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

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **J.F. FELTHAM**

UNITED STATES

v.

Michael A. JONES
Gunnery Sergeant (E-7), U.S. Marine Corps

NMCCA 200100889 Decided 30 November 2005

Sentence adjudged 1 December 2000. Military Judge: A.W. Keller, Jr. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Headquarters and Service Battalion, MCRD, Parris Island, SC.

Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
LT CRAIG A. POULSON, JAGC, USNR, Appellate Government Counsel

PRICE, Senior Judge:

Contrary to his pleas, the appellant was convicted by a special court-martial comprised of officer and enlisted members of the wrongful use of marijuana, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 112a. The adjudged and approved sentence was reduction to pay grade E-3, forfeiture of $890.00 pay per month for two months, and a bad-conduct discharge.

The appellant asserts that the military judge erred by:

(1) allowing the Government to make a major change to the specification by enlarging the alleged period of offense from 10 to 33 days;

(2) denying a motion for mistrial after the trial counsel asked the appellant about uncharged misconduct when the military judge had ruled it inadmissible;

(3) denying a motion to suppress a statement made by the appellant to the urinalysis coordinator; and

(4) denying a motion to suppress the urinalysis results because it was not a valid inspection.

The appellant also contends that the record of trial is incomplete because of a mechanical failure in the court recording equipment.

We have carefully considered 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 materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was a 15-year staff noncommissioned officer who had just completed a year of study at Syracuse University in the Military Photojournalism Program. Upon completion of the program in May of 2000, he reported to Marine Corps Recruit Depot, Parris Island, South Carolina, for duty. His new commanding officer had previously issued an order that all incoming personnel undergo a urinalysis. In compliance with that order, on 12 June 2000, the appellant provided a urine sample.

Some time in late June 2000, the appellant called Sergeant (Sgt) Robert A. Osbeck, the assistant substance abuse control officer who had collected the appellant's sample, and asked if the results were back yet. Sgt Osbeck responded in the negative, then asked if there was anything he should know about. The appellant answered by saying that some Marines at his last unit had tested positive while taking the same medication or supplements he was taking, and he was just checking to see if everything was "good to go," or words to that effect. Record at 139. At no time during this phone conversation did Sgt Osbeck advise the appellant of his rights under Article 31(b), UCMJ.

The appellant's urine sample tested positive for THC, a metabolite of marijuana. Based on that positive urinalysis, a charge of wrongful use between 2 and 12 June 2000 was preferred on 28 July 2000. The referred charge was served on the appellant on 1 August 2000. He was arraigned on 24 August 2000.

On 3 November 2000, having just received relevant discovery materials, the trial defense counsel (TDC) moved to suppress alleged statements made by the appellant to Master Sergeant (MSgt) Mark D. Rich, U.S. Air Force. MSgt Rich was his roommate and classmate while both studied at Syracuse University. During a telephone conversation in the late summer of 2000, the appellant advised MSgt Rich that he was going to a court-martial and allegedly explained that he thought he tested positive because "he had taken a drag off a marijuana cigarette on graduation evening, which would have been May 11th of this year." *Id.* at 446. In his motion, the TDC argued that, even if true, such a statement was not relevant to the charge, not admissible

under MILITARY RULE OF EVIDENCE 404(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), and unfairly prejudicial under MIL. R. EVID. 403.

In response, the Government moved to amend the specification by changing the inception date for the offense from 2 June 2000 to 11 May 2000. During litigation of the defense motion, Mr. Albert J. Marinari, an expert witness from the Navy Drug Screening Laboratory, testified that, although unlikely, it was possible that a marijuana metabolite can be detected by urinalysis more than 30 days after use. The military judge denied the defense motion to suppress and granted the Government permission to amend the specification.

Motion to Suppress Urinalysis Results - Improper Inspection

The appellant contends that the military judge abused his discretion in denying his motion to suppress the urinalysis results. We disagree.

