UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman ERIC T. WILLIAMS
United States Air Force

ACM S31147

12 December 2007

Sentence adjudged 22 June 2006 by SPCM convened at Tyndall Air Force Base, Florida. Military Judge: Donald A. Plude.

Approved sentence: Bad-conduct discharge and confinement for 30 days.

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

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Donna S. Rueppell, and Captain Jamie L. Mendelson.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

OPINION OF THE COURT

FRANCIS, Senior Judge:

Consistent with his plea, the appellant was convicted by special court-martial of one specification of wrongful use of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Contrary to his plea, he was also convicted of a second specification of wrongful marijuana use. A panel of officer members sentenced him to a bad-conduct discharge and confinement for 30 days. The convening authority approved the sentence adjudged.

The appellant asserts the military judge erred by allowing an Air Force Office of Special Investigations (AFOSI) agent to testify as a "human lie detector" and then failing to provide any curative instruction to the members. We find no error and affirm.

Background

The marijuana use to which the appellant pled guilty occurred on 20 October 2005 and was identified through a positive urinalysis test of a sample provided by the appellant that same day. The marijuana use to which the appellant pled not guilty occurred between 5 December 2005 and 4 January 2006, and was identified through a positive urinalysis test of a sample collected from the appellant on the latter date.

The appellant was questioned by AFOSI agents about each of the positive urinalysis tests shortly after the test results became known. When questioned about the October 2005 positive test, he admitted marijuana use.

When the appellant was later questioned by AFOSI about the January 2006 test result, he denied any marijuana use beyond October 2005, and suggested the most recent positive was simply a residual reading from the earlier use. Upon further questioning, the appellant asked one of the agents, Special Agent T, something to the effect of: "If I tell you the truth . . ." or "If I tell you what happened, will I be able to go home and take care of my kids, or am I going to be arrested here on the spot?" Although Special Agent T was taking notes during the interview, he did not write down that particular comment. The appellant thereafter continued to deny any additional use beyond October and provided a written statement to that effect at the end of the interview.

The trial counsel brought out the appellant's "If I tell you" question through the testimony of Special Agent T, ultimately asserting during findings argument that the question was an acknowledgement of guilt. The trial defense counsel made no objection to that portion of Special Agent T's testimony. The trial counsel also attempted to solicit testimony from Special Agent T about the appellant's "physical characteristics" when he posed the "If I tell you" question, apparently with the intent of establishing whether Special Agent T thought the appellant was being truthful. However, the defense objected and the judge quickly moved into an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session. After brief additional argument by counsel, the military judge sustained the objection and so advised the members when they returned.

During cross-examination, the defense closely questioned Special Agent T about the absence of any reference to the "If I tell you" question in the agent's notes. On redirect, Special Agent T was asked to explain why he did not include reference to that question in his notes. During the course of his explanation, Special Agent T, in reference to the general AFOSI note taking process, stated:

> we are trained at certain times to do what we call 'close the gap.' That means, at certain times, we are taught to kind of move closer to the individual and talk in softer tones when we think an individual may be on the fence between doing what is right and telling the truth, or still continuing to deceive the agents. [Emphasis added.]

The defense at that point objected on the basis of "relevance," but the judge overruled the objection. Special Agent T, referring to his interview of the appellant, then went on to state:

> at this point, we are very close, speaking in very soft tones . . . . So at this time I felt it in my best interest, and in the best interest of the interview, not to dictate that individual's statement because it was a very intimate type of situation that Mr. Williams and myself were having.

Human Lie Detector

The appellant asserts the statements highlighted above, and specifically the reference to the appellant's "If I tell you" question and Special Agent T's "still continuing to deceive" comment, constitute improper opinion testimony that the appellant was lying when he told the agents he hadn't used since October.

We review a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003); *United States v. Gogas*, 55 M.J. 521, 523 (A.F. Ct. Crim. App. 2001). "'[H]uman lie detector' testimony - that is, an opinion as to whether the person was truthful in making a specific statement regarding a fact at issue," is not admissible in courts-martial. *United States v. Kasper*, 58 M.J. 314, 315 (C.A.A.F. 2003). If such testimony is offered, the military judge must issue prompt curative instructions. *Id.*

We conclude Special Agent T's testimony before the members did not constitute "human lie detector" testimony within the meaning of the above definition. Accordingly, the military judge did not abuse his discretion in admitting such testimony and no curative instruction was required.

Testimony about the appellant's "If I tell you" question was not opinion testimony at all, but simply a factual recitation of what the appellant said during the interview. Such a statement could, as trial counsel argued, be fairly interpreted as an "acknowledgment of guilt" and was fair game. As to the other testimony, the words "still continuing to deceive," standing alone, could be interpreted as an opinion that the appellant was lying up until that time. However, when the phrase is read in context, it is clear that was not the focus or intent of Special Agent T's testimony. Rather, the entire focus of the exchange on re-direct examination was simply to explain why his notes did

not include reference to the appellant's "If I tell you" question, the absence of which the defense explicitly brought out, and heavily emphasized, both on cross-examination and during his closing argument.

The only other testimony from Special Agent T that might have equated to "human lie detector" testimony, had it been successfully elicited, concerned his observations of the appellant's "physical characteristics" when he asked the "If I tell you" question. However, the judge sustained the defense objection to that line of questioning and Special Agent T was not allowed to answer the question in front of the members. Any potential danger that the question itself might have tainted the members was purged by the judge's direction to the members on what it meant when he sustained an objection. As part of his initial instructions to the members, the military judge specifically told them that if he sustained an objection, they "must disregard the question and any answer that may have been given." In the absence of evidence to the contrary, court members are presumed to follow a judge's instructions. *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000). We find nothing in the record to suggest they did not do so in this case.

Additional Matter

We note the court-martial promulgating order is dated 11 August 2006, but the convening authority's action is not dated. We find no prejudice to the appellant on that issue and direct the government to correct the error.

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