UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JOHN D. TUNE
United States Air Force

ACM 34611

17 January 2002

Sentence adjudged 18 April 2001 by GCM convened at Whiteman Air Force Base, Missouri. Military Judge: Sharon A. Shaffer.

Approved sentence: Bad-conduct discharge, confinement for 7 months, forfeiture of all pay and allowances, reduction to E-1.

Appellate Counsel for Appellant: Lieutenant Colonel Beverly B. Knott, Lieutenant Colonel Timothy W. Murphy, and Major Maria A. Fried.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo.

Before

SCHLEGEL, ROBERTS, and PECINOVSKY
Appellate Military Judges

PER CURIAM:

The appellant was convicted, pursuant to his plea, of violating Articles 123a and 134, UCMJ, 10 U.S.C. §§ 923a, 934. His approved sentence included a bad-conduct discharge, 7 months' confinement, total forfeitures, and reduction to E-1. The case was submitted to us on the merits.

Following voir dire, the trial counsel exercised his peremptory challenge against a minority member, Second Lieutenant (2Lt) B. The military judge, sua sponte, requested a race-neutral explanation based upon *Batson v. Kentucky*, 476 U.S. 79 (1986). The trial counsel stated, "He is the youngest member on our panel, with the least amount of military experience, let alone military justice experience." The defense counsel

complained that the explanation was insufficient, but the military judge sustained the challenge.

Under the equal protection and due process requirements of the Constitution, a party may not utilize a peremptory challenge to exclude persons from the jury venire because of race or gender. *Id.* In *United States v. Moore*, 28 M.J. 366, 368 (C.M.A. 1989), our superior court adopted a per se rule: upon timely objection to a peremptory challenge, a prima facie case of discrimination is established, and the burden shifts to the challenging party to give a race-neutral explanation. Counsel may not exercise a peremptory challenge "on the basis of a proffered reason, under *Batson* and *Moore*, that is unreasonable, implausible, or that otherwise makes no sense." *United States v. Tulloch*, 47 M.J. 283, 287 (1997).

While we recognize that the convening authority already had selected this court member using the Article 25, UCMJ, 10 U.S.C. § 825, criteria, we note that trial counsel "shall prosecute cases on behalf of the United States." Rule for Courts-Martial 502(d)(2). In the course of discharging that duty, trial counsel exercised a peremptory challenge against 2Lt B. Trial counsel stated that the non-discriminatory reason for the challenge against the minority member was that he was the youngest member with the least military justice experience. The military judge properly accepted this reason. It meets the *Tulloch* reasonableness test.

The 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; *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

LAURA L. GREEN
Clerk of Court