The TDC moved to suppress the positive urinalysis result because it did not qualify as a valid inspection under MIL. R. EVID. 313. The TDC argued that such an inspection must be conducted uniformly, and that since a majority of the eligible participants did not produce a urine sample, the discretionary nature of the urinalysis vitiated the inspection.

Although the commanding officer had ordered all newly-reporting personnel to undergo urinalysis, the evidence showed that less than 40% of all such personnel actually produced a urine sample. However, this was not because of deliberate action by the chain of command. Sgt Osbeck testified that he tested 100% of personnel who checked in with him, as ordered. Rather, the chain of command simply failed to enforce the commanding officer's order with exactness.

The appellant cites *United States v. Bickel*, 30 M.J. 277, 286 (C.M.A. 1990) for the proposition that:

> neither Mil. R. Evid. 313 nor the Fourth Amendment permits a military commander to pick and choose the members of his unit who will be tested for drugs and then to use the resulting evidence to obtain a criminal conviction. Instead, the testing must be performed on a nondiscriminatory basis pursuant to an established policy or guideline that will eliminate the opportunity for arbitrariness by the person performing the tests.

Although not cited by the appellant in his brief, we note that the TDC relied upon a case that followed *Bickel* that deserves brief mention. In *United States v. Patterson,* 39 M.J. 678 (N.M.C.M.R. 1993), we held that the rule established in *Bickel* was violated and therefore reversed the conviction. However, in *Patterson*, the officer supervising the administration of the

urinalysis "was literally picking and choosing which returning absentees would provide urine samples" in contravention of the commanding officer's order that all such absentees would participate in the urinalysis. *Patterson*, 39 M.J. at 683.

Here, the circumstances are different. Sgt Osbeck was the noncommissioned officer who supervised the administration of the urinalysis in accordance with his commander's order. It is undisputed that he did so without picking and choosing individuals. The fact that others in the command were negligent in directing all newly-reporting Marines to check in with Sgt Osbeck does not equate to the type of "picking and choosing" condemned in *Bickel* and *Patterson.* We hold that the military judge did not abuse his discretion in denying this motion to suppress.

Motion to Suppress the Appellant's Out-of-Court Statement

As noted previously, the TDC moved to suppress the appellant's telephonic statement to Sgt Osbeck about the results of the urinalysis and his concern that he might follow his classmates who tested positive. He argued that Sgt Osbeck knew or should have known that the appellant was a suspect and therefore violated Article 31(b), UCMJ, by questioning him without first advising him of his rights. We disagree.

The standard of review for a denial of a motion to suppress out-of-court statements of the appellant is abuse of discretion. *United States v. Simpson,* 54 M.J. 281, 283 (C.A.A.F. 2000). We accept the military judge's findings of facts unless they are clearly erroneous. *Id.*

After hearing the testimony of Sgt Osbeck, the military judge made detailed findings of fact and conclusions of law and denied the motion. The critical factual question that we must resolve is whether the appellant was a suspect after asking about the urinalysis results. If he was a suspect, and if Sgt Osbeck was conducting a disciplinary/law-enforcement inquiry, then he was obligated to advise the appellant of his Article 31(b), UCMJ rights before asking any questions. *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000).

Finding them not clearly erroneous and supported by the record, we accept the military judge's findings of fact and adopt them for our own. Furthermore, the military judge's application of the law was correct and well-reasoned. The record shows that Sgt Osbeck was not conducting an investigation of any kind when the appellant called him on the telephone and that the appellant was not a suspect at the time. This assignment of error is without merit.

Major Change to Specification

The appellant argues that when the military judge permitted the trial counsel to amend the specification from "between, on, or about 2 June 2000 and 12 June 2000" to "between, on or about **11 May** 2000 and 12 June 2000," he violated the rule against major changes in specifications. We disagree.

RULE FOR COURTS-MARTIAL 603(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.) prohibits major changes to specifications over defense objection, whether made before or after arraignment. A "major change" includes addition of a (1) party; (2) offenses; (3) substantial matter not fairly included in those previously preferred; or (4) substantial matters which are likely to mislead the accused as to the offenses charged. R.C.M. 603(a).

