7 February 2017

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellant,* v. Senior Airman (E-4) CHAD A. BLATNEY, USAF, *Appellee.*	))))))))	REPLY TO APPELLEE'S ANSWER TO THE APPEAL BY THE UNITED STATES UNDER ARTICLE 62, UCMJ Misc. Dkt. No. 2016-16 Panel No. 1

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(o) of this Court's Rules of Practice and Procedure, the United States submits this Motion for Leave to File a Reply to Appellee's Answer to the Appeal by the United States under Article 62, UCMJ.

ISSUE PRESENTED

WHETHER THE MILITARY JUDGE ERRED BY SUPPRESSING APPELLEE'S ACT OF UNLOCKING HIS CELLULAR PHONE AS WELL AS THE CONTENTS OF APPELLEE'S PHONE PURSUANT TO THE FIFTH AMENDMENT.

STATEMENT OF THE CASE

The United States adopts the Statement of the Case contained within its 11 January 2017 brief in support of its appeal under Article 62, UCMJ.

STATEMENT OF FACTS

The United States adopts the Statement of the Facts contained within its 11 January 2017 brief in support of its appeal under Article 62, UCMJ.

ARGUMENT

THE MILITARY JUDGE ERRED BY SUPPRESSING APPELLEE'S ACT OF UNLOCKING HIS CELLULAR PHONE AS WELL AS THE CONTENTS OF THE PHONE PURSUANT TO THE FIFTH AMENDMENT.

Standard of Review

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. United States v. Sullivan, 42 M.J. 360, 363 (C.A.A.F. 1995).

Since this is an Article 62 appeal by the United States, this Court may not make findings of fact, but may determine whether the military judge's factual findings are clearly erroneous or unsupported by the record. United States v. Lincoln, 42 M.J. 315, 320 (C.A.A.F. 1995). Matters of law in an Article 62 appeal are reviewed de novo. United States v. Terry, 66 M.J. 514, 517 (A.F. Ct. Crim. App. 2008), *rev. denied,* 66 M.J. 380 (C.A.A.F. 2008). This Court has explained, "[o]n questions of fact [we ask] whether the decision is *reasonable;* on questions of law, [we ask] whether the decision is correct." Id. (internal citations omitted.)

"A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law." United States v. Seay, 60 M.J. 73, 77 (C.A.A.F. 2004) (quoting United States v. Roberts, 59 M.J. 323, 326 (C.A.A.F. 2004)).

Law and Analysis

The United States makes the following arguments in reply to Appellee's Answer brief.

a. This Court has jurisdiction to hear this appeal.

Appellee claims that this Court does not have jurisdiction to hear this appeal because the United States has not adequately established that the evidence suppressed qualifies as "substantial proof of a fact material to the proceedings." (App. Br. at 4.) In making such a claim, Appellee ignores this Court's own precedent in United States v. Pacheco, 36 M.J. 530, 533 (A.F.C.M.R. 1992). In Pacheco, this Court adopted the proposition that it has jurisdiction to hear an Article 62 appeal where the petitioner *believes* that the excluded evidence is significant to its case. *(citing* United States v. Scholz, 19 M.J. 837, 840-41 (N.M.C.M.R. 1984) ("So long as it is *alleged* that the evidence is substantial, the Petitioner will come within the appellate court's jurisdiction.")) This interpretation of Article 62(a)(1) reflects that the government's right to appeal interlocutory orders suppressing or excluding evidence is to be construed broadly. Pacheco, 36 M.J. at 532-33.

In their notice of appeal dated 2 December 2016, trial counsel asserted that the military judge's ruling excluded evidence which was "substantial proof of a material fact in the proceedings: specifically that the Accused intentionally and

knowingly ingest cocaine" and that they were not making the appeal for purposes of delay. (App. Ex. XI.) Furthermore, in its brief in support of this appeal, the United States invoked this Court's jurisdiction based on Article 62(a)(1)(B), which allows a government appeal when a ruling "excludes evidence that is substantial proof of a fact material to the proceedings." (Govt. Br. at 3.) These assertions by trial counsel and appellate government counsel demonstrate that the United States believes the excluded evidence is substantial and significant. Under Pacheco, this alone is sufficient to establish this Court's jurisdiction to hear the appeal. There is no basis to support Appellee's attack on this Court's jurisdiction.

