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

BEFORE

C.A. PRICE **J.F. FELTHAM** **J.J. MULROONEY**

UNITED STATES

v.

Elesia M. JEMISON
Lieutenant Commander (O-4), U.S. Navy

NMCCA 200100993 Decided 27 October 2005

Sentence adjudged 14 January 2000. Military Judge: T.L. Miller. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Camp Smedley D. Butler, Okinawa, Japan.

LT ROBERT E. SALYER, JAGC, USNR, Appellate Defense Counsel
Capt ROGER E. MATTIOLI, USMC, Appellate Government Counsel
Capt GLENN R. HINES, USMC, Appellate Government Counsel

MULROONEY, Judge:

Contrary to her pleas, the appellant was convicted before officer members, of one specification each of fraud and conduct unbecoming an officer, in violation of Articles 132 and 133, Uniform Code of Military Justice, 10 U.S.C. §§ 932 and 933 respectively. She was sentenced to a dismissal and a $1,090.00 fine. The convening authority approved the sentence as adjudged. As a matter of clemency, the Secretary of the Navy has administratively remitted the dismissal to a General Discharge Under Honorable Conditions.

The appellant claims that the military judge committed reversible error by: (1) denying her motion to suppress an unwarned conversation she had with her superior; and (2) admitting improper expert testimony.

We have examined and considered the record of trial, the pleadings filed by the parties, and the oral arguments presented by the parties. We conclude that, after taking corrective action, the findings and sentence are correct in law and fact,

and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Facts

The appellant, a nurse, stationed at U.S. Naval Hospital, Camp Lester, Okinawa, received a phone call alerting her that Harry Snead was gravely ill and that his death was imminent. The appellant's conversation on the phone attracted the attention of her supervisor, Commander (CDR) Katherine A. Surman. When CDR Surman asked the appellant if she was alright, the appellant told her that her brother was dying and she would like to go home on emergency leave. CDR Surman volunteered that the command may be able to fund the transportation back to the United States.[1] The appellant completed emergency leave paperwork at CDR Surman's direction. The paperwork, which is written in the appellant's handwriting, contains the following justification: "My brother's medical status has changed as of 07 July 99. He is in the hospital with a terminal diagnosis. Would like to go home as soon as possible. Thank you." Prosecution Exhibit 3. The appellant and her division officer, Lieutenant Commander (LCDR) Hosack, went to the local Red Cross office where the appellant provided information to be sent to U.S. Naval Hospital, Portsmouth to confirm Snead's condition and that he was a patient there.

Later that day, CDR Surman was approached by LCDR Helena Ely, who advised her that she believed that Snead was not the appellant's brother, but a friend. LCDR Ely, who had been directed to ensure nursing coverage to compensate for the appellant's imminent departure, warned CDR Surman that the appellant was being granted funded emergency leave based on the false premise that she was attending to a sick brother. LCDR Ely related to CDR Surman a conversation that she had overheard between the appellant and Captain (CAPT) Winslett, the director of nursing services. LCDR Ely informed CDR Surman that she was called into CAPT Winslett's office on the day she had been selected for promotion so that CAPT Winslett could offer her congratulations. In LCDR Ely's presence, the appellant told CAPT Winslett that CDR Essie Rucker's husband was sick. LCDR Ely told CDR Surman that she knew CDR Rucker from a prior tour with her. She also told CDR Surman that she knew Rucker's husband's first name was "Harry," that Rucker and the appellant were known to be good friends, but that she knew of no family relationship between them. Additionally, LCDR Ely told CDR Surman that the appellant had told her that all her relatives were in Alabama, and that as far as she (Ely) knew, the appellant had no brothers in Portsmouth. LCDR Ely told CDR Surman that she believed that the appellant's application for funded emergency leave was fraudulent

[1] Neither the appellant nor CDR Surman had read, or were familiar with, USNAVHOSP OKINAWA INSTRUCTION 1050.1F, the local instruction regarding leave and liberty for staff personnel, which contained the requirements for funded emergency leave.

and would constitute conduct unbecoming an officer. She asked CDR Surman to stop her and make her pay for her own way.

