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.

Joshua R. MCKEEL
Seaman (E-3), U.S. Navy

NMCCA 200202328 Decided 26 January 2005

Sentence adjudged 6 February 2003. Military Judge: J.A. Maksym. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Chief of Naval Air Training, Corpus Christi, TX.

JOHN B. WELLS, Civilian Appellate Defense Counsel
Maj CHARLES R. ZELNIS, USMC, Appellate Defense Counsel
Capt GLEN R. HINES, USMC, Appellate Government Counsel

HEALEY, Judge:

Pursuant to his pleas, the appellant was convicted of indecent assault, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. A general court-martial consisting of a military judge sitting alone sentenced the appellant to 5 years confinement, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged and, with the exception of the dishonorable discharge, ordered it executed. Pursuant to the pretrial agreement, the convening authority suspended all confinement in excess of 15 months for 15 months from the date of trial.

We have carefully considered the record of trial, the appellant's three assignments of error,[1] the Government's

[1] I. The Convening Authority and the Military Judge erred in allowing the court-martial to proceed in the Northern District of Florida.
II. The military judge erred in not dismissing the charge and specification because the appellant relied to his detriment on a pre-trial agreement.
III. The actions of the special court-martial convening authority and his legal officer constituted unlawful influence in violation of Article 31.

response, and the appellant's reply. 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.

Change of Venue

In the appellant's first assignment of error, he asserts the military judge erred by allowing the court to proceed in a district other than where the offense was committed. We disagree.

The appellant's offense occurred at Lackland Air Force Base, Texas, where the appellant and the victim were attending "A" School. However, at the time of the trial, neither was stationed in Texas. Many of the witnesses had been transferred from Texas to other parts of the world. At trial, the Government counsel stated all witnesses would be made available and the appellant conceded he was not aware of any problems with getting witnesses to Pensacola, Florida the site of the trial. The military judge, counsel, and potential members were from Pensacola. Therefore, it was economical for the Government to try the court-martial in Pensacola.

The appellant does not claim he was prejudiced because the trial was held at a location other than where the offense was committed. His sole basis for requesting a change of situs was the Sixth Amendment to the Constitution of the United States that says, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . ."

As to the appellant's assertion that the Sixth Amendment to the Constitution of the United States, requires court-martial cases be tried in the district where the incident occurred, the Supreme Court of the United States has held that the requirements of Article III of the Constitution and similar requirements of the Sixth Amendment are not applicable to military tribunals. *Ex Parte Quirin*, 317 U.S. 1, 39 (1942). Our superior court has also concluded that federal practice applies to courts-martial if not incompatible with military law or with the special requirements of the military establishment. *Chenoweth*, 46 C.M.R. 183, 186 (C.M.A. 1973)(citing *United States v. Knudson*, 16 C.M.R. 161 (C.M.A. 1954)); *United States v. Fisher*, 15 C.M.R. 152 (C.M.A. 1954).

Neither the Uniform Code of Military Justice nor the Manual for Courts-Martial establish the location at which a court-martial may, or must be conducted. *Chenoweth*, 46 C.M.R. at 186. RULE FOR COURTS-MARTIAL 504(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), says, "The convening authority shall ensure that an appropriate location and facilities for courts-martial are

provided." "However, once he has referred charges to a court-martial, any motion for a change of venue, or of the situs of the trial, is properly addressed solely to the military judge as an interlocutory matter, and his ruling thereon 'is final and constitutes the ruling of the court.'" *Chenoweth*, 46 C.M.R. at 186 (quoting Art. 51(b), UCMJ 10 USC § 851(b)). The military judges' ruling on a motion for a change of venue is reviewed for abuse of discretion. *United States v. Thomas,* 43 M.J. 550, 595-96 (N.M.Ct.Crim.App. 1995)(quoting Art. 51(b), UCMJ, 10 USC § 851(b)). Based on the circumstances in this case, where the appellant was provided with equal access to witnesses, we do not find an abuse of discretion in the denial of the request for a change of venue. Therefore, we decline to grant relief.

Motion to Dismiss

In the appellant's second assignment of error, he contends that the military judge erred by not dismissing the charge and specification because the appellant relied to his detriment on a pretrial agreement. We disagree.