After the TDC moved to suppress the appellant's statements to MSgt Rich, the trial counsel moved to amend the specification as indicated above. The TDC objected to the amendment, complaining that it added an offense because "science precludes that [sic] an 11 May 00 alleged use in Syracuse, NY would be the same alleged use that would cause a positive urinalysis at Parris Island thirty-two days later. . . ." Appellate Exhibit XXVIII at 2. The TDC also argued that the proposed amendment would add a substantial matter since the period of offense was much greater than originally pled. Finally, the TDC contended that the amendment would change the essential character of the alleged offense and would mislead the appellant as to the precise offense charged. With respect to that final argument, the TDC stated that he had already expended much time and effort preparing a defense addressing the more limited time frame and that the appellant would be prejudiced in trial preparation by the amendment.

The military judge concluded that the amendment did not add a party, an offense, or a substantial matter not fairly included in the specification, or a matter likely to mislead the appellant. He observed that the defense was put on notice of the proposed amendment 18 days in advance of the date of trial. He also found that Mr. Marinari's testimony regarding the connection, if any, of the admission of 11 May and the 12 June urinalysis did not affect his decision.

We begin by noting that the words, "on or about" are commonly used in pleading the alleged date of an offense under the UCMJ. They are "words of art in pleading which generally connote any time within a few weeks of the 'on or about' date." *United States v. Brown*, 34 M.J. 105, 110 (C.M.A. 1992)(citing *United States v. Grapp*, 653 F.2d 189, 195 (5th Cir. 1981); *Yaw v. United States* 228 F.2d 382, 382-83 (9th Cir. 1955)). We also note that the expert witness testified that it was possible that a chronic user of marijuana could test positive on a urinalysis approximately 30 days after the last usage. Thus, the appellant

cannot be heard to complain that enlarging the window of the date of offense actually forced him to defend against use on divers occasions, once on or about 11 May and another closer in time to the date of urinalysis. *See Brown*, 34 M.J. at 110. In this respect, we disagree with the military judge and conclude that Mr. Marinari's testimony was relevant to the analysis of the issue.

The statute of limitations was not invoked by this proposed amendment and "no other reason exists for concluding time was of the essence with respect to this statutory crime." *Id.* Moreover, the defense had more than two weeks to prepare to address this proposed amendment and failed to request a continuance after hearing the ruling of the military judge. Thus, we conclude that the appellant suffered no prejudice. We hold that the military judge did not violate R.C.M. 603 in permitting the Government to amend the specification.

Uncharged Misconduct and Mistrial

The appellant contends that the military judge abused his discretion in denying a motion for mistrial after the trial counsel asked the appellant a question the military judge had previously placed off-limits. We disagree.

As discussed previously, the TDC moved to suppress alleged statements made by the appellant to MSgt Rich. During a telephone conversation in the late summer of 2000, the appellant advised MSgt Rich that he was going to a court-martial and allegedly explained that he thought he tested positive because "he had taken a drag off a marijuana cigarette on graduation evening, which would have been May 11th of this year." *Id.* at 446. The defense argued that, even if true, such a statement was not relevant to the charge, not admissible under MIL. R. EVID. 404(b), and unfairly prejudicial under MIL. R. EVID. 403.

Another evidentiary issue stemming from MSgt Rich's proffered testimony was also discussed in a pretrial Article 39(a), UCMJ session. The trial counsel indicated that he intended to question MSgt Rich about his observation of the appellant smoking a marijuana cigarette in Syracuse, New York in December 1999. He would also testify that in a subsequent email, the appellant asked MSgt Rich if he had ever seen the appellant use marijuana. The military judge deferred a ruling on the admissibility of this evidence, but prohibited the trial counsel from alluding to it during his opening statement.

