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

BEFORE

Charles Wm. DORMAN **D.A. WAGNER** **J.F. FELTHAM**

UNITED STATES

v.

Harvey M. JOHNSTON, Jr.
Fireman Apprentice (E-2), U.S. Navy

NMCCA 200301582 Decided 15 December 2005

Sentence adjudged 15 January 2003. Military Judge: R.N. Johnson. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Southwest, San Diego, CA.

Capt ROLANDO SANCHEZ, USMC, Appellate Defense Counsel
Maj WILBUR LEE, USMC, Appellate Government Counsel

WAGNER, Senior Judge

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of five specifications of unauthorized absence and two specifications of false official statement, in violation of Articles 86 and 107, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 907. The military judge also convicted the appellant, contrary to his pleas, of wrongful possession of marijuana with the intent to distribute and wrongful importation of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged and approved sentence consisted of a dishonorable discharge, forfeiture of all pay and allowances, reduction to pay grade E-1, and confinement for four years.

We have examined the record of trial, the appellant's three assignments of error asserting that the military judge erred in denying the request for defense expert assistance at trial, that the evidence adduced at trial was legally and factually insufficient to support the findings on the contested offenses, and that the military judge erred in allowing the trial counsel a 15-minute recess prior to conducting cross-examination of the

appellant, who testified at trial. We have also considered the Government's answer and the appellant's reply. 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.

Facts

On 27 June 2002, the appellant drove a van from Tijuana, Mexico, across the border into the United States. Upon crossing the border, and while still within the customs inspection area, the vehicle gained the attention of a customs inspector, who asked the appellant who the van belonged to and where it was heading. The appellant responded that the van belonged to his uncle "Mike" and that it was destined for Riverside, California. Both of the appellant's statements to the customs inspector were false and intended to mislead him, giving rise to the false official statement offenses to which the appellant pleaded guilty at trial. The appellant was in an unauthorized absence status at the time. The van was subsequently searched after the customs inspector observed vacuum sealed packages inside the door panels. The search disclosed 200 pounds of marijuana concealed in the door panels and seats of the vehicle.

DA, a friend of the appellant's, was a passenger in the vehicle. Both were detained and subsequently interviewed by a special agent of the Naval Criminal Investigative Service (NCIS). In a sworn statement, the appellant stated that he had a chance meeting with DA in a nightclub in Tijuana and DA had asked him to drive the van across the border. The appellant stated that DA told him that the owner of the van was a friend of DA's who could not drive the van himself due to his immigration status. DA also allegedly told the appellant that, because he looked like a gang member, DA would get "hassled" if he drove the van for his friend. After looking inside the vehicle to make sure there was nothing amiss, the appellant stated that he would drive the vehicle. During the interview, the appellant repeated a set of directions to the NCIS special agent that appeared to be memorized and that the agent recognized as a route common to drug smuggling in the area, ending in a parking lot near the pedestrian bridge across the border.

The parties stipulated at trial that the appellant was driving the van when it was stopped crossing the border and that the van concealed 200 pounds of marijuana. The only contested issue as to the possession and importation offenses was whether the appellant knew that the marijuana was concealed in the

vehicle. Customs agents testified at trial that the driver's seat felt hard and too high because of the marijuana concealed therein. They also testified that the interior was obviously altered based on the use throughout of shiny, new, and non-standard screws to reattach the interior components. The customs agent who drove the van to the search area testified that the smell of marijuana in the van was distinct and obvious.

The NCIS special agent testified that he discovered three slips of paper in DA's wallet with the appellant's first name and Mexican telephone numbers on them. The van was registered to a resident of California, who stated that he had sold the van sometime before the incident. A background check of the owner revealed that he had several vehicles that he owned seized in the past for carrying similar amounts of marijuana across the border.

Expert Assistance

The defense requested funding from the convening authority to employ a civilian expert investigator familiar with drug activity in Mexico in an effort to locate DA and to investigate his background to establish that he was involved in drug trafficking and had lured the appellant into driving the van as an unknowing "mule" for his nefarious purposes. DA was subsequently located, served with a subpoena, and made available for the defense at trial. The NCIS special agent conducted a background check on DA and provided it to the defense.

