IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. CARVER | **D.O. VOLLENWEIDER** | **E.E. GEISER**

UNITED STATES

v.

William C. HUDSON, Jr.
Construction Mechanic Constructionman (E-3), U. S. Navy

NMCCA 200301540 Decided 19 January 2006

Sentence adjudged 24 October 2002. Military Judge: D.J. Daugherty. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commander, Fleet Activities, U.S. Naval Air Facility, Kadena, Okinawa, Japan.

LT STEPHEN C. REYES, JAGC, USNR, Appellate Defense Counsel
LT GUILLERMO J. ROJAS, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Judge:

The appellant was convicted, contrary to his pleas, by a special court-martial with officer and enlisted members of conspiracy to commit wrongful appropriation, wrongful appropriation of U.S. currency in excess of $100.00, uttering insufficient fund checks, and knowingly executing a scheme to defraud a financial institution in violation of 18 U.S.C. § 1344, in violation of Articles 81, 121, 123a, and 134, Uniform Code of Military Justice, 10 U.S.C. § 881, 921, 923a, and 934. The appellant was sentenced to a bad-conduct discharge, confinement for 30 days, and reduction to pay grade E-2. The convening authority approved the sentence as adjudged.

The appellant raises three assignments of error. First, the appellant asserts that prosecution of an 18 U.S.C. 1344 violation in a military court-martial is preempted by Article 123a, UCMJ. The appellant also avers that it was multiplicious for the Government to charge him with violating Article 123a, UCMJ, and 18 U.S.C. 1344. Finally, the appellant contends that the military judge erred in denying the appellant's motion to dismiss because the testimony of the Government's main witness was

enhanced by the appellant's prior immunized testimony. The appellant requests that this Court set aside his conviction.

We have examined the record of trial, the assignments of error, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Background

Between February and March 2002, the appellant and another Sailor conspired to pass worthless checks for cash. The gravamen of the scheme was that one Sailor would write checks on his personal account in the United States payable to the other Sailor. The other Sailor would deposit the checks in his local credit union account in Okinawa and they would share the money.

At all relevant times, the checks were drafted and uttered on an account that both conspirators understood had insufficient funds to cover the checks; notwithstanding a vague hope that an insurance check from the co-conspirator's father might possibly arrive to cover the checks. At one point the account was actually closed by the bank but the conspirators continued to write and cash checks totaling over six thousand dollars. The scheme eventually became evident to the local credit union and the Sailors' command when the checks began coming back unpaid.

An investigation was initiated which eventually led to courts-martial for both Sailors. After the investigation was concluded and a decision had been made to charge each Sailor for their participation in the scheme, each Sailor was given testimonial immunity to facilitate their testimony at the other's trial.

Immunized Testimony

The appellant asserts that his conviction was illegally facilitated by the Government's indirect reliance on the appellant's earlier immunized testimony at the court-martial of his co-conspirator. Specifically, the appellant avers that his co-conspirator's memory of events that he testified to at the appellant's trial was enhanced by the appellant's prior immunized testimony at the co-conspirator's court-martial. The trial defense counsel made a motion at trial to exclude the allegedly tainted testimony based on this same argument. The military judge denied the motion.

Once a defendant demonstrates that he has testified under a grant of immunity, prosecutors have the burden of showing by a preponderance of the evidence that the defendant's own prosecution is based on evidence obtained from an independent, legitimate source other than the defendant's immunized testimony

or the fruits of such testimony. This is a preliminary question of fact. *United States v. Mapes*, 59 M.J. 60, 67 (C.A.A.F. 2003). A military judge's finding that all prosecution evidence is independent of the immunized testimony should not be overturned on appeal unless it is clearly erroneous or unsupported by the evidence. *United States v. McGeeney*, 44 M.J. 418, 423 (C.A.A.F 1996).

At trial, the military judge engaged in an extended colloquy with counsel and the appellant on this issue.[1] Record at 77-124. In response to the motion, the former trial counsel testified that all of the evidence he had developed regarding the appellant's participation in the charged offenses was sealed and provided to a new trial counsel who was previously uninvolved in the appellant's or his co-conspirator's courts-martial. All of this was accomplished before the former trial counsel ever spoke to the appellant under the immunity agreement. The new trial counsel in the appellant's case testified that he was careful not to solicit any additional information from the prior trial counsel or from the co-conspirator regarding interviews with the appellant after immunity was granted and the appellant testified at the co-conspirator's court-martial.