When the appellant went home that night to pack, she called her friend, LCDR Constance Evans, to ask her to watch her house while she was on emergency leave. When LCDR Evans asked how she was going home, the appellant told her it was emergency leave, and as far as she was concerned, Harry Snead was her brother. CDR Evans did not relate this information to CDR Surman before the appellant departed for her funded emergency leave.

Later that evening, CDR Surman received a phone call at her bachelor officer quarters (BOQ) room from the officer of the day (OOD) informing her that a Red Cross message had been received indicating that there was a patient at Portsmouth Naval Hospital in guarded condition with terminal cancer. CDR Surman noted the details of the conversation on a post-it note.

When CDR Surman reported for work the next morning, LCDR Ely approached her to reiterate her concerns regarding the appellant's emergency leave application. CDR Surman directed the appellant's division officer to have the appellant report to her before she departed on leave. When CDR Surman realized that she had neglected to bring her post-it note containing the details of her phone conversation with the OOD, she had the Red Cross message brought to her.

When the appellant reported as directed, CDR Surman, Red Cross message in hand, said, "Are you all set to go . . . I got the Red Cross message and Harry Snead, your brother, is dying of cancer at Portsmouth?" Appellate Exhibit XXXVI at 2. The appellant responded in the affirmative. CDR Surman testified that she asked the question ". . . to just clarify that this indeed was her brother because the Red Cross is funding the ticket from Okinawa to California." Record at 243-44.

Within one-half hour of the time she finished this final conversation with the appellant, CDR Surman took the matter to CDR Steve Nichols, the hospital director for administration. Within an hour and one-half from the time she and the appellant ended this brief conversation, CDR Surman sought advice from Lieutenant Hamilton, the hospital legal officer. In its case on the merits (but not at the suppression hearing), the Government presented evidence that between the time CDR Rucker spoke with the hospital administrative officer and the legal officer, LCDR Ely told her that she had spoken with hospital personnel at Portsmouth and ascertained that a patient named Harry, who was married to a retired Navy nurse, had been there, was discharged, and had died at home.

The appellant did travel to Portsmouth to visit Harry Snead. The Government paid $1,090.40 for the airfare. Unfortunately, Snead had expired before the appellant made it to his bedside. Upon her return to Okinawa, she was directed to meet with Naval

Criminal Investigative Service Special Agent Gabriel Carruth. During the course of the appellant's conversation with Special Agent Carruth, following adequate warnings, the appellant executed a written, voluntary statement that admitted, *inter alia*, that she and Snead were not related by blood.

While the investigation was pending, the appellant was briefly assigned to work at a computer terminal in LCDR Ely's office. When LCDR Ely told the appellant that she was sorry for what she was going through, the appellant said, "Well, you didn't have to tell her. You did not have to tell CDR Surman the truth." Record at 558.

The appellant had 16 brothers and sisters. She and Harry Snead were not related by blood, but they frequently referred to each other as brother and sister. Snead had been brought into the appellant's house by her older brother when the appellant was quite young and was treated as a sibling by the appellant's mother. Mr. Snead's widow, CDR Rucker (a retired Navy nurse,) also refers to the appellant as her "little sister," and Snead's obituary lists the appellant as his sister.

The Appellant's Statement to Commander Surman

The appellant argues that the military judge erred in denying her motion to suppress the conversation she had with CDR Surman the morning she left on emergency leave. Specifically, the appellant argues that CDR Surman had a duty to provide warnings in accordance with Article 31(b), UCMJ. We agree.

