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.

John L. PIAZZA
Private (E-1), U.S. Marine Corps

NMCCA 200301263 Decided 22 November 2005

Sentence adjudged 9 November 2001. Military Judge: M. H. Sitler. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d FSSG, Camp Lejeune, NC.

LT ANTHONY S. YIM, JAGC, USNR, Appellate Defense Counsel
Maj KEVIN C. HARRIS, USMC, Appellate Government Counsel

DORMAN, Chief Judge:

Contrary to his pleas, the appellant was convicted by a general court-martial of two specifications of attempted kidnapping, one specification of attempted robbery, one specification of conspiracy to commit robbery, kidnapping, and murder, and one specification of conspiracy to commit robbery, kidnapping, and aggravated assault in violation of Articles 80 and 81, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 811. A panel of officer members sentenced the appellant to confinement for six years, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority approved the sentence.

The appellant has raised four assignments of error. He asserts that the military judge erred in failing to suppress the appellant’s statement made to military investigators because they did not properly advise him of all the offenses they suspected him of committing. The appellant also alleges that the military judge erred when he denied the appellant's challenge for cause against one member and when he failed to provide proper instructions regarding lesser included offenses. Finally, the

appellant asserts that a sentence that includes a dishonorable discharge is inappropriately severe.

We have carefully considered the record of trial, the assignments of error, the Government's Answer, and the appellant's Reply. Based on that review, we conclude that the findings and sentence are correct in law and fact and that no errors were committed that materially prejudiced the appellant's substantial rights. Arts. 59(a) and 66(c), UCMJ.

Suppression of the Appellant's Confession

In the appellant's first assignment of error, he asserts that the military judge erred when he denied the appellant's motion to suppress his confession. The appellant argues that since the military investigators did not advise him that he was suspected of attempted murder, his confession should have been suppressed. Appellant's Brief of 30 Nov 2004. He alleges a violation of his rights under Article 31, UCMJ. The appellant is factually correct in his argument that he was not advised that he was suspected of the crime of attempted murder. In fact, at the time he was questioned, the appellant was informed that he was "suspected of attempted robbery, assault, conspiracy [and] attempted kidnapping." Prosecution Exhibit 2. The appellant argues that he only agreed to be questioned about those specific crimes. When he completed his statement to the investigator, however, he was asked questions about the plan to possibly kill the intended robbery and kidnap victim. The substantive portion of Prosecution Exhibit 3 was written by the appellant and it addresses the plan to kill the victim. The preliminary portion of Prosecution Exhibit 3, however, put the appellant on notice that his statement was given concerning his "knowledge of attempted robbery, assaulting, conspiring, and attempted kidnapping and the killing of Eric Lewis Madden."

In reviewing a military judge's denial of a suppression motion, appellate courts apply "an abuse of discretion standard." *United States v. Simpson*, 54 M.J. 281, 283 (C.A.A.F. 2000)(citing *United States v. Young*, 49 M.J. 265, 266-67 (C.A.A.F. 1998)). In fact, all challenged evidentiary rulings are reviewed under that standard. In conducting that review:

> The military judge's "findings of fact will not be overturned unless they are clearly erroneous or unsupported by the record." We review conclusions of law *de novo*. *United States v. Reister*, 44 M.J. 409, 413 ([C.A.A.F.] 1996). As [our superior court] said in *United States v. Sullivan*, 42 M.J. 360, 363 ([C.A.A.F] 1995), "We will reverse for an abuse of discretion if the military judge's findings of fact are clearly erroneous or if his decision is influenced by an erroneous view of the law."

United States v. Owens, 51 M.J. 204, 209 (C.A.A.F. 1999). This is a strict standard requiring more than a mere difference of opinion. *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000). In short, a military judge's admission of evidence will be reversed only when his actions are "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous." *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)(quoting *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)). Additionally, in conducting our review, we are required to consider the evidence "in the light most favorable" to the "prevailing party." *Reister*, 44 M.J.at 413. The issue in this case, however, is a mixed question of law and fact. "[A] military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995).

A suspect has the right to know the general nature of the crime that he is accused of before an investigator can request the suspect to make a self-incriminating statement. *United States v. Pipkin*, 58 M.J. 358, 360 (C.A.A.F. 2003)(quoting *United States v. Simpson*, 54 M.J. 281, 284 (C.A.A.F. 2000)). Our superior court has refined the meaning of Article 31, UCMJ, noting that the details of the appellant's involvement with a crime need not be "spelled out with technical nicety." *Id*. at 360 (citing *United States v. Rice*, 29 C.M.R. 340, 342 (C.M.A. 1960)). In general, the nature of the accusation must be communicated to the accused before any incriminating statement made by an accused can be used in court. Our superior court has identified the following factors to consider in determining whether the nature of the accusation requirement was satisfied.