In any event, it is evident and beyond any reasonable dispute from the record and pleadings that the contents of Appellee's phone are substantial proof of a fact material to the proceedings. Appellee tested positive for cocaine on a urinalysis. (App. Ex. IV at 1.) The text messages taken from Appellee's phone tend to indicate concern on the part of Appellee and/or his friends as to whether Appellee passed the urinalysis. (App. Ex. IV at 4; App. Ex. II at 8-19.) As trial counsel correctly argued at trial, this was valuable evidence of Appellee's consciousness of guilt. (R. at 47.) There is no requirement that the suppressed evidence be "case dispositive" or that the government be unable to "proceed with the evidence it has," as Appellee seems to suggest. In fact,

Pacheco states the opposite: in Article 62 appeals, "it is not necessary that the evidence suppressed be the only evidence in the case." Pacheco, 36 M.J. at 532-33. Under these circumstances, this Court plainly retains jurisdiction to decide this Article 62 appeal, and this Court has a statutory duty to review it.

b. Maryland v. Shatzer does not change the analysis of voluntariness in this case.

Appellee now alleges that the military judge "failed to address the presumption of involuntariness" from Maryland v. Shatzer, 559 U.S. 98, 100, 105 (2009) (App. Br. at 8.) However, Shatzer merely stood for the proposition that a 14-day break in custody would end the Edwards presumption of involuntariness. Id. at 110. Shatzer did not change the well-established understanding that requests for consent to search after the invocation of the right to counsel are not "further interrogation," and that the giving of consent under such circumstances is not presumptively involuntary and does not violate Edwards.[1] *See* Govt. Br. at 22-23. Thus, Shatzer does not render Appellee's consent to search and consent to unlock his phone involuntary. As described in the United States' original brief, under the facts of this case, the Edwards presumption of involuntariness simply did not apply. The

[1] Significantly, at least one of the federal circuit cases holding that request for consent to search after invocation to the right counsel does not constitute "further interrogation" was decided in 2015, well after the Supreme Court's decision in Shatzer. Everett v. Sec'y, Fla. Dep't of Corr., 779 F.3d 1212, 1244-45 (11th Cir. 2015).

military judge's finding of fact that Appellee's consent was voluntary was wholly supported by her other extensive findings of fact and was not clearly erroneous. There is no reason to remand this case for further fact-finding on voluntariness.

c. This Court can and should apply the foregone conclusion doctrine in this case.

Appellee argues that this Court should not apply the foregone conclusion doctrine when the government failed to develop the issue on the record. (App. Br. at 17.) Whether a statement was testimonial or a "foregone conclusion" is a standard that ultimately answers the constitutional question of whether that statement was privileged under the Fifth Amendment. *See* Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 189 (2004). As such, these are best described as mixed questions of fact and law. *See* United States v. Gwinn, 219 F.3d 326, 332 (4th Cir 2000) (citing Ornelas v. United States, 517 U.S. 690, 699 (1996)) (a trial court's findings of historical facts are reviewed for clear error, but a determination of whether the historical facts satisfy a constitutional standard is reviewed de novo); United States v. Castillo, 74 M.J. 160, 165 (C.A.A.F. 2015) (questions of constitutional law are reviewed de novo, including whether a statement – such as a self-reporting requirement – conflicts with the Fifth Amendment privilege against self-incrimination).

It is true that some courts have stated that "whether the existence of documents is a foregone conclusion is a question of fact." United States v. Norwood, 420 F.3d 88, 895 (8th Cir. 2005); United States v. Bright, 596 F.3d 683, 690 (9th Cir. 2010) (both citing United States v. Doe (Doe I), 465 U.S. 605, 613-14 (1984)). However, the question of whether the "foregone conclusion doctrine" applies to a particular case must be considered a question of law. A "doctrine" is defined as "a principle, especially a legal principle, that is widely adhered to." Black's Law Dictionary, 496 (7th ed. 1999). Whether a certain legal principle applies in a given case is undoubtedly a legal question.