The Air Force Office of Special Investigations (OSI) interviewed the appellant on 3 October 2001. During that interview the appellant admitted that he digitally penetrated and had sexual intercourse with a shipmate who he did not believe had the ability to consent. The appellant's admissions were recorded in notes made by the OSI agent contemporaneous to the interview and in a summary of the interview. Appellate Exhibit XXXI at 270-76. Sometime subsequent to the OSI interview, the unit's legalman chief petty officer (CPO) advised the appellant that if he accepted Article 15, UCMJ, nonjudicial punishment (NJP) for the rape and then waived his right to an administrative discharge board, there would be no court-martial. Record at 204-07. On 26 April 2002, nearly eight months after the appellant's statement to the OSI agent, the appellant plead guilty at an NJP to rape and other charges. Prosecution Exhibit 2. He was processed for an administrative discharge and he waived his board. Record at 205. However, rather than discharge the appellant, the general court-martial convening authority (GCMCA) referred the appellant to a general court-martial for the same rape for which he had received NJP. Record 191-207; Charge Sheet.

At trial the appellant moved to dismiss the charge and specification alleging he had received, "equitable immunity" from the legalman CPO who induced him to cooperate, accept NJP, and waive his administrative discharge in exchange for not being sent to a courts-martial. The appellant asserts the actions of the CPO were in essence a pretrial agreement that triggered a *defacto* immunity barring further prosecution. Again, we disagree.

The appellant stated he believed that the CPO had the authority to tell him what he told him. Record at 205. The appellant does not aver that the CPO had received any assurances that an administrative discharge would be approved by the officer

exercising general courts-martial (OEGCM) jurisdiction. *Id.* at 198. To the contrary, the GCMCA did not approve the discharge, but had a charge of rape preferred and sent to an Article 32, UCMJ, investigation. Investigating Officer's Report of 12 Aug 2002. Other than accepting NJP and waiving his administrative discharge board, the appellant does not assert that the Government imposed any other requirements on him. The appellant does not assert and there is no evidence that the Government intended to use at trial any evidence obtained from the NJP proceedings. In fact, the Government agreed the NJP proceeding would only be used to factor in "*Pierce* credit," if convicted. Record at 215; *see United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989).

The decision to grant immunity is a matter generally within the sole discretion of the appropriate GCMCA. R.C.M. 704(e). Under some circumstances a promise of immunity by someone other than a GCMCA may bar prosecution altogether. R.C.M. 704(c), Discussion. Our superior court has held a promise of a staff judge advocate, a special court-martial convening authority, or a representative may result in *de facto* immunity. *United States v. Kimble*, 33 M.J. 284 (C.M.A. 1991); *United States v. Churnovic*, 22 M.J. 401 (C.M.A. 1986); *Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982). "A *de facto* grant of immunity arises when there is an after-the-fact determination based on a promise by a person with apparent authority to make it that the individual will not be prosecuted. *United States v. Jones*, 52 M.J. 60, 65 (C.A.A.F. 1999).

A factor to be considered when *de facto* immunity is raised is whether there has been detrimental reliance on the part of the appellant. "Where an official who has either expressed or implied authorization of the [GCMCA] promises immunity, 'the Government must abide by an agreement on which an accused has reasonably relied to his detriment.'" *Kimble,* 33 M.J. at 292 (quoting *Churnovic*, 22 M.J. at 405). "[D]etrimental reliance may include any action taken by an accused in reliance on a pretrial agreement which makes it significantly more difficult for him to contest his guilt on a plea of not guilty." *Shepardson v. Roberts,* 14 M.J. 354, 358 (C.M.A. 1983).

De facto immunity, commonly called "equitable immunity," triggers the remedial action of the exclusionary rule and permits enforcement of the agreement. *United States v. Olivero*, 39 M.J. 246, 249 (C.M.A. 1994)(concluding the "Government may not prosecute unless it can show, by a preponderance of the evidence, that the prosecutorial decision was untainted by the immunized testimony"). Where there is *de facto* immunity, our superior court has held that any evidence derived from such *de facto* immunity will not be admissible unless there is an independent source for the evidence or charges. *Oliver*, 39 M.J. at 249.

The appellant seeks to avail himself of the shield of detrimental reliance because he received NJP, waived his

administrative board rights, and made admissions during his NJP. There is nothing to demonstrate any of these actions on the part of the appellant made it more difficult for him to contest his guilt. This is particularly true in view of, (1) his prior comprehensive admissions made the day of the offense, and (2) the Government's concession to exclude from evidence any information from the NJP.

We also look at whether the admissions of the appellant at NJP factored into the prosecutorial decision to forward the charges to a general courts-martial. Based upon the nature and extent of the inculpatory admissions made by the appellant to the OSI agent and the OSI investigation, there was ample evidence for the GCMCA to refer a charge of rape to general courts-martial. We are not persuaded that any admissions made by the appellant during NJP, even if forwarded to the GCMCA, played a part in the decision to prosecute. Appellate Exhibit XXXI.