> They include[]: Whether the conduct is part of a continuous sequence of events; whether the conduct was within the frame of reference supplied by the warnings; or whether the interrogator had previous knowledge of the unwarned offenses. [*United States v. Simpson*, 54 M.J. 281, 284 (C.A.A.F. 2000)]. The factors cited are not exhaustive, but are "among the possible factors" to be considered. "Necessarily, in questions of this type, each case must turn on its own facts." *United States v. Nitschke*, 12 C.M.A. 489, 492, 31 C.M.R. 75, 78 (1961). Other factors might also bear on the application of Article 31(b), including, . . . the complexity of the offense at issue.

United States v. Pipkin, 58 M.J. at 360-61. While acknowledging that the military judge followed *Simpson*, the appellant argues that the military judge erred as a matter of law when he did not consider *United States v. Reynolds*, 37 C.M.R. 23 (C.M.A. 1966). We disagree.

In *Reynolds*, the accused, Airman Reynolds, was found guilty of absence without leave and wrongful appropriation. Airman

Reynolds appealed his conviction for wrongful appropriation, asserting that before giving his self-incriminating statement to authorities he was not properly advised by investigators that he was suspected of wrongful appropriation. The *Reynolds'* court agreed, noting that the two crimes were separate and distinct crimes. Airman Reynolds was only aware of the general nature of the absence without leave charge, not the wrongful appropriation charge. That advice was "insufficient to inform the accused 'of the nature of the accusation' against him and thereby deprive[d] him of any meaningful choice concerning whether to speak or remain silent. . . ." *Id*. at 25. The case before us is factually distinguishable.

The appellant was convicted of an ongoing scheme to kidnap, rob, and eventually cause the death of Hospitalman (HN) Madden. These crimes were not separate and distinct. Instead, the crimes all stemmed from one fact pattern; this gave the appellant notice of the general nature of the crimes for which he was being questioned. The investigator owed no duty to inform the appellant with "particularity" what the charges against him were. The investigator only had to inform the appellant of the general nature of the charges against him. In this case he did so by advising the appellant that he was suspected of "attempted robbery, assault, conspiracy, [and] attempted kidnapping." Prosecution Exhibit 2.

Based upon our review of the record, we conclude that the essential findings of fact made by the military judge are not clearly erroneous and are supported by the record. Appellate Exhibit XVIII. Accordingly, we adopt them as our own. Applying a *de novo* standard of review to the military judge's conclusions of law, we find no error. Thus we conclude that the military judge did not err in denying the appellant's motion to suppress his confession.

Challenge for Cause

In the appellant's second assignment of error, he asserts that the military judge erred when he denied the appellant's causal challenge against Colonel (Col) Carothers. When the challenge was denied, the appellant exercised a peremptory challenge in a manner that preserved the issue for appellate review. *See United States v. Jobson*, 31 M.J. 117, 120 (C.M.A. 1990); RULE FOR COURTS-MARTIAL 912(f)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). The appellant alleges that, because the convening authority was Col Carothers' reporting senior, the military judge erred when he did not excuse Col Carothers on the basis of implied bias. Appellant's Brief of 30 Nov 2004 at 8-10. We find no merit in this argument.

For purposes of clarity, we include the relevant portions of the record of trial:

> DC: Yes, sir. The defense challenges Col Carothers for cause, sir.
>
> MJ: And what's the reason for challenging him?
>
> DC: Sir Colonel Carothers indicated that the actual Convening Authority in this case is his reporting senior. He is in a command directly subordinate to the actual convening authority.
>
> The defense feels that this represents a perceived bias and challenges for cause on that basis. Obviously, he is a well-established, experienced colonel in the Marine Corps; but the perceived bias and the position he holds warrants a challenge for cause, sir.

Record at 211-12. The Government opposed the challenge, commenting on Col Carothers' demeanor as well as the answers he provided during voir dire. In ruling on the challenge, the military judge stated:

> MJ: And I believe the implied-bias challenge is embodied in R.C.M. 912(f)(1)(N), and the question that I need to answer is: Would a reasonable member of the public have substantial doubt as to the legality, fairness, and impartiality of the proceeding? And in making my decision on this issue, I'm going to consider Colonel Carothers's demeanor in responding to the question of whether or not this relationship he has with the Convening Authority . . . would affect his decision making in this court-martial; and without hesitation and quite emphatically he said, "No."
>
> He also indicated that his relationship with. . . the Convening Authority is professional; that Col Carothers has not known the Convening Authority for very long; and I believe a member of the public who was sitting in the court-martial and who witnessed the demeanor of Colonel Carothers when responding to the questions would not have a substantial doubt as to the fairness and impartiality of the proceedings, or for that fact, Colonel Carothers. So I'm going to deny your challenge for cause of Colonel Carothers on that basis.

Id. at 212-13.