Warnings under Article 31(b) are required when a suspect or an accused is questioned by a military superior during an official law enforcement investigation or disciplinary inquiry. *United States v. Bradley*, 51 M.J. 437, 441 (C.A.A.F. 1999) (citing *United States v. McLaren*, 38 M.J. 112 (C.M.A. 1993); *United States v. Moore*, 32 M.J. 56, 60 (C.M.A. 1991); *United States v. Loukas*, 29 M.J. 385 (C.M.A. 1990)). Not every conversation between a military member and a superior or law enforcement agent requires a warning as a prerequisite to admissibility. *Bradley*, 51 M.J. at 442 (questions regarding a civilian arrest posed by a commander to evaluate any required action with respect to an active security clearance did not require warnings); *United States v. Tanksley*, 50 M.J. 609, 617 (N.M.Ct.Crim.App. 1999)(questions posed by agent during overseas security clearance background investigation did not require warnings). However, it is now well-settled that the law will strongly presume that a superior in the immediate chain of command is acting in an investigatory or disciplinary role unless circumstances show otherwise. *United States v. Swift*, 53 M.J. 439, 448 (C.A.A.F. 2000); *Bradley* 51 M.J. at 441. In *Swift*, our superior court held that the test in evaluating a superior's duty to warn is whether a reasonable person would have considered the appellant to be a suspect. *Swift*, 53 M.J. at 447-48. The Court stated that there is a "relatively low quantum of evidence

required to treat an individual as a suspect" and that a superior's optimism that a suspect will be ultimately vindicated is not sufficient to "deprive a member of the armed forces of the right to be warned under Article 31(b) when the objective facts point to the subordinate." *Id.*

We review a military judge's rulings on the admission or exclusion of evidence, including rulings on motions to suppress, for abuse of discretion. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). We review a military judge's findings of fact under a clearly erroneous standard and his conclusions of law *de novo*. *Id.* The determination of whether an interrogation occurred is reviewed *de novo*. *United States v. Young,* 49 M.J. 265, 267 (C.A.A.F. 1998)(citing *United States v. Kosek*, 41 M.J. 60, 63 (C.M.A. 1994)). Although we have reviewed the suppression decision below *de novo*, we believe that on the present record it is unlikely that the more deferential standard would have yielded a contrary result.

The military judge, relying on *Bradley*, 51 M.J. at 442, denied the appellant's suppression motion. In his findings, the military judge initially indicated that he would presume that, as the appellant's superior, CDR Surman was acting in an investigatory-disciplinary capacity. Later in his findings, the military judge found that CDR Surman was not acting in an investigatory-disciplinary capacity. The military judge ultimately found that, based on the facts elicited at the hearing, the appellant could not reasonably have been a suspect at the time the question was posed.[2] Based on the record, this finding is virtually unsupportable.

The military judge considered the testimony and an affidavit from CDR Surman, as well as an affidavit from LCDR Ely. CDR Surman testified that she had two conversations with LCDR Ely before the challenged conversation with the appellant took place. LCDR Ely provided CDR Surman a specific, detailed account of a conversation that she overheard which arguably referred to the sick person that the appellant was going home to see. LCDR Ely remembered the participants in the conversation (the appellant and CAPT Winslett,) when it took place (the day LCDR Ely was selected for promotion,) where it took place (CAPT Winslett's office,) and the details of the conversation (CDR Essie Rucker's husband was sick.). It is not insignificant that LCDR Ely informed CDR Surman that appellant had previously said all her brothers were in Alabama. Likewise adding to the objective

[2] The military judge also placed a significant emphasis on CDR Surman's testimony that she would have approved emergency leave for the appellant, even if she knew that Snead was not her brother. Unfortunately, this portion of the military judge's findings was apparently based on an ambiguity in the terminology employed by CDR Surman. A careful reading of her testimony makes it clear that CDR Surman testified that she would have approved leave, but not funded emergency leave. While not issue-dispositive, this misunderstanding does not enhance the weight we are able to accord to the findings below.

veracity of LCDR Ely's concerns was the fact that she told CDR Surman that she had been stationed with CDR Rucker and knew her personally. LCDR Ely was certainly not junior in rank or experience, was a division officer working for CDR Surman, and there is nothing on the present record to suggest that she was in any way biased against the appellant or had a motive to fabricate the details she was providing.

