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

BEFORE

C.A. PRICE **E.B. HEALEY** **R.C. HARRIS**

UNITED STATES

v.

Jose R. RIVERA
Machinist's Mate Fireman (E-3), U.S. Navy

NMCCA 200201611 Decided 9 February 2005

Sentence adjudged 30 October 2001. Military Judge: P.L. Fagan. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Southwest, San Diego, CA.

LT ROBERT SALYER, JAGC, USNR, Appellate Defense Counsel
LT GUILLERMO ROJAS, JAGC, USNR, Appellate Government Counsel

HEALEY, Judge:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of unauthorized absence and bringing or attempting to bring aliens into the United States, in violation of Articles 86 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 934, and 8 U.S.C. § 1324(a)(2)(B)(ii). The appellant was sentenced to reduction to pay-grade E-1, confinement for 20 months, total forfeiture of pay and allowances, a fine of $1,400.00, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

We have carefully examined the record of trial, the appellant’s two assignments of error, and the Government’s response. We conclude that the findings and the 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.

Facts

The appellant entered the United States driving a borrowed car. The U.S. Customs Service (Customs) at the San Ysidro Port of Entry (SYPOE) stopped him. The Customs agent asked the appellant what he was bringing from Mexico and the appellant replied "nothing." Record at 602. According to the agent the appellant seemed shaky, did not make eye contact, and was a little talkative. The agent opened the trunk of the car and found three people (hereinafter referred to as "aliens" as they were in the record of trial) in the locked trunk. *Id.* Immigration and Naturalization Service (INS) agents processed the appellant and the three aliens. The processing included: (1) interviews, (2) searches of the people and the car, and (3) fingerprinting and photographs. During the processing, the agents noted that the aliens did not respond to English and that they did respond to Spanish. None of the aliens had entry documentation. The photographs and the fingerprints of the aliens were entered into a computer database. The computer check confirmed that all three aliens had made previous attempts to enter the United States without proper documentation. All three aliens were listed as residents of Mexico.

A standard form I-385, alien booking record, was filled out on each alien as they were being interviewed and searched. Prosecution Exhibits 2,3, and 4. The information put on the form was based upon the information provided by the aliens, documents found on their persons, and information that came back after the computer searches, the photographs and the fingerprints were processed for matches. One of the aliens possessed documents that gave her an entitlement to Mexican social security benefits.

During the processing, INS contacted the Navy Shore Patrol (SP) because the appellant identified himself as an active duty Sailor. The SPs arrived at the SYPOE with Naval Criminal Investigation Service (NCIS) agents. Due to the large number of illegal aliens stopped at the border each day, aliens are generally kept in the United States as witnesses for subsequent proceedings only in cases in which there is a repeated smuggler or there has been endangerment to life. The NCIS agents videotaped their interviews with the aliens because they anticipated INS would deport the aliens and they would not be available later. NCIS did not ask INS to hold the aliens in the United States. The aliens in this case were deported to Mexico. Prior to trial the Government made an effort to locate two of the aliens by sending a United States embassy representative to the small Mexican village listed as the residence of two of the aliens on their Record of Deportable/Inadmissible Alien INS forms. Prosecution Exhibits 4 and 5.

During his interview with NCIS, the appellant denied knowledge that the aliens were in his car trunk and claimed he borrowed the car from a man named "Ignacio" because he had locked his keys in his own car. The appellant declined to provide

Ignacio's last name or to state how he planned to get the car back to Ignacio. The appellant was found with more than $1,400.00 of cash on his person. He said his mother wired the money, via Western Express, from Puerto Rico, so that he could use the money as a deposit on a car. Record at 719. However, the appellant was in possession of a receipt showing he had already made a $2,000.00 deposit on the purchase of a car. Also, he could not recall the location of the Western Union office where he allegedly picked up the cash. Western Union did a computer search of all monetary transfers from Puerto Rico to California during the applicable time frame. They found no record supporting the appellant's claim. Record at 726-47; Prosecution Exhibits 19 and 20. In addition, a fellow Sailor testified that, a few days before the appellant's apprehension at the border, the appellant had asked him if he would like to make $3,000.00 crossing people across the border between Mexico and the U.S.

Admitting Hearsay

In the appellant's first assignment of error, he asserts that the military judge erred by admitting into evidence documents containing hearsay assertions that three alleged alien witnesses – the subjects of Charge II – were citizens of Mexico. The appellant avers that this court should set aside the findings and the sentence. We disagree.

