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

BEFORE

Charles Wm. DORMAN **C.J. VILLEMEZ** **R.C. HARRIS**

UNITED STATES

v.

Christopher E. NELSON
Aviation Structural Mechanic Airman Apprentice (E-2), U.S. Navy

NMCCA 200001049 Decided 30 June 2004

Sentence adjudged 8 September 1999. Military Judge: J.V. Garaffa. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Naval Air Station, Jacksonville, FL.

E.J. McCORMICK III, Civilian Defense Counsel
Maj PHILLIP SANCHEZ, USMC, Appellate Defense Counsel
Maj PATRICIO TAFOYA, USMC, Appellate Government Counsel

VILLEMEZ, Judge:

The appellant was tried before a special court-martial composed of officer members. Contrary to his pleas, he was convicted of attempted possession of methylenedioxymeth-amphetamine (ecstasy), attempted possession with intent to distribute ecstasy, and attempted use of ecstasy, in violation of Article 80, Uniform Code of Military Justice, 10 U.S.C. § 880. The adjudged sentence includes a bad-conduct discharge and reduction to pay grade E-1. The convening authority approved the sentence as adjudged. There was no pretrial agreement in the case.

After reviewing the record of trial, the appellant's seven 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.

Summary of Relevant Facts

The record of trial establishes that on 21 April 1999, while the appellant's squadron was deployed to Puerto Rico, Petty Officer (PO) Podwal asked the appellant if he would like to attend a party a couple of days hence, where there would be available both "Puerto Rican women" and "drugs," specifically LSD and ecstasy. The appellant *immediately* and *eagerly* accepted the invitation. At the time, PO Podwal was working as a "controlled witness" (CW) for the Naval Criminal Investigative Service (NCIS), and the "party" to which PO Podwal invited the appellant was part of an NCIS "sting" operation. Shortly before extending this invitation to the appellant, PO Podwal had begun working with NCIS, after being confronted by NCIS special agents for his own possible involvement with illegal drugs. While never actually told that he would be officially charged with any drug-related offenses, PO Podwal decided to cooperate with NCIS and agents from several other anti-drug agencies. He approached the appellant about attending the "sting" party, because previously "on numerous other occasions" he and the appellant had engaged in conversations "about the use of drugs . . . ." Record at 318.

The day after being invited to the party, the appellant saw PO Podwal and asked him if the party was still on for the next evening. The following evening, the appellant and several others used the squadron's duty van to follow PO Podwal, who was in a separate vehicle, to the party's location at a private, off-base, civilian residence belonging to another CW. Unknown to the appellant and his non-CW companions, a surveillance camera had been set up to record the activities in the house. PO Podwal put what appeared to be LSD and ecstasy on the kitchen table. After the appellant asked for cocaine, but was told there was no cocaine available, he agreed to purchase six “ecstasy” pills for $60.00. After PO Podwal gave the appellant six sham ecstasy pills, the appellant ingested two of the pills and handed one to each of his two non-CW companions, putting the remaining two apparent-ecstasy pills in his pocket. Shortly thereafter, the party abruptly ended when NCIS special agents entered the room and began to "take names." It is noted that while the appellant originally placed $60.00 on the table to pay for the purchase of the six pills, as testified to by an NCIS Special Agent at trial, "as the transaction's coming to a conclusion, he repockets the money . . . he doesn't pay for the drugs." Record at 359.

Entrapment

The appellant does not actually dispute the fact that the events happened as described. However, he raises the defense of entrapment as the basis for five of his assignments of error, in which he contends it was error for the military judge:

(1) to deny his motion for a finding of not guilty, due to the overwhelming evidence of entrapment;

(2) to deny his motion for a finding of not guilty regarding the alleged attempt by the appellant to distribute ecstasy, as there was no evidence that he possessed any predisposition to distribute narcotics;

(3) to instruct the members as to the attempt to distribute ecstasy and to the defense of entrapment, without any reference to the need to find a predisposition to distribute drugs, as there was no evidence that he possessed any predisposition to distribute narcotics;

(4) to deny his motion for a finding of not guilty on all counts, as the evidence clearly indicated that the Government's conduct constituted improper inducement of a servicemember; and

(5) to deny his motion for a finding of not guilty on all counts, as the evidence clearly indicated that the Government's conduct as a violation of his rights to due process of law.