Although CDR Surman was in possession of a significant volume of apparently credible information, she repeatedly testified that her dual purpose in posing the question to the appellant was to make sure that she was all set to go and to confirm the relationship between the appellant and Mr. Snead. However, we note that since her direction to the appellant's division officer was to bring the appellant to see her before she departed on leave, her presence made it clear that she was ready to depart. CDR Surman did not inquire about travel details or times. Likewise, she was not seeking the name of the sick person that was the subject of the emergency leave request, since the Red Cross message already in her possession provided that information. There was no conceivable purpose for CDR Surman's inquiry apart from procuring a statement from the appellant that CDR Surman had good reason to believe would be untrue.

CDR Surman's actions after the conversation are likewise informative. Within one-half hour of the time the appellant responded "yes" to her question, CDR Surman went to see the hospital administrative officer about her suspicions. Within an hour and one-half, she conveyed her misgivings to the hospital legal officer. The only changed circumstance between the time she posed her question to the appellant and her report to the hospital administrator, was the appellant's "yes."[3] It is clear the CDR Surman's suspicions were well-founded both before and after the appellant responded to her inquiry in the affirmative. It is equally clear that because the evidence CDR Surman possessed at the time she posed her question easily met the "relatively low quantum of evidence required to treat an individual as a suspect," *Swift*, 53 M.J. at 447, she was required to provide the appellant with Article 31(b) warnings. Admission of the conversation under these facts was erroneous.

We must next turn our attention to whether the admission of the conversation between the appellant and CDR Surman, in violation of Article 31(b), had a prejudicial impact. In support of the fraud specification, the Government charged and proved beyond a reasonable doubt that the appellant submitted an emergency leave application which contained the false statement that her brother was terminally ill. The inadmissible

[3] In its case on the merits, the Government introduced evidence that between the time CDR Rucker spoke with the administrative officer and the time she spoke to the legal officer she received additional information from LCDR Ely about a telephone call Ely had made with hospital personnel in Portsmouth. Inexplicably, this information was not introduced at the suppression hearing and formed no part of the decision reached by the military judge.

conversation was not referenced in either the specification language or the bill of particulars provided by the Government. The appellant's written confession, her other conversations with CDR Surman, her statements to LCDR Evans and LCDR Ely which demonstrated consciousness of guilt, and other evidence, convince us that the erroneous admission of this conversation constituted harmless error regarding this specification.

The conduct unbecoming an officer specification, presents a different scenario. The appellant was convicted of "convey[ing] numerous untruthful statements to superiors in her chain of command and co-workers for the purpose of defrauding the United States Government." Charge Sheet. As was the case with the fraud specification, the specific conversation is not set forth in either the charge sheet or the bill of particulars. In his instructions on findings, the military judge did not specify which untruthful statements could form the basis of a conviction under this specification. We find that the inadmissible statement in question is undoubtedly one of the "numerous untruthful statements" introduced by the Government upon which the members could have based their guilty verdict. There is no way to meaningfully discern whether the members relied on this inadmissible evidence in reaching their verdict on the specification under Charge II. *Cf. United States v. Augsperger*, 61 M.J. 189, 190 (C.A.A.F. 2005)(where the specification alleges "divers occasions" and the members convict but except the "divers occasions" language, the Court of Criminal Appeals cannot conduct a factual sufficiency review or affirm findings where it cannot discern the occasion on which the conviction is based). Accordingly, we are compelled to set aside the guilty finding as to this specification and will grant appropriate relief in our decretal paragraph.