In order to convict on Charge II and the specification thereunder, the Government had to establish that the appellant attempted to bring the three aliens to the United States for the purpose of private financial gain, knowing or in reckless disregard of the fact that the aliens had not received prior official authorization to enter the United States. *See* 8 U.S.C. § 1324(a)(2)(B)(ii); *United States v. Fujii*, 301 F.3d 535, 539 (7th Cir. 2002).

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003). "A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law." *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004).

At trial the alien booking records, Prosecution Exhibits 2, 3, and 4, were offered by the Government as records of regularly conducted activity, a hearsay exception under MILITARY RULE OF EVIDENCE 803(6), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). We need not decide the issue of whether the evidence was properly admitted because, even if error, we conclude that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). We so conclude because there was overwhelming evidence admitted at trial even without Prosecution Exhibits 2,3, and 4 from which the finder of fact could find

beyond a reasonable doubt that the three aliens were in fact illegal aliens without prior official authorization, and that the appellant was acting for the purpose of private financial gain. We base this on the record as a whole, and in particular the evidence that, (1) the three aliens were traveling across an international border concealed in a closed trunk, (2) the three aliens when interviewed and searched did not have entry documentation, (3) the three aliens did not respond to questions or directions in English, (4) the three aliens were subsequently deported to Mexico,[1] (5) the appellant's explanation for possessing $1,400.00 cash was directly contradicted by the Government's evidence, (6) the appellant had recently disclosed to a fellow sailor that he was smuggling aliens across the United States border for money, and (7) the appellant was unable to provide an explanation for how he was going to return the 'borrowed' car he was driving.

Lay Opinion

In the appellant's second assignment of error, he asserts that the military judge erred by admitting into evidence lay opinion that the alleged aliens were citizens of Mexico and that they were therefore not authorized entry into California. The appellant avers that this court should set aside the findings and sentence. We disagree.

MIL. R. EVID. 701 establishes a two-part test for admissibility of lay opinion: (1) the opinion must be rationally based on the witness's perception; and (2) the opinion must be helpful to the determination of a fact in issue. Like other evidentiary rulings, a military judge's application of MIL. R. EVID. 701 is reviewed for an abuse of discretion. *United States v. Byrd*, 60 M.J. 4 (C.A.A.F. 2004)(citing *United States v. Littlewood*, 53 M.J. 349, 353 (C.A.A.F. 2000)). A trial judge's ruling is "entitled to 'due deference.'" *United States v. Maxwell*, 38 M.J. 148, 152 (C.M.A. 1993)(quoting *United States v. Strozier*, 31 M.J. 283, 288 (C.M.A. 1990)). Accordingly, we will reverse for an abuse of discretion only "if the military judges' findings of fact are clearly erroneous or if his decision is influenced by an erroneous view of the law." *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995).

The INS agent offered lay opinion, based on (1) his observations of the appellant and the three aliens, and (2) his experiences in Mexico and as an INS agent. After a careful review of the record, we have no difficulty concluding that the witness had a rational basis for offering an opinion on the status of the aliens. However, we find the military judge could

[1] Removal from the United States is a sanction reserved for aliens. See 8 U.S.C. § 1225; *see* also *Mathews v. Diaz*, 426 U.S. 67, 80, (1976)(concluding that "[t]he exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government's power to regulate the conduct of its own citizenry" (footnote omitted)).

have determined the illegal status of the aliens based upon the other ample evidence in the record. Therefore, assuming *arguendo*, that the lay testimony on the issue of nationality exceeded the bounds of permissible lay testimony, we find the error was harmless and did not materially prejudice the appellant.

Conclusion

Therefore, we find these assignments of error to be without merit, and decline to grant relief. Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

We note the court-martial promulgating order (CMO) omitted mention of that part of the sentence that adjudged a fine of $1,400.00. Nevertheless, the staff judge advocate's recommendation correctly stated the adjudged sentence and the convening authority approved the sentence. The appellant has not argued that he was prejudiced by this scrivener's error.

Nevertheless, the appellant is entitled to accurate official records concerning his court-martial. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). We therefore direct that the supplemental court-martial order reflect that the appellant's adjudged punishment included a $1,400.00 fine.

Senior Judge PRICE and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court