UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman CARRIE L. BASKIN
United States Air Force

ACM 36207

13 December 2006

Sentence adjudged 3 September 2004 by GCM convened at Little Rock Air Force Base, Arkansas. Military Judge: Barbara E. Shestko.

Approved sentence: Bad-conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Sandra K. Whittington, and Captain John S. Fredland.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Kimani R. Eason.

Before

ORR, FRANCIS, and SOYBEL
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

FRANCIS, Judge:

A general court-martial composed of officer members convicted the appellant, contrary to her pleas, of one specification each of attempting to escape from custody, absent without leave terminated by apprehension, disrespectful language toward a noncommissioned officer (NCO), violation of a lawful order, making a false official statement, wrongful use of cocaine, wrongful use of marijuana, disorderly conduct, and impeding an investigation, in violation of Articles 80, 86, 91, 92, 107, 112a, and 134, UCMJ, 10 U.S.C. §§ 880, 886, 891,

892, 907, 912a, and 934. The appellant was sentenced to a bad-conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged.

The appellant raises one allegation of error. She asserts the military judge abused her discretion by denying a motion to suppress statements made by the appellant to a urinalysis observer who questioned the appellant without a rights advisement under Article 31, UCMJ, 10 U.S.C. § 831. Finding error, we set aside the appellant's conviction for making a false official statement in violation of Article 107, UCMJ, and reassess the sentence. The remaining findings of guilty and the sentence, as reassessed, are affirmed.

Background

Along with several other offenses, the appellant was suspected of illegal drug use. On 7 January 2004, acting pursuant to a search authorization, a security forces investigator, Technical Sergeant (TSgt) B, transported the appellant to the base medical clinic for urinalysis testing. Staff Sergeant (SSgt) C, a female security forces member in the appellant's unit, was selected to serve as an "observer" to ensure proper collection of the urine sample. At the time of her selection for this duty, SSgt C was nine months pregnant. Because of her condition, she had been assigned to perform administrative duties. SSgt C was not previously trained as a urinalysis observer, but was selected and briefed for that duty on 7 January 2004, shortly before the appellant was brought in for testing.

At the medical clinic, SSgt C accompanied the appellant to the bathroom to watch her provide a urine sample. In accordance with her instructions, SSgt C watched the appellant carefully to make sure she provided a valid sample. After an approximately 20-minute wait, during which the appellant fidgeted on the toilet seat and professed difficulty in providing a sample, SSgt C saw her dip the collection cup into the toilet and fill it with water. When she saw what the appellant had done, SSgt C immediately asked her if there was only urine in the collection container. The appellant replied, "yes." SSgt C asked the appellant if she was sure it was only urine and again received an affirmative response. SSgt C then accompanied the appellant out of the bathroom and the appellant gave her "sample" to a medical technician responsible for sealing and marking it.

The appellant's deception was short lived. SSgt C immediately pulled TSgt B aside and told him what the appellant had done. In addition, the medical technician who took the sample for sealing and marking noted that the sample was cold and clear, which would not have been true if it were a fresh urine sample. The appellant was then directed to provide a second, valid sample, which ultimately tested positive for cocaine and marijuana. Based on her false responses

to SSgt C's questions, the appellant was charged with making a false official statement.

At the appellant's court-martial, trial defense counsel moved to suppress the appellant's responses to SSgt C's questions, asserting the statements were obtained in violation of Article 31, UCMJ. The military judge denied the motion and the appellant was convicted of making a false official statement.

Article 31, UCMJ

We review the military judge's findings of fact in connection with the motion to suppress for violation of the appellant's rights under Article 31, UCMJ, using a clearly- erroneous standard. *United States v. Brisbane*, 63 M.J. 106, 110 (C.A.A.F. 2006) (citing *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000)). We review the judge's conclusions of law de novo. *Id.*

Article 31(b), UCMJ, provides that "[n]o person subject to [the UCMJ] may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial." Statements obtained in violation of Article 31(b), UCMJ, are "involuntary" and, with certain exceptions not applicable here, are not admissible into evidence against the accused. Mil. R. Evid. 304(a), 304(c)(3).