The Testimony of Commander Nichols

In its case in chief, the Government called CDR Nichols, the hospital administrative officer, to provide necessary foundational testimony for the admission of various documents introduced by the Government. Among the documents admitted during his testimony was USNAVHOSP OKINAWA INSTRUCTION 1050.1F (INSTRUCTION 1050.1F), which outlines the parameters for leave and liberty at Naval Hospital Okinawa. CDR Nichols testified that he was not only familiar with INSTRUCTION 1050.1F, but that he actually drafted it and revised it. He testified that INSTRUCTION 1050.1F authorized funded emergency leave for personnel to attend to emergencies relative to "family members" as that term is defined in the Military Personnel Manual (MILPERSMAN), but not for emergencies that involve close friends.

The Government asked CDR Nichols if he was familiar with the details of the appellant's application for emergency funded leave and whether INSTRUCTION 1050.1F would authorize funded emergency leave where the emergency related to someone who did not fall within the MILPERSMAN definition of a family member. The defense

interposed an objection based on “speculation” which was overruled by the military judge, and the witness was permitted to testify that INSTRUCTION 1050.1F would not authorize the approval of funded emergency leave under those circumstances.

On appeal, the appellant argues that the military judge committed error in overruling the objection, but the nature of the error alleged on appeal is different from the theory urged at the court-martial. On appeal, the appellant argues that the testimony was really expert testimony admitted without sufficient foundation, and invaded the province of the members by providing an opinion as to whether Mr. Snead was the appellant’s brother.

The appellant has never argued here or below that she and Mr. Snead were related by blood or that their relationship otherwise fit within the definition of family members as that term is defined in the MILPERSMAN or INSTRUCTION 1050.1F. Simply put, both factually and tactically, it was never an issue in the case. We note also that the military judge provided detailed, correct instructions on the elements of the two offenses and even on the defense of mistake of fact. But inasmuch as the basis for inadmissibility urged on appeal was not the basis that formed the objection at the court-martial, the error is not preserved for our review. *United States v. Eggen*, 51 M.J. 159, 161 (C.A.A.F. 1999); *United States v. Davis*, 44 M.J. 13, 20 (C.A.A.F. 1996). Furthermore, even if admission of the testimony were assumed, *arguendo*, to be erroneous, it certainly does not rise to the level of plain error in this case. *See United States v. Kahmann*, 58 M.J. 667, 668 (N.M.Ct.Crim.App. 2003), *aff'd*, 59 M.J. 309 (C.A.A.F. 2004).

Accordingly, this assignment of error has no merit.

Conclusion

The findings of guilty of Charge II, alleging a violation of Article 133, UCMJ, and its single specification are set aside. That charge and its specification are dismissed. The remaining findings are affirmed.

We have reassessed the sentence in accordance with the principles of *United States v. Cook*, 48 M.J. 434 (C.A.A.F. 1998), *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990), and

United States v. Sales, 22 M.J. 305, 307-08 (C.M.A. 1986) and affirm only so much of the sentence as includes a $1,090.00 fine.[4]

Senior Judge PRICE and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court

[4] We have considered the Secretary's action regarding the remission of the approved dismissal to an administrative separation. Inasmuch as the sentence adjudged by the court-martial and approved by the members was extremely lenient, we have concluded that the sentence we affirm here is appropriate whether the punitive discharge is included in the baseline sentence we consider or not. Accordingly, we need not address the issue of what impact, if any, the Secretary's action has on our baseline sentence. We need not reach this issue to decide the case and decline to do so as a matter of discretion. *See United States v. Gaines*, 61 M.J. 689 (N.M.Ct.Crim.App. 2005) (citing *United States v. Gibson*, 43 M.J. 343, 346 n.3 (C.A.A.F. 1995) and *United States v. Lawson*, 34 M.J. 38, 40 (C.M.A. 1992)); *but see United States v. Dedert*, 54 M.J. 904, 909 (N.M.Ct.Crim.App. 2001) and *United States v. Olinger*, 45 M.J. 644, 650 (N.M.Ct.Crim.App. 1997).