocate testified she knew officers from the medical group were upset with the outcome of the trial. Third, as a result of two or three positive urinalysis cases, the medical group commander conducted a sweep of the entire unit. For all of these reasons, the staff judge advocate testified she did not believe it was appropriate to nominate anyone from the medical group. Nevertheless, she informed the special court-martial convening authority that he could nominate any officer from within his command and officers from other organizations on the base. The general court-martial convening authority was also advised by his staff judge advocate that he was not limited to the members nominated to

him but that he could select other individuals using the criteria specified in Article 25, UCMJ, 10 U.S.C. § 825.

The judge's findings of fact mirrored the staff judge advocate's testimony. He found "no improper motive or prohibited grounds" in recommending that captains and officers from the medical group not be selected to hear the appellant's case. He concluded she was trying to comply with Article 25(d)(2), UCMJ, by not nominating members who were most likely biased.

Analysis

Article 25(a), UCMJ, provides that an officer on active duty can sit as court member for any person who can be tried by a court-martial. Although Article 25(c)(1), UCMJ, prohibits enlisted personnel from an accused's unit from serving as court members, there is no similar prohibition for officers. Article 25(d)(1), UCMJ, urges convening authorities to avoid, whenever possible, selecting court members who are junior in rank or grade to the accused. *See also* R.C.M. 912(f)(1)(K).

> Whether a court-martial panel was selected free from systematic exclusion is a question of law which we review de novo. *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986). The defense shoulders the burden of establishing the improper exclusion of qualified personnel from the selection process. *United States v. Roland*, 50 M.J. 66, 69 (1999). Once the defense establishes such exclusion, the Government must show by competent evidence that no impropriety occurred when selecting appellant's court-martial members. *Cf. Castaneda v. Partida*, 430 U.S. 482, 501 (1977).

United States v. Kirkland, 53 M.J. 22, 24 (2000). An accused in the armed forces does not have a right to a court panel composed of a cross-section of the military community. *Roland*, 50 M.J. at 68 (citing *United States v. Lewis*, 46 M.J. 338, 341 (1997)).

Article 25(d)(1), UCMJ, directs a convening authority to avoid selecting court members who are junior in rank or grade to the accused whenever possible. A convening authority would, therefore, be acting within the mandate of Article 25 by selecting court members who hold the same rank or grade as the accused but have an earlier date of rank. However, based on our experience in reviewing courts-martial, we know that whenever possible, convening authorities select court members who are senior by at least one rank or grade to an accused. The primary logic behind this practice is to avoid even the appearance of a violating Article 25(d)(1), UCMJ. We can find no case law holding this practice constitutes a form of impermissible court-stacking.

In *United States v. Bertie*, 50 M.J. 489 (1999), the accused, who was an E-4, alleged the convening authority improperly stacked the court panel with senior and noncommissioned officers. One aspect of his argument was that no junior enlisted persons in the grades of E-4 to E-7 were detailed to hear his case. Our superior court rejected the accused's argument, in part, because the evidence showed that the convening authority was provided with a list of nominees in all grades down to private first class. Judge Gierke in a concurring opinion wrote, "Because [the] appellant was a specialist (E-4), it was not improper to exclude soldiers in grades private first class (E-3) and specialist (E-4) from consideration." *Id*. at 493 (citing R.C.M. 912(f)(1)(K) and *United States v. Upshaw*, 49 M.J. 111, 112 (1998)).

We find no evidence of improper motive or an attempt to stack the court against the appellant in nominating or selecting officers who were senior in rank to the appellant in order to avoid creating even the appearance of violating Article 25(d)(1). Officers in the grades of major through colonel were forwarded to the convening authority for detail to the court-martial as members. Four majors were nominated, and the convening authority selected two majors. We would view this differently if only colonels or lieutenant colonels were nominated. However, it is common practice to nominate officers who are superior to an accused in rank, beginning with the rank or grade immediately above the accused.

In the *United States v. Brocks*, 55 M.J. 614, 616-17 (A.F. Ct. Crim. App. 2001), we held that excluding officers from the accused's unit as court members at his trial did not constitute unlawful court stacking because the motive for the exclusion was not improper. (citing *Upshaw*, 49 M.J. at 113). In *Brocks*, the accused, his co-conspirators, and many witnesses were members of the various squadrons within the medical group. As a result, officers from the medical group were not nominated to sit in judgment of the accused because the staff judge advocate wanted to protect the fairness of the court-martial.

This is precisely the motive expressed by the staff judge advocate and found by the trial judge in the case sub judice. In the appellant's case, a number of the witnesses, for and against him, were from the medical group. The dental clinic was co-located with the hospital, and the appellant ate there everyday. Moreover, a member of the medical group had recently been acquitted of similar charges to the displeasure of many officers in the group. Finally, the court-martial of an officer gathers a great deal of attention locally, sometimes even nationally. Thus, we agree that the effort to avoid "bias or prejudice either for or against an accused" is a legitimate consideration in nominating or selecting court members. *United States v. Wilson*, 21 M.J. 193, 195 (C.M.A. 1986) (quoting *United States v. Timmons*, 49 C.M.R. 94, 95 (N.C.M.R. 1974)).

We concur with the trial judge that there was no improper motive by the staff judge advocate, and no effort to stack the court-martial against the appellant or in favor of the prosecution.

V. Forfeiture of All Pay and Allowances

The appellant argues, and the government concedes, that because no confinement was adjudged, the convening authority erred by approving that portion of his sentence which requires him to forfeit all of his pay and allowances. R.C.M. 1107(d)(2), Discussion. *United States v. Warner*, 25 M.J. 64 (1987). We will correct this error in the decretal.

VI. Remaining Assignments of Error

At trial and in his brief, the appellant relied extensively on the *Campbell* decisions in alleging the judge erred by failing to give a findings instruction he requested, that his conviction is factually and legally insufficient, and that the use of the permissive inference violates due process. However, our superior court's subsequent decision in the *United States v. Green*, 55 M.J. 76 (2001), *cert. denied*, 70 U.S.L.W. 3315 (October 29, 2001), effectively moots a lengthy discussion of these errors.

In addition, our decisions in *United States v. Tanner*, 53 M.J. 778 (A.F. Ct. Crim. App. 2000), *aff'd*, 55 M.J. 357, *cert. denied*, 122 S.Ct. 470 (2001), and *United States v. Phillips*, 53 M.J. 758 (A.F. Ct. Crim. App. 2000), *aff'd*, 55 M.J. 292 (2001), are applicable to the appellant's case on all three of these issues. The evidence clearly demonstrated that the appellant delayed in providing his urine sample for over six hours. He also gave conflicting explanations for this delay.

We address these issues summarily, relying on the holdings in *Green*, *Tanner*, and *Phillips*. The appellant's conviction for wrongfully using cocaine is factually and legally sufficient. In addition to the urinalysis result, the appellant's behavior on the day of the urinalysis and subsequent explanation was other evidence the court members could use in deciding the appellant's guilt or innocence. We also note the result of his test was not slightly above the DoD cut-off for reporting of a positive result, but was over 20 times higher than that cut-off level. The trial judge did not commit an abuse of discretion by failing to give the findings instruction requested by the appellant. Indeed, there was additional evidence of the appellant's guilt. Finally, the use of the permissive inference in this case did not violate due process because there was more then enough evidence from which the court members could infer that the appellant knowingly used cocaine.

The findings 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. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). We approve only so much of the sentence as provides for a dismissal and forfeiture of $1600.00 pay per month for 6 months. Accordingly, the findings and sentence, as modified, are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, SSgt, USAF
Chief Court Administrator