UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman FRANK A. VARNAUSKAS, III
United States Air Force

ACM 36825

19 March 2008

Sentence adjudged 04 May 2006 by GCM convened at McChord Air Force Base, Washington. Military Judge: James B. Roan.

Approved sentence: Bad-conduct discharge, confinement for 26 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Christopher L. Ferretti.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Major John P. Taitt.

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

The appellant was arraigned on a total of three charges and eight specifications. Contrary to his pleas, he was convicted of six of the eight specifications. Specifically, the appellant was convicted of a single use of methamphetamine and divers uses of ecstasy, marijuana, and cocaine during a 4-month period of time. He was also convicted of distribution of ecstasy on divers occasions during this same period of time and obstruction of justice arising out of a threat made to a fellow drug user. His convictions were for violations of Articles 112a and 134 UCMJ, 10 U.S.C. §§ 912a and 934. A panel of officers sentenced him to a bad-conduct discharge, confinement for 27 months, total

forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged except he reduced the confinement to 26 months.

On appeal, the appellant raises one issue. He claims the prosecution's failure to provide the defense a copy of a local police report surrounding the assault and obstruction charges violated his due process rights. All parties agree the police report was not provided to the defense prior to trial and the report was in the possession of the Air Force's Office of Special Investigations (OSI).[1] While the appellant concedes that the failure to disclose was unintentional, he argues prejudice is still apparent. He contends that disclosure of this police report would have resulted in a different result regarding the obstruction of justice charge.[2] Specifically, the appellant argues, "[h]ad trial defense counsel had the report, he may have been able to impeach PVT Orr-Compton with his prior, arguably inconsistent statements to civilian law enforcement authorities."

The Supreme Court, in *Brady v. Maryland*, 373 U.S. 83 (1963), held that withholding exculpatory information, unavailable to a defendant, violates a defendant's due process rights. In order to be entitled to relief, an appellant must show the claimed exculpatory evidence puts the whole case in a different light, thereby undermining confidence in the verdict. *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

To prevail on a claim that withholding of impeachment evidence constitutes a *Brady* violation, the petitioner must establish that: "(1) the evidence at issue is favorable to him; (2) the [government], either willfully or inadvertently, suppressed that evidence; and (3) prejudice ensued." *Harbison v. Bell*, 408 F.3d 823, 830 (6th Cir. 2005) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). Prejudice is shown when the suppressed evidence is "material," *Strickler*, 527 U.S. at 282. Evidence is material when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 433-34 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

The appellant has not met his burden in this case. While OSI's failure to turn over a copy of the police report is unacceptable, this failure does not rise to the level of a *Brady* or due process rights violation. First, the contents the police report are virtually identical to in-court witness testimony on the obstruction of justice charge. In both cases the circumstances surrounding the threat is the same. Therefore, the report does not constitute "favorable" information. Second, the defense sought to undermine the in-court testimony because of a *lack* of a police report. The production of the document prior to trial would have prevented the defense from attacking the witness on this point. Thus the failure to provide the document to defense prior to trial did not prejudice the appellant.

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[1] Apparently, OSI provided the report to the trial counsel the day after the trial.
[2] The appellant was acquitted of the assault charge at trial.

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