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

BEFORE

C.L. CARVER **D.A. WAGNER** **R.W. REDCLIFF**

UNITED STATES

v.

Walter D. DISNEY
Hospital Corpsman First Class (E-6), U.S. Navy

NMCCA 200100932 Decided 31 August 2004

Sentence adjudged 19 October 2000. Military Judge: P.L. Fagan. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Southwest, San Diego, CA.

LT MARCUS FULTON, JAGC, USN, Appellate Defense Counsel
LT JASON GROVER, JAGC, USN, Appellate Defense Counsel
LT LORI MCCURDY, JAGC, USNR, Appellate Government Counsel

CARVER, Senior Judge:

Pursuant to mixed pleas, the appellant was convicted by the military judge alone, sitting as a general court-martial, of larceny of ordnance and related military equipment and illegally storing stolen explosive materials in violation of 18 U.S.C. § 842(h), in violation of Articles 121 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 921 and 934. The appellant was sentenced to a bad-conduct discharge, confinement for 16 months, total forfeiture of pay and allowances, and reduction to pay grade E-1. There was no pretrial agreement. The convening authority approved the sentence as adjudged.

The appellant claims that (1) the federal criminal statute in question was unconstitutional and (2) he was prejudiced by improper evidence during sentencing.

After carefully considering the record of trial, the appellant's assignments of error,[1] and the Government's response, we conclude that the findings and sentence are correct in law and

[1] The appellant filed a Motion for Expedited Appellate Review on 9 Jul 2004. That motion is now moot.

fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Unconstitutionality of Federal Statute

In his first assignment of error, the appellant contends that 18 U.S.C. § 842(h) is unconstitutional since Congress exceeded its authority under the Commerce Clause of the U.S. Constitution when it criminalized local, intrastate possession and storage of explosives and that therefore we must dismiss Charge II and its Specification. We disagree and decline to grant relief.

The federal statute provides that

> It shall be unlawful for any person to receive, possess, transport, ship, conceal, store, barter, sell, dispose of, or pledge or accept as security for a loan, any stolen explosive materials which are moving as, which are part of, which constitute, or which have been shipped or transported in, interstate or foreign commerce, either before or after such materials were stolen, knowing or having reasonable cause to believe that the explosive materials were stolen.

18 U.S.C. § 842(h). During the providence inquiry, the appellant admitted that he stole explosive materials from the U.S. Navy and stored them in his off base house. He further admitted that the ordnance had been transported in interstate commerce from the manufacturer to the U.S. Navy.

The appellant now contends that this statute is unconstitutional because there is no nexus between the prohibited conduct and interstate commerce that is "more than the mere fact that the contraband had traveled in interstate commerce at some point in time," relying upon *United States v. Lopez,* 514 U.S. 549 (1995). Appellant's Brief of 30 Sep 2002 at 6. In *Lopez,* the Supreme Court held that a portion of the Gun-Free School Zones Act of 1990, which prohibited the possession of a firearm in a school zone, 18 U.S.C. § 922(q), was invalid because the statute contained no jurisdictional element that would ensure that the possession had the requisite nexus with interstate commerce. But we find that *Lopez* is distinguishable because § 842(h), unlike § 922(q), does contain the necessary jurisdictional element requiring the Government to prove that the materials had been transported in interstate commerce.

We could find only one federal case directly on point. The 8th Circuit opined that § 842(h) was constitutionally valid, finding that there was a "rational basis upon which Congress properly could have determined that the misuse of explosive materials is one activity which, as a class, affects commerce . . . ." *U.S. v. Dawson,* 467 F.2d 668, 673 (8th Cir. 1972), *cert.*

denied, 410 U.S. 956 (1973). The court held that there was no requirement of a nexus between the conduct and interstate commerce.

> Once it is determined that a given class of intrastate activity substantially affects the commerce, or the exercise of congressional power over it, there need not be proof that an isolated activity within that class itself has an effect on commerce.

Id. at 671. We agree with the *Dawson* opinion that § 842(h) is constitutional.

Improper Sentencing Evidence

In his second assignment of error, the appellant claims that he was improperly prejudiced by the testimony of a Government witness in aggravation who introduced unlawful command influence by a flag officer into the proceedings. We decline to grant relief.

The testimony at issue is that of Commander (CDR) Campion, appellant's commanding officer. The appellant did not object at trial,[2] but now complains that the testimony of CDR Campion improperly impinged on the independence of the military judge's ability to properly carry out the sentence proceeding. CDR Campion opined that in appellant's case, a "significant signal" needed to be sent "because things like this cannot continue." Record at 469. He also stated that individuals who had committed similar crimes had been incarcerated. Record at 483. Finally, CDR Campion testified that the appellant's actions, along with other similar incidents that had recently occurred within the SEALs, led the Commanding officers of WARCOM to hold a meeting discussing ordnance accountability:

> Q. Sir, as the Commanding Officer, are you aware of the command's and the community's feelings and concerns regarding the incident and the material that was involved?
>
> A. Well, I think that there -- there are several different concerns there. The ammo is a concern and, like I stated before, a certain amount would not have been a problem. Okay.
>
> . . . .
>
> Because of these incidents, this became a very high level thing WARCOM down. WARCOM Commander, Naval

[2] The trial defense counsel (TDC) initially objected that there was an improper foundation for the witness to state the concerns of the community. But, when the TDC realized that the term community was limited to the special warfare community, he withdrew his objection. Record at 582.