During his opening statement, the trial counsel began to allude to the late summer telephone conversation between the appellant and MSgt Rich when the TDC objected. During the Article 39(a), UCMJ, session that followed, the MJ reiterated the prohibition on reference to the December 1999 incident or any subsequent conversation about it. The military judge also reiterated the prohibition during another such session at the end

of the Government's case-in-chief. At the conclusion of the defense case-in-chief, the military judge ruled that any reference to the December 1999 incident was inadmissible.

In the defense case in surrebuttal, the appellant testified that he had called MSgt Rich and discussed the positive urinalysis and was trying to figure out how it tested positive. The only possible explanation he could come up with was smoking a cigarette given him from a college student at a fraternity party. The implication was that the cigarette may have been laced with marijuana. In cross examination, the trial counsel asked the appellant: "Now going back to Master Sergeant Rich, you asked him in an e-mail whether or not he'd ever seen you smoke pot, is that right?" *Id.* 491. The TDC immediately objected.

In the Article 39(a), UCMJ, session that followed, the trial counsel said he misunderstood the military judge's ruling. The military judge was plainly not convinced by that explanation and said he would give a limiting instruction to the members. Not satisfied with that, the TDC moved for a mistrial. The military judge denied the motion, instructed the members to disregard the trial counsel's improper question and precluded the trial counsel from conducting further cross-examination of the appellant.

During the Government's case in surrebuttal (the third installment of prosecution evidence), the military judge permitted the trial counsel to ask MSgt Rich about an e-mail that the appellant sent him with a subject line, "Re: Character Reference." Prosecution Exhibit 9. MSgt Rich testified that he told the appellant he would not be a good witness because of some of the appellant's behavior he observed in December 1999. The type of behavior was not specified.

In the defense case in surrebuttal (the third installment of defense evidence), the TDC called seven witnesses, including Mr. William R. Mars, to say that the appellant was truthful. Mr. Mars also testified that the appellant's performance of duty was exemplary. The military judge ruled that this testimony and other expansive foundation testimony opened the door for the trial counsel to test the limits of Mr. Mars' opinion of the appellant's character by asking if he knew of MSgt Rich's observations of the appellant smoking marijuana in December of 1999. The trial counsel did so, but did not succeed in weakening the witness' opinion. As part of the instructions on findings, the military judge gave an appropriate limiting instruction to the members on the questioning of Mr. Mars relative to the December 1999 incident.

In *United States v. Diaz*, 59 M.J. 79 (C.A.A.F. 2003), our superior court summarized the law of mistrial:

> Rule for Courts-Martial 915 (Mistrial) [hereinafter R.C.M.], states in part:

> (a) In general. The military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings. A mistrial may be declared as to some or all charges, and as to the entire proceedings or as to only the proceedings after findings.

The discussion to R.C.M. 915(a) cautions that,

> The power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons. As examples, a mistrial may be appropriate when inadmissible matters so prejudicial that a curative instruction would be inadequate are brought to the attention of the members[.]

In *United States v. Dancy*, 38 M.J. 1 (C.M.A. 1993), this court recognized that a mistrial is an unusual and disfavored remedy. It should be applied only as a last resort to protect the guarantee for a fair trial. We explained:

> Declaration of a mistrial is a drastic remedy, and such relief will be granted only to prevent manifest injustice against the accused. It is appropriate only whenever circumstances arise that cast substantial doubt upon the fairness or impartiality of the trial.

Id. at 6 (citations and internal quotes omitted).

