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

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **P.G. STRASSER**

UNITED STATES

v.

Latisha R. SMITH-MITCHELL
Airman (E-3), U.S. Navy

NMCCA 200400304 Decided 22 November 2005

Sentence adjudged 23 September 2003. Military Judge: D.P. Fry. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS DWIGHT D. EISENHOWER (CVN 69).

LT STEPHEN C. REYES, JAGC, USNR, Appellate Defense Counsel
Maj RAYMOND BEAL II, USMC, Appellate Government Counsel
LT IAN K. THORNHILL, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

STRASSER, Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to her pleas, of false official statement (two specifications), larceny (five specifications), and obtaining services through false pretenses, in violation of Articles 107, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 921, and 934. The adjudged and approved sentence consists of confinement for six months, reduction to pay grade E-1, and a bad-conduct discharge. The pretrial agreement had no impact on the sentence.

Before entry of pleas, the appellant moved to suppress statements she made to command investigators. After the military judge denied the motions, the appellant entered conditional guilty pleas to the additional charges and specifications (one specification of false official statement and four specifications of larceny). Under RULE FOR COURTS-MARTIAL 910(a)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), these conditional pleas preserved the issues inherent in the motions to suppress. The remainder of the appellant's guilty pleas were unconditional.

The appellant contends that two statements she gave to investigators violated her Fifth and Sixth Amendment rights to counsel. We disagree. Having carefully considered the record of trial, the two assignments of error, and the Government's response, 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.

Background

The appellant was under investigation for stealing and using the personal ATM, credit, and phone cards of four service members attached to the USS EISENHOWER (victims A, B, C, and D) between October 2002 and June 2003. Investigators questioned her on three occasions: 18 November 2002, 28 April 2003, and 28 July 2003. She was later charged with making false statements in the November 2002 and April 2003 interviews. Her conditional pleas of guilty to Additional Charge I and supporting specification, Additional Charge II and two supporting specifications and "Additional Additional" Charge II[1] and two supporting specifications addressed the last three thefts (victims B, C, and D) and the April 2003 false statement.

On 13 March 2003, the appellant was charged with the theft of currency and obtaining telephone services through false pretenses, committed through the wrongful taking of victim A's ATM and phone cards. She was also charged with making a false statement to investigators about that misconduct. Counsel was then detailed to represent her on those specific charges (Charges I, II, and III).

In April 2003, a similar theft occurred against Victim B. Thereafter, victim B discovered evidence in the appellant's room indicating that she was the perpetrator. Victim B reported her suspicions to the USS EISENHOWER's Security Department. On 28 April 2003, the appellant was ordered to report to the Security Department. There, she was advised of her Article 31(b), UCMJ rights, which she waived in writing. The appellant admitted to the investigator to using victim B's credit card, but stated she thought it was her own card. A second investigator then told the appellant she was lying, resulting in her confession to the theft. During a consent search of her barracks room, investigators found the ATM and credit cards of victim C. Subsequently, on 13 June 2003, Additional Charges I and II were

[1] This awkward designation of additional charges does not conform to established practice in the naval service and fails to comply with the sound guidance in the Discussion for RULE FOR COURTS-MARTIAL 307(c)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). Under that practice and guidance, any additional charge is numbered with Roman numerals; the word "additional" is used only once in labeling additional charges. In this instance, the correct designation would have been "Additional Charge III." We strongly recommend that staff judge advocates and trial counsel follow this guidance.

preferred, with the instruction that they be tried in conjunction with the charges preferred on 13 March 2003. These additional charges alleged larceny against victims B and C and the 28 April 2003 false statement to the first investigator.

In June 2003, $400 was electronically taken without authority from victim D's bank account. He suspected the appellant and reported his suspicions to Security. Again, in a replay of the April scenario, the appellant was ordered to report to the Security Office. On 28 July 2003, she signed the waiver of rights form, but said: "I don't know if I should say anything because I have a lawyer and I don't know if I should write a statement or not. I don't know what to do." Record at 35-36, 102.

The three investigators present for this interrogation testified that they handled the situation as follows:

- "We talked to her" (Record at 96);
- "I wasn't going to push her to make a statement, but at the same time, I thought he (the other investigator) could speed it up" (Record at 97);
- "I advised her it would be in her best interest . . . to tell your side of the story" (Record at 119); and
- "We debated whether or not she wanted to, but no one told her she had to. I had that very distinct feeling [that she did not want to make a statement.]" (Record at 127).