> Special Warfare Command is in charge of all the SEALs and all of Naval Special Warfare. With the rash of incidents, he had all the commander [sic] officers down there in his conference room to talk about ordnance accountability. Okay. So that's why I say, when I talk about the community's feelings, I can tell you community feelings. Okay. That's where that comes from. It's not, you know, from my hip; that's from the admiral's mouth.
>
> Q. And what are those community feelings, sir?
> A. Well, there are several. One is that, you know the rounds is [sic] one thing. The number of rounds takes it to another realm. Okay. So now there's more concern. With each new thing that you add there, there's a heightened concern. Okay. You get the demol., now all of a sudden you're into a -- you know, you're out there in a whole different ball park. Now you put the caps with that, have M-60's, so you have sensitized that cord, meaning you have explosives ready to go and now you -- you've reached the outer limits. Okay. It doesn't matter if it's a thimble full or if it's a truckload, it's the same kind of thing. And guys in the community that have gotten caught with demol. are in jail.

Record at 481-83.

We review issues involving unlawful command influence de novo. *United States v. Argo*, 46 M.J. 454, 457 (C.A.A.F. 1997). Unlawful command influence is an error of constitutional dimension; we may not affirm the findings or the sentence in the appellant's case unless we are "persuaded beyond a reasonable doubt that each [fact finder has] not been affected by [unlawful] command influence." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999); *see Argo*, 46 M.J. at 457; *United States v. Thomas*, 22 M.J. 388, 393-94 (C.M.A. 1986), *cert. denied*, 479 U.S. 1085 (1987). Our superior court found that:

> The threshold for raising the issue at trial is low, but more than mere allegation or speculation. . . . [T]he evidentiary standard for raising the issue [is] the same as required to raise an issue of fact, i.e., "some evidence."
>
> . . . .
>
> Once the issue is raised at the trial level, the burden shifts to the Government, which may . . . show that unlawful command influence will not affect the proceedings.

Biagase, 50 M.J. at 150.

We initially note that the issue was never raised at trial. Only in limited circumstances will the issue of unlawful command influence be preserved for appellate review in the absence of raising the issue at trial. Those limited circumstances include when a party is deterred by unlawful command influence from raising the issue. *United States v. Hamilton*, 41 M.J. 32, 37 (C.M.A. 1994). In this case, there is no allegation that the appellant was deprived of the facts that may have constituted unlawful command influence, nor has there been an allegation that unlawful command influence existed which prevented the appellant from raising the issue at trial, therefore it is waived.

Assuming that the issue was not waived, we will nonetheless grant no relief because the appellant has failed to meet the minimum showing under *Biagase*. On appellate review, the appellant must show that "the proceedings [were] unfair and the unlawful command influence was the cause of the . . . unfairness." *United States v. Ayers*, 54 M.J. 85, 95 (C.A.A.F. 2000). Although the appellant must only "show [] facts which, if true, would constitute unlawful command influence," *United States v. Richter*, 51 M.J. 213, 224 (C.A.A.F. 1999), the "quantum of evidence required to raise the issue is . . . more than mere allegation or speculation." *Ayers*, 54 M.J. at 95; *accord United States v. Baldwin*, 54 M.J. 308, 311 (C.A.A.F. 2001), *Biagase*, 50 M.J. at 150.

Even if CDR Campion's testimony could be said to be improper, it did not make the proceedings unfair because it did not affect the findings and sentence. The military judge stated:

> [T]here have been some matters that improperly came before the court, and the court will disregard those in sentencing . . . . [T]here was some testimony that discussed the type and/or amount of punishment that might be appropriate in this case, and the court will specifically exclude from any consideration any of that testimony.

Record at 656. Our Superior Court has held in the past that "[a] military judge is presumed to know the law and apply it correctly, is presumed capable of filtering out inadmissible evidence, and is presumed not to have relied on such evidence.... *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000). This presumption, along with the military judge's statements on the record, lead us to conclude that unlawful command influence did not influence the appellant's sentencing proceeding in any way.

We find that CDR Campion essentially testified that the flag officer had concerns about the accountability of ordnance and that improperly secured ordnance could result in an explosion. We believe that the trial counsel could have argued those common sense matters even without that testimony. We specifically find no evidence of either actual or apparent unlawful command influence.

Conclusion

Accordingly, the findings of guilty and sentence, as approved below, are affirmed.

Judge WAGNER concurs.

For the Court

R.H. TROIDL
Clerk of Court

Judge REDCLIFF did not participate in the decision of this case.