Use of administrative alternatives, open plea bargaining, and resolution of appropriate cases at lower levels is important, and in fact, critical to ensure proper and timely disposition of infractions in the military system. The convening authority is in the best position to decide whether to enter into a pretrial agreement, whether to grant immunity in exchange for testimony, and whether there should be any limitations on the findings and the sentence in an individual's case. *Jones*, 52 M.J. at 66. As articulated by our sister service court, "[i]f immunity were to be conferred upon this appellant, almost any statement of nonprosecutorial intent by almost any person with an investigators badge could bind the government's hands and preclude a prosecution." *United States v. Zupkofska*, 34 M.J. 537, 540 (A.F.C.M.R. 1991). We conclude the appellant did not suffer detrimental reliance. Therefore, we decline to grant relief.

Unlawful Command Influence

In his third assignment of error, the appellant raises for the first time on appeal, unlawful command influence on the part of the special court-martial convening authority and his legal officer. The appellant avers that the decision to prefer charges was defective because it was based upon statements induced by the legal officer that violated Article 31, UCMJ.

At the appellate level, the appellant "must show (1) facts which, if true, constitute unlawful command influence; (2) that the proceedings were unfair; and (3) that unlawful command influence was the cause of the unfairness." *United States v. Richter,* 51 M.J. 213, 224 (C.A.A.F. 1999)(citing *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)). However, defects in preferring and forwarding charges are forfeited if not raised at trial, unless the failure to raise the issue is itself the result of unlawful command influence. *Id.* (citing *United States v. Hamilton*, 41 M.J. 32, 37 (C.M.A. 1994)). In this case, the

evidence surrounding the accusatorial stage of the trial was available at trial. The appellant does not aver that the alleged unlawful command influence prevented him from raising the issue at trial. Therefore, we hold the issue of unlawful command influence was forfeited, and decline to grant relief.

Absence of the Appellant at Trial and Failure to Authenticate

Although not raised as error, we note that the appellant was not present during the 15 November 2002 session of the trial. Record 102-07. We also note that the record for the 15 November 2002 session was not authenticated.

Sessions were held 24 September 2002, 4 November 2002, 15 November 2002, 16 November 2002, 17 December 2002, 8 January 2003, and 6 February 2003. During the 15 November session the defense brought a motion to suppress or order depositions. The judge granted the defense requested depositions.

R.C.M. 804(a) says, "[T]he accused shall be present at. . . every stage of the trial," but then sets out numerous exceptions. The right to be present is so fundamental, and the Government's interest in the attendance of the accused so substantial, that the accused should be permitted to waive the right to be present only for good cause, and only after the military judge explains to the accused the right and the consequences of foregoing it, and secures the appellant's personal consent to proceeding without the accused. R.C.M. 804, Discussion. In that regard, the following brief colloquy occurs:

> MJ: Okay. Now, for the purpose of this limited hearing, has your client waived his presence?
> CDC: He has, and we're also waiving Captain Weisman's presence, and Lieutenant Wallace's presence.

Record at 102. During the numerous sessions, both prior to and after the 15 November session, there is neither objection nor affirmation on the part of the appellant regarding his absence from this session.

R.C.M. 1104 implemented Article 54, UCMJ. *United States v. Ayers,* 54 M.J. 85, 92 (C.A.A.F. 2000). R.C.M. 1104(a)(2)(A) requires that a record of trial be authenticated by the military judge who presided over that portion of the trial. The purpose of authentication is to ensure the verity of the record. *Ayers*, 54 M.J. at 92 (citing *United States v. Galloway*, 9 C.M.R. 63, 65 (C.M.A. 1953) and *United States v. Myers*, 2 M.J. 979, 980 (A.C.M.R. 1976)).

We conclude, under the circumstances of this case, to include, (1) the very limited duration of the session, (2) the absence of objection by the appellant at subsequent sessions, (3)

the ruling favorable to the appellant during the session, and (4) the lack of any post trial objection that the appellant suffered no prejudice from the military judge's failure to authenticate pages or from the appellant's absence at trial. Therefore, we decline to grant relief. Notwithstanding our conclusion in this case, greater attention to the authentication process and MCM guidance concerning procedures to be used in the absence of the appellant's presence at trial, should be rendered by those responsible for the fairness and the accuracy of the proceedings.

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority. We further order that Appellate Exhibits XXXVII through XL and L be sealed.

Senior Judge PRICE and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court