A chief legalman (LNC) assigned to the Naval Legal Service Office, Southwest, as a defense investigator, testified that DA's previous residence was in a dangerous section of Riverside and looked as if it had been used for criminal purposes. The LNC did not feel safe in returning to the area for further investigation. During the course of the motion to compel the Government to provide the funding for the civilian investigator, the NCIS special agent indicated his willingness to continue to explore any further areas of interest requested by the defense. The military judge denied the motion, concluding that the defense made an inadequate showing of the necessity for the investigator.

"An accused is entitled to an expert's assistance before trial to aid in the preparation of his defense upon a demonstration of necessity." *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005)(citing *United States v. Gunkle,* 55 M.J. 26, 31 (C.A.A.F. 2001)). To show necessity, the accused must

demonstrate more than the "'mere possibility of assistance from a requested expert'...." *Id*. (quoting *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994)). In order to prevail, the accused must demonstrate as a reasonable probability "'both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.'" *Id*. (quoting *Robinson*, 39 M.J. at 89)).

Our superior court has established a three-part test to determine whether expert assistance is necessary. *Bresnahan*, 62 M.J. at 143 (citing *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994); *United States v. Ndanyi*, 45 M.J. 315, 319 (C.A.A.F. 1996). The accused must demonstrate (1) why the expert assistance is needed; (2) what the expert assistance would accomplish; and (3) why the defense counsel would otherwise be unable to gather and present the evidence developed through the use of expert assistance. *Id.* The military judge's ruling on a motion to compel expert assistance will not be overturned absent an abuse of discretion. *Gunkle*, 55 M.J. at 32. In order to find an abuse of discretion, we must determine that the military judge's findings of fact are clearly erroneous or that his conclusions of law are erroneous. *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004).

In the present case, the military judge found that the defense team had not provided any showing of what evidence could have been obtained by an independent defense investigator that was not otherwise available to them utilizing the resources at hand. We agree. The defense team had access to the LNC, a designated defense investigator fluent in Spanish. The NCIS special agent had conducted a background check of DA and provided it to the defense. The special agent expressed a willingness to continue exploring investigative leads, and could have provided security for the LNC in conducting any on-site investigation. There was no showing that the assistance needed to be provided by an investigator falling within the attorney-client privilege. The appellant failed to demonstrate the necessity for the expert assistance and the military judge was well within his discretion in denying the defense motion. Consideration of the matters attached to the record by the appellate defense counsel does not change the conclusion of this court.

Legal and Factual Sufficiency

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ.

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ.

In considering the evidence, the fact-finder is free to determine what testimony is believable and what is not. *United States v. Harris,* 8 M.J. 52, 29 (C.M.A. 1979). In addition, circumstantial evidence can be sufficient to support a finding of guilty. *United States v. Roberts,* 59 M.J. 323, 327 (C.A.A.F. 2004).

The circumstantial evidence that the appellant knew that the marijuana was concealed in the van is overwhelming. The appellant testified that he agreed to drive the vehicle because he knew and trusted DA. The appellant also testified, however, that he had inspected the interior of the vehicle before agreeing to drive it across the border. The appellant could not provide a believable explanation for why he would have needed to memorize directions if his friend, DA, who allegedly arranged the trip, was riding in the van with him. The interior of the van was visibly altered, the driver's seat was hard and lifted the driver unusually high because of the marijuana concealed within, and the interior of the van smelled distinctly of marijuana. DA had in his wallet, three slips of paper with the appellant's first name and Mexican telephone numbers on them. Finally, when questioned by the NCIS special agent, the appellant asked the agent what sentence he could expect to get for the offenses.

We conclude that the evidence presented at trial was legally sufficient to support the offenses. In addition, we are convinced of the appellant's guilt beyond a reasonable doubt.

Conclusion

The remaining assignment of error is without merit and need not be addressed. Accordingly, the findings of guilty and the sentence, as approved by the convening authority, are affirmed.

The supplemental court-martial order will reflect that the appellant pled and was found guilty of each of the specifications under the Additional Charge.

Chief Judge DORMAN and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court