The appellant then wrote out a statement in which she admitted to using victim D's ATM card, but claimed it was with his permission.[2] On 20 August 2003, two specifications of larceny were preferred against the appellant, which were then joined to the pending court martial as Additional Additional Charge II.

Sixth Amendment Issue

The appellant argues that once an attorney was detailed to represent her on or about 13 March 2003, a bright and hard line should have been drawn under the Sixth Amendment disallowing any future interrogation by the USS EISENHOWER investigators without the presence of her detailed counsel. We disagree.

In *McNeil v. Wisconsin*, 501 U.S. 171, (1991), the U.S. Supreme Court held that invoking a Sixth Amendment right to counsel is "offense-specific," and police can initiate questioning on crimes other than the one charged without

[2] The record is unclear as to how the appellant gained the PIN number to victim D's ATM card.

notifying counsel. Thus, notice to counsel need be given *only* when the interrogation concerns an offense for which counsel has been retained or appointed. Under settled precedents, this rule applies even though the interrogator knows the accused is represented by counsel with respect to the other offense. *United States v. Kendig*, 36 M.J. 291, 296 (C.M.A. 1993); *United States v. Sager*, 36 M.J. 137, 146 (C.M.A. 1992); *United States v. Spencer,* 19 M.J. 184 (C.M.A. 1985).

At trial, the appellant argued that the rule's reference to "that offense" includes related offenses. She claimed her subsequent larcenies were a pattern of conduct, all occurring in the same general place within a distinctive time period, and all charged at the same court martial. According to that argument, they are related offenses and so her interrogation by the security officers on both 28 April and 28 July should have been preceded by notice to her counsel.

We disagree and conclude that the military judge did not abuse his discretion in denying the motions to suppress based on asserted violations of the Sixth Amendment. The offenses here are factually unconnected and unrelated in time, covering four different victims over the space of seven months. The only link between these offenses is that they are punishable under the same article of the UCMJ. That, however, is not a sufficient nexus. The fact that the charges ended up at the same court-martial with the same defense counsel does not make the offenses related. *United States v. Warren*, 24 M.J. 656, 657 (A.F.C.M.R. 1987).

Fifth Amendment Issue

Interrogation of a suspect in custody must cease if the suspect requests counsel. MIL. R. EVID. 305(f)(2). An ambiguous comment or request, however, does not require that interrogation cease. A request for counsel must be articulated "sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis v. United States,* 512 U.S. 452, 459 (1994). If the mention of an attorney "fails to meet the requisite level of clarity," questioning may continue. *Id.* "If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." *Id.* at 461-62. The Supreme Court noted, however, that "it will often be good police practice for the interviewing officers to clarify whether or not [a suspect] actually wants an attorney." *Id. at 461.*

The statement given on April 28th gives us no pause. The appellant clearly waived her rights and never indicated any desire for counsel. The statement given on July 28th, however, is more troublesome. The appellant testified that she told the investigator, "I don't know if I should say anything because I have a lawyer and I don't know if I should write a statement or not. I don't know what to do." Record at 35-36. When the trial

defense counsel then asked the appellant, “Did you tell her you wanted to speak to me,” the appellant responded, “Yes, I did.” Record at 36. According to the appellant, the investigator replied that the matter under investigation “had nothing to do with your court-martial. This is going up to the [Commanding Officer], and whatever he wants done with it, that’s what’s going to be done.” *Id.*

However, the investigator and two co-workers who were present each testified that the appellant never requested to talk to a lawyer. The investigator did admit that the appellant indicated she was unsure if she should give a statement without her lawyer. One of the co-workers testified that he had the impression that the appellant did not want to give a statement.

The military judge made the following finding of fact on this issue: “The court further finds at no time during the taking of any of the statements at issue before the court did the accused properly invoke her right to counsel.” Record at 169. Findings of fact should not be disturbed unless unsupported by the record or clearly erroneous. *United States v. Simpson,* 54 M.J. 281, 283, (C.A.A.F. 2000). Whether the appellant's statement was a request for a lawyer is a question of fact. *U.S. v. Ford,* 51 M.J. 445, 451 (C.A.A.F. 1999). Based on our review of the record, we conclude that this crucial finding is not clearly erroneous and is supported by the record. We also conclude that the military judge correctly applied the law in denying the motions to suppress the appellant’s statements.

Conclusion

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

Chief Judge DORMAN and Senior Judge PRICE concur

For the Court

R.H. TROIDL
Clerk of Court