Thus, Norwood and Bright should not be read to suggest that a trial judge must make an explicit "factual" finding that the historical facts of a case satisfy the legal term of art "foregone conclusion." Rather, they indicate that the trial judge should address what information was known to the government prior to any act of production by a suspect. In this case, the military judge did just that. There are extensive historical facts found by the military judge that establish that the agents already knew the phone at issue belonged to Appellee.

For example, the military judge found as fact that the OSI agent took Appellee's phone prior to his interview and placed it on a table outside the interview room. (App. Ex. X. at 1.) SA

J.C. knew that Appellee's property had been taken from Appellee and placed on the table, and SA J.C. in fact saw the property he understood to be Appellee's on the table. (Id.) In her findings of fact, the military judge, repeatedly referred to the phone as belonging to Appellee. (Id. at 1-2.) Nothing in the record indicates that the OSI agents had any doubts as to whether the phone belonged to Appellee rather than to anyone else; therefore, the military judge's findings of fact were supported by the record and not clearly erroneous. It would not serve any purpose to remand this case to the military judge just to make a factual finding using the magic words "foregone conclusion" to establish that OSI already knew this phone belonged to Appellee prior to him entering his passcode. This is already implicit in the military judge's findings of fact, and is even explicitly stated when the military judge refers to "the accused's cell phone" or "his . . . phone." (App. Ex. X. at 1-2.)

Although Appellee claims that the government should be penalized for not making the foregone conclusion argument at trial, it must be remembered that the Fifth Amendment issue related to unlocking the phone was raised by the military judge *sua sponte* in the middle of argument on the motion to suppress the contents of Appellee's phone. (R. at 48.) Trial defense counsel did not even raise the Fifth Amendment issue in his

motion to suppress, which itself was untimely filed the day before trial. (App. Ex. II.) As such, the government had little time or opportunity to prepare a proper response to this newly-raised issue. In addition, the record contains no discussion between the military judge and the parties of Fisher, Doe I, Doe II, or Hubbell, which are the Supreme Court cases that discuss the foregone conclusion doctrine. Thus, it appears the first time that the government was made aware that the military judge was going to base her ruling, in part, on those cases, was when she included them in her ruling. (App. Ex. IV at 10.) Once the military issued her ruling, trial counsel had a strict 72-hour deadline to consult with JAJG and decide whether to appeal. In sum, the government was not on fair notice that the Fifth Amendment would or could form the basis for suppressing the contents of Appellee's phone. As such, the government should not be faulted for asserting the foregone conclusion doctrine for the first time on appeal, especially when the doctrine explains why the military judge erred in her application of Fisher, Doe I, Doe II, and Hubbell. The military judge still had the duty to correctly apply the law she cited, and those cases could not be applied correctly without a legal analysis of the foregone conclusion doctrine.

Moreover, the government adequately developed the record as to what the OSI agents knew about the phone,[2] and the military judge made ample findings of fact for this Court to determine the legal question of whether the foregone conclusion doctrine applies. For the reasons discussed in the United States' original brief, this Court should find that the foregone conclusion doctrine applies and that there was no Fifth Amendment violation.

CONCLUSION

The United States respectfully requests this Honorable Court set aside the military judge's erroneous decision to exclude Appellee's act of unlocking his phone and the contents of his phone and expeditiously remand the case to trial for further proceedings.

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[2] Appellee's claim that the government "failed to request a factual finding supporting its theory on appeal" is inaccurate. (App. Br. at 18.) After the military judge's ruling, trial counsel asked the military judge to make additional findings of fact, including that Appellee's phone "was on the table before the interview started and it was known to OSI whose phone it was . . ." (R. at 185.)

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 7 February 2017.

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