We disagree with these assertions by the appellant. The defense of entrapment exists if "the criminal design or suggestion to commit the offense originated in the Government and the accused had no predisposition to commit the offense." RULE FOR COURTS-MARTIAL 916(g), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). Once the defense of entrapment is raised, the Government "must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents." *Jacobson v. United States*, 503 U.S. 540, 549 (1992); *see also United States v. Bell*, 38 M.J. 358, 360 (C.M.A. 1993).

It is not "entrapment," however, for Government agents simply to offer an accused the mere opportunity or facility to commit an offense to which he or she is already predisposed. In proving that the accused was so predisposed, the Government may offer evidence of uncharged misconduct by the accused of a nature similar to that charged in the case herein. *See* R.C.M. 916(g), Discussion; MIL. R. EVID. 404(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). Additionally, case law also establishes that "[the] entrapment doctrine does not require law enforcement agents to have evidence of a defendant's criminal activity before approaching the defendant." *Bell*, 38 M.J. at 360. Our senior court goes on in *Bell* to conclude that "[e]vidence that 'a person accepts a criminal offer without being offered extraordinary inducements . . . demonstrates his predisposition to commit the type of crime involved.'" *Bell*, 38 M.J. at 360 (quoting *United States v. Evans*, 924 F.2d 714, 718 (7th Cir. 1991)). *See also United States v. Kemp*, 42 M.J. 839, 846 (N.M.Ct.Crim.App. 1995).

As established by the facts of this case, as related above, one of the reasons PO Podwal selected the appellant as a potential target for the NCIS sting operation is because previously "on numerous other occasions" he and the appellant had engaged in conversations "about the use of drugs . . . ." Record

at 318. And when asked by PO Podwal if he wanted to attend a party where Puerto Rican women and illicit drugs would be available, the appellant quickly and eagerly accepted the invitation. *Id*. at 225. It is irrelevant to our consideration whether the *stronger* attraction to the appellant was the prospect of the presence of women or the availability of drugs.

Additionally, another Government witness, Airman Recruit (AR) Flaherty, testifying with a grant of immunity, stated that while he did not actually see the appellant use marijuana on a previous occasion, the circumstances were such that it is probable that the appellant did so. *See* record at 440-89. On the evening in question, AR Flaherty, the appellant, and two women they met earlier in the evening in a bar in Puerto Rico got in a car belonging to one of the women. AR Flaherty and one of the women sat in the front seat and the appellant and the other woman sat in the back seat. The woman sitting next to AR Flaherty removed from her purse and lit what she claimed was a marijuana cigarette. After taking a couple of puffs on the cigarette, the woman passed it on to AR Flaherty, who did the same. AR Flaherty testified that he felt the effects he expected to experience from smoking marijuana. After using the substance, he passed the cigarette to someone in the back seat, without actually looking back. After the marijuana was in the possession of those in the back seat for a time, it was passed back to the woman in the front seat. The lit marijuana cigarette made that same circuit around the car twice more.

Thus, based on the totality of the circumstances and the evidence presented by the Government, including the testimony provided by PO Podwal and AR Flaherty, we find that the appellant was not entrapped by Government agents to commit the offenses of which he was charged and convicted, as he was predisposed to commit those acts. Thus, we find no merit in the appellant’s assignments of error involving the defense of entrapment, nor do we find that his rights to due process were violated in any manner by the Government in this case.

Before moving on, however, it is specifically noted that the appellant’s claim that there was no evidence that he was predisposed to distribute drugs is severely undercut by his action of immediately giving one pill of the apparent ecstasy to each of his two non-CW companions at the "party" as soon as he received them from PO Podwal. Finally, the military judge, in fact, gave an instruction on entrapment, with respect to the specification alleging the appellant's attempt to possess two doses of ecstasy with the intent to distribute, to include the requirement for the panel to find the appellant not guilty *if* they found that he had not been predisposed or inclined to do the acts charged. Record at 640-41; *see also* the Government’s Answer of 22 May 2003 at 17.

Challenge of Court Member

The appellant contends that it was an error for the military judge to deny his challenge of a prospective member for cause, where there was a showing of an implied bias, and, thus, forcing the appellant to use his peremptory challenge that would otherwise not have been used. We disagree.