Our superior court has outlined the law applicable to R.C.M. 912(f)(1)(N) as follows:

> R.C.M. 912(f)(1)(N) encompasses "both actual bias and implied bias." R.C.M. 912(f)(3) provides: "The burden of establishing that grounds for a challenge exist is upon the party making the challenge." Military judges should be "liberal in granting challenges for cause."
>
> "The test for actual bias [in each case] is whether any bias 'is such that it will not yield to the evidence presented and the judge's instructions.'" "Actual bias is reviewed" subjectively, "through the eyes of the military judge or the court members."
>
> Actual bias is a question of fact. Accordingly, the military judge is given great deference on issues of actual bias, recognizing that he or she "has observed the demeanor of the" challenged party. "We will not overturn the military judge's" denial of a challenge unless there is "a clear abuse of discretion in applying the liberal-grant mandate."
>
> On the other hand, implied bias is "viewed through the eyes of the public." "The focus 'is on the perception or appearance of fairness of the military justice system.'" There is implied bias "when 'most people in the same position would be prejudiced.'" We give the military judge less deference on questions of implied bias. On the other hand, we recognize that, when there is no actual bias, "implied bias should be invoked rarely."

United States v. Warden, 51 M.J. 78, 81-82 (C.A.A.F. 1999)(citations omitted)(alteration in original); *see also United States v. Wiesen*, 56 M.J. 172 (C.A.A.F. 2001).

We turn then to whether the military judge correctly denied the appellant's challenge for cause against Col Carothers. Clearly, in this case the only possible basis for causal challenge is R.C.M. 912(f)(1)(N), which provides that "[a] member shall be excused for cause whenever it appears that the member . . . [s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." Given the responses of Col Carothers during voir dire, we see no issue of actual bias in this case. Since this is a case of implied bias, we apply the same standard of review as was clearly applied by the military judge. Implied bias is viewed objectively, through the eyes of the public. *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997). The focus is on the appearance of fairness. *Id*.

In applying the more demanding objective standard concerning implied bias, which affords the military judge less deference than in a case of actual bias (*United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996)), we have reviewed the findings of the military judge and adopt them as our own. We conclude that the military judge did not err in denying the appellant's causal challenge against Col Carothers. We reach this conclusion based upon our own review of the voir dire of this member, and arrive at the same findings as the trial judge. Accordingly, we reject the appellant's second assignment of error.

Instructions on Findings

Under Specification 1 of Charge II, the appellant was convicted of entering into a conspiracy to kidnap, rob, and murder HN Madden. The principal evidence against the appellant was his confession. In that confession, he admitted that he and his co-conspirator had "discussed every aspect of our idea. We decided that in order for us to pull off this job we would have to be forceful to the point of killing the person." Prosecution Exhibit 3 at 1. He further stated, "We also were to take him to the woods and leave him there, if he died we wouldn't know and if he got away and survived we were hoping to beat him to the point of a vegatible [sic]. We had no intentions of using the pistol, it was just for the fear factor, but we would beat him to death if needs [sic] be." *Id*. The appellant also admitted to numerous actions he took in furtherance of the conspiracy. Other witnesses corroborated the appellant's confession.

In the appellant's third assignment of error, he argues that, based upon the content of his confession, the military judge was obligated to *sua sponte* instruct the members on the lesser included offenses of voluntary and involuntary manslaughter. Appellant's Brief at 10. The appellant cites no case law in support of his argument. We find no merit in this assignment of error.

We review the question of whether the military judge properly instructed the court-martial as a question of law. Thus, we apply a *de novo* standard of review. *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002). "Even if not requested by the defense, a military judge has a sua sponte duty to give certain instructions when reasonably raised by the evidence. . . ." *United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003). If there is "some evidence which reasonably places [a] lesser included offense in issue," the military judge has a sua sponte duty to instruct on that issue. *United States v. Wells*, 52 M.J. 126, 129 (C.A.A.F. 1999)(quoting *United States v. Staten*, 6 M.J. 275, 277 (C.M.A. 1979)).

Upon our review of the record, we conclude that it does not contain "some evidence which reasonably places [a] lesser included offense in issue." *Id*. We reach that conclusion by examining the evidence in light of MANUAL FOR COURTS-MARTIAL, UNITED

STATES (2000 ed.), Part IV, ¶ 44 and the text of Article 119, UCMJ. Specifically, voluntary manslaughter is an unlawful killing committed with an intent to kill, but done in the heat of sudden passion. *Id*, at ¶¶ 44a(a) and 44c(1)(a). Involuntary manslaughter is only applicable when there was no "intent to kill or inflict great bodily harm." *Id*. at ¶ 44a(b). The record before us does not contain any evidence of heat of sudden passion, nor does it contain evidence that the appellant did not intend to either kill HN Madden or inflict great bodily harm upon him. Accordingly, we conclude that the military judge was not required to instruct the members as to the possibility of the lesser included offenses of voluntary or involuntary manslaughter with regard to Specification 1 of Charge II.

Sentence Appropriateness

In his final assignment of error, the appellant argues that under the facts of this case that portion of his sentence as extends to a dishonorable discharge is inappropriately severe. Appellant's Brief at 11. We do not agree.

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

The appellant stands convicted of several offenses, including the attempted kidnapping, robbery, and murder of a Sailor, who was serving with the Marines. After reviewing the entire record, we find that the adjudged sentence is appropriate for this offender and his offenses. *Healy*, 26 M.J. at 395-96; *Snelling*, 14 M.J. at 268. Thus, we decline to grant relief.

Conclusion

The findings and the sentence are affirmed, as approved by the convening authority.

Senior Judge PRICE and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court