A military judge has "considerable latitude in determining when to grant a mistrial." *United States v. Seward*, 49 M.J. 369, 371 (C.A.A.F. 1998). This Court will not reverse the military judge's decision absent clear evidence of abuse of discretion. *Dancy,* 38 M.J. at 6; *United States v. Rushatz*, 31 M.J. 450 (C.M.A. 1990). Our deference to the military judge's decision on a mistrial is consistent with other federal practice addressing this matter as reflected in this statement by the First Circuit:

> The trial court has a superior point of vantage, and . . . it is only rarely -- and in extremely compelling circumstances -- that an appellate panel, informed by a cold

> record, will venture to reverse a trial judge's on-the-spot decision . . . [A] mistrial is viewed as a last resort, only to be implemented if the taint is ineradicable, that is, only if the trial judge believes that the jury's exposure to the evidence is likely to prove beyond realistic hope of repair.
>
> *United States v. Freeman*, 208 F.3d 332, 339 (1st Cir.2000)(citations and internal quotes omitted).

Diaz, 59 M.J. at 90-91.

We must first decide whether the trial counsel erred in asking the appellant if MSgt Rich had seen him smoke marijuana. In his ruling on the motion for a mistrial, the military judge found that the question was improper. The Government does not argue otherwise. We conclude that this finding is not clearly erroneous and is supported by the record. From the posture of the evidence at that point, the military judge was well within his discretion to conclude that the evidence was both logically and legally irrelevant.

The only issue remaining is the appropriate remedy. The military judge found that the trial counsel was not guilty of intentional prosecutorial misconduct, a finding that we adopt solely out of deference to the fact that an experienced military judge saw and heard the trial counsel throughout this case. Apparently, the military judge interpreted the trial counsel's question "as reflective of an excess of adversarial zeal rather than purposeful misstatement." *United States v. Goodyear*, 14 M.J. 567, 573 (N.M.C.M.R. 1982). However, we need not rely solely on that finding in our analysis.

Of perhaps greatest importance in assessing the relative degree of risk that the appellant was deprived of a fair trial is an examination of what the members actually heard. In this case, the members heard an improper question. Fortunately, they did not hear an answer to the question. While in some cases we believe that a question alone could warrant a mistrial, this is not one of them.

The military judge had previously instructed the members that they must disregard questions where an objection was sustained. Following the Art. 39(a), UCMJ, session in which the motion for mistrial was discussed, the military judge specifically instructed the members that he had sustained the TDC's objection to the improper question. He also instructed that "there is absolutely no evidence to suggest that Master Sergeant Rich personally observed the accused use marijuana." Record at 506. The military judge then asked each member individually whether he/she would follow the instruction. Each

answered in the affirmative. We presume that members will follow the instructions of the military judge, particularly when they individually committed to do so in open court. *See Rushatz*, 31 M.J. at 456.

Another factor we consider in assessing the relative prejudice is the tactical choices of the TDC following the denial of the motion for mistrial. In calling seven witnesses to testify as to the appellant's character, the TDC pursued an exceptionally risky course of action, knowing that any one of the witnesses might offer an expansive opinion that would open the door to a "Did you know?" or "Have you heard?" question in cross-examination. *See United States v. White*, 36 M.J. 306, 307 (C.M.A. 1993). In fact, that is precisely what happened. Through the mouth of his own witness, Mr. Mars, the TDC effectively invited another reference to the December 1999 incident. While we understand the TDC's choice to place all possible favorable evidence in front of the members in an effort to secure an acquittal, he did so knowing that any prejudicial effect of the military judge's earlier ruling was thereby diminished.

Finally, we note that the trial counsel did not refer to the prohibited question or expected answer in his argument on findings. We conclude that the military judge wisely evaluated the issue, applied the law correctly and instructed the members accordingly. We hold that, in doing so, he did not abuse his discretion.

Conclusion

We have considered the remaining assignment of error and find it lacking in merit. The findings and sentence, as approved by the convening authority, are affirmed.

Although not assigned as error, we note that the court-martial promulgating order (CMO) incorrectly states in one place that the sentence was adjudged by a special court-martial composed of a military judge sitting alone and that Charge III was for a violation of Article 107, UCMJ. In fact, the appellant was tried by a court consisting of members, as the CMO correctly states in the convening authority's action, and Charge III

was for a violation of Article 112a, UCMJ. We direct that the supplemental CMO correct these errors.

Chief Judge DORMAN and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court