The appellant asked the military judge to remove LCDR Ball from the panel, because six or seven months previously he sat as a member on a drug case involving NCIS video-surveillance evidence that had been prosecuted by the same trial counsel, who was also prosecuting the appellant. The servicemember in that case was found guilty. When the military judge denied the appellant's challenge for cause against LCDR Ball, the appellant used his peremptory challenge against LCDR Ball, noting that he would not have done so, but for the denial of the challenge for cause.

Our superior court recently provided us renewed guidance in resolving this issue in *United States v. Strand*, 59 M.J. 455 (C.A.A.F. 2004),[1] in which the court reviewed this issue and the applicable case law. It concluded and reaffirmed that on review, a military judge's trial decision regarding whether to excuse a member for either "actual" or "implied" bias is examined for an abuse of discretion. While a ruling involving an issue of actual bias is to be given great deference as questions of fact, the court stated that one involving "'[i]mplied bias is viewed through the eyes of the public, focusing on the appearance of fairness.'" *Strand*, 59 M.J. 455, 2004 CAAF LEXIS at 11-12 (C.A.A.F. 2004)(quoting *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998)). The court went on to conclude in *Strand* that: "In making judgments regarding implied bias, this Court looks at the totality of the factual circumstances." *Id*. at 12-13.

Based on our review of the manner in which the military judge assessed the issue of LCDR Ball's continued service as a member on the appellant's court-martial, we find that the military judge did not abuse his discretion in denying the appellant's challenge of cause. Through a thorough question-and-answer process, the military judge became satisfied that LCDR Ball's dismissal as a member in the case was not necessary "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(N). During the discourse, LCDR Ball stated that he could retain an open mind and make a determination based solely on the evidence presented by both sides in the case and the military judge's instructions, including any evidence offered concerning the defense of entrapment, and that there was nothing in his past experience or training that would prevent him from being unbiased, including having sat as a member in another court-martial at which one of the trial counsel in this case had also

[1] *See also United States v. Miles*, 58 M.J. 192 (C.A.A.F. 2003).

been the trial counsel. Record at 117-18, 125, 127, 130-32, and 144-49.

Extrinsic Evidence to Challenge Credibility of a Witness

In his final assignment of error, the appellant claims that it was error for the military judge to refuse to permit the introduction of extrinsic evidence to challenge the credibility of a Government witness, when the statements to be challenged were extremely exculpatory as to the issue of the appellant's predisposition to commit the offenses charged.

During the testimony of PO Podwal, he stated that one of the reasons that he targeted the appellant for the NCIS sting operation was that he had previously had conversations with the appellant and others concerning the use of illicit drugs. The appellant desired to attack PO Podwal by calling to testify two of the other individuals PO Podwal stated that he had previously talked with about the use of drugs. The appellant indicated that these two individuals would testify that they had never talked to PO Podwal about the use of illicit drugs. Thus, the appellant sought to attack PO Podwal's credibility in this manner, but he was prevented in doing so by the ruling of the military judge denying him the opportunity to call the two witnesses for that purpose.

We disagree with this assertion of error. Generally, the provisions of Mil. R. Evid. 608(b), prevent the use of extrinsic evidence for the purpose of attacking the credibility of a witness, and based on the facts and circumstances of this case, we do not find that the military judge abused his discretion in his ruling.

Damaged Prosecution Exhibit

Prosecution Exhibit 3 (PE 3) is the NCIS video surveillance tape of the "party" at which the appellant committed the drug-related offenses of which he now stands convicted. The Government moved to attach a copy of the tape on 22 May 2003, noting that the copy was "not functioning properly" and that efforts to acquire a functioning copy were underway. The appellant was informed of the fact that the exhibit was not viewable in May 2003. To date, the Government has not been able to produce a viewable copy of the tape. For the following reasons, we conclude that it is permissible for this court to proceed and to consider the merits of this case and the appellant's assignments of error, none of which involve this court's inability to view PE 3: (1) having been given notice of the problem with PE 3, the appellant, to date, has lodged no objection to the inability of the Government to provide an authenticated copy of the exhibit; (2) the appellant neither disputes nor questions in any manner the events that are contained on the video tape, in fact his civilian counsel at trial used segments of the tape to bolster the appellant's claim

of entrapment; *see* record at 522; and (3) the record contains a detailed description of what is on the tape, as it was being viewed in the courtroom; *see* record at 256 forward.

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Chief Judge DORMAN and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court