In response to pointed questions from the military judge, the new trial counsel in the instant case testified that he had no conversations with anyone regarding the appellant's interviews, statements, or preparation notes taken during the interviews or testimony. The trial counsel acknowledged, however, that the co-conspirator's recollection of events evolved following the appellant's testimony against him and that the co-conspirator now recalled several matters he had not previously included in statements to investigators. The Government may not use the testimony of a witness that was influenced by the prior immunized testimony of a defendant. *McGeeney*, 44 M.J. at 422 (citing *United States v. North*, 910 F.2d 843, 860 (D.C.Cir), *modified in part*, 920 F.2d 940, 942(1990)).

The military judge focused on these matters and determined that the co-conspirator's recollection was enhanced following the appellant's immunized testimony in only three ways. Record at 83-85. First, the co-conspirator recanted his statement to investigators that he told the appellant that his bank account in the United States was closed. Second, he recalled telling the appellant that the co-conspirator was expecting his father to deposit about $10,000 from an insurance settlement into his account. Third, he recanted his earlier statements to investigators that he received only about $250 from all the bad checks. He now recalled actually receiving one-half the face

[1] At trial a court must normally hold a hearing for the purpose of allowing the Government to demonstrate that it obtained all of the evidence it proposes to use from sources independent of the compelled testimony. *See Kastigar v. United States*, 406 U.S. 441 (1972).

amount of at least three other checks totaling far more than $250.00.

While the co-conspirator's memory was clearly enhanced as a result of the appellant's immunized testimony at the co-conspirator's court-martial, it was not enhanced in a manner detrimental to the appellant or in a manner that enhanced the Government's case against the appellant. The Government must only show that the appellant's immunized testimony was not used, directly or indirectly to "indict or convict" the appellant. *North*, 910 F.2d at 860.

The military judge entered ten pages of extensive written findings of fact and legal analysis into the record. Appellate Exhibit XVI. We adopt the military judge's findings of fact. The military judge noted and we concur that the three instances in which the appellant asserted his co-conspirator's memory was enhanced were each favorable to the appellant. In each instance, the co-conspirator's enhanced recollection either potentially lessened the appellant's culpability or enhanced the co-conspirator's role in the scheme. As the military judge noted, "[t]he objective of 'immunity from use and derivative use of compelled testimony is to leave the Federal government in substantially the same position as if the witness had claimed his privilege in the absence of a ... grant of immunity.'" *United States v. Gardner*, 22 M.J. 28, 30 (C.M.A. 1986). Appellate Exhibit XVI at 10. We find that the military judge applied the correct standard and that his ruling was neither clearly erroneous nor unsupported by the evidence.

Preemption and Multiplicity

We find that the appellant's remaining two assignments of error are without merit. *See United States v. Teters*, 37 M.J. 370 (C.M.A. 1993), and *United States v. Tenney*, 60 M.J. 838 (N.M.Ct.Crim.App. 2005), *rev. granted,* __ M.J. __, 205 CAAF LEXIS 1029 (C.A.A.F. 2005). Although not raised by either appellate counsel, we note that the military judge found Charge IV (18 U.S.C. 1344, bank fraud) multiplicious for sentencing with the remaining charges and specifications and that he properly instructed the members on two occasions. Record at 374, 385. Thus, even assuming *arguendo* that the military judge erred in not dismissing Charge IV for preemption or multiplicity, the error did not materially prejudice a substantial right of the appellant.

Court-Martial Order

Although not raised by the appellant, the appellate government counsel astutely noted that the court-martial order misstates the findings of the court-martial. Specifically, it reflects two specifications under Charge I when, in fact, the military judge consolidated the two into one prior to findings.

Appellate Exhibit VI. It also misstates the specific exceptions and substitutions articulated by the President of the Court at trial. The appellant has not asserted and we have not found any prejudice to the appellant from these scrivener's errors. The appellant is nonetheless entitled to a record that correctly reflects the results of his trial. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). We will order appropriate action in the decretal paragraph.

Conclusion

We direct that the supplemental court-martial order accurately reflect the findings of the court. The approved findings and the sentence are affirmed.

Senior Judge CARVER and Judge VOLLENWEIDER concur.

For the Court

R.H. TROIDL
Clerk of Court