"Article 31(b) contains four textual predicates. First, the article applies to persons subject to the UCMJ. Second and third, the article applies to interrogation or requests for any statements from 'an accused or a person suspected of an offense.' Fourth, the right extends to statements regarding the offense(s) of which the person questioned is accused or suspected." *Brisbane*, 63 M.J. at 113 (quoting *United States v. Cohen*, 63 M.J. 45, 49 (C.A.A.F. 2006)). Not all questions posed to suspects fall under the protection of Article 31(b), UCMJ. "[W]here the questioner is not acting in a law enforcement or disciplinary capacity, rights warnings are generally not required." *Cohen,* 63 M.J. at 49-50. Questions "focused solely on the accomplishment of an operational mission" are one example of this. *Cohen,* 63 M.J. at 50. However, if the questioner is performing a law enforcement or disciplinary function and he or she suspects the person being questioned of an offense, an Article 31, UCMJ, warning is required. Whether the questioner should be considered to be performing a law enforcement or disciplinary function is determined by looking at the totality of the facts and circumstances surrounding the interview. *Cohen,* 63 M.J. at 49.

In denying the defense motion to suppress, the military judge found that although SSgt C was an experienced security forces member who admittedly suspected the appellant of committing an offense under the UCMJ, she "had been assigned to administrative duties within the security forces squadron for the last 7 months and was [at the time she questioned the appellant] acting only in [sic] administrative role as an 'observer.'" Further, the military judge found that SSgt C "spontaneously asked the accused if she had urinated in that cup because she was confused at what she saw. She was confused and stunned that an active duty airman, ordered to provide a urine sample by her commander, would commit such an act in front of an NCO under all the circumstances." Based on these findings, the military judge concluded SSgt C "was not acting in an official disciplinary or law enforcement capacity" when she questioned the appellant and so was not required to provide an Article 31(b), UCMJ, warning.

The record supports the military judge's findings of fact. However, based on those facts, we reach a different legal conclusion as to SSgt C's role for purposes of Article 31, UCMJ. Assessing all the facts and surrounding circumstances, it is clear that, notwithstanding her protestations to the contrary, SSgt C was acting in an official law enforcement or disciplinary capacity when she questioned the appellant about her urine sample. The entire purpose of the urine test, and SSgt C's observation of it, was to further a law enforcement function. This was not a routine observation of a random urinalysis test. Security forces investigators brought in the appellant specifically for the urine test. SSgt C knew that and met the investigators at the hospital with the appellant to observe the test. She was specifically told that the drug test she was observing was a mandatory test, at the order of the commander, and that if the appellant did not consent, the security forces investigators already had a valid search order. Further, the observer briefing given to SSgt C that night, just prior to the test, made it clear that improper actions of the appellant when giving the sample could lead to disciplinary action. It required that SSgt C "report all incidents of known or suspected abuse, adulteration, or unusual behavior, by the member being tested to the testing monitor, or substance abuse office, immediately."

Against this backdrop, when SSgt C "saw [the appellant] dip the cup into the toilet water and pull it out," there was "no doubt" in SSgt C's mind as to what the appellant had done. She immediately suspected the appellant of committing an offense under the UCMJ. On the basis of that suspicion, SSgt C asked the appellant if it was only urine in the cup. When the appellant said "yes", SSgt C asked her again and got the same answer.

Although SSgt C professed that she was only acting as an "observer" when she questioned the appellant, her testimony is replete with indicators to the

contrary. We find the following responses by SSgt C to questions posed by the military judge on this issue particularly telling.

> Q: Did it cross your mind to read her her Article 31 rights?
>
> A: At the end, it did and that's when I -- I didn't say anything else. We left and that's when I went and told the investigators . . . .
>
> . . . .
>
> Q: So at the time that you saw her dip the cup into the toilet water, did you consider advising her of her Article 31 rights at that moment?
>
> A: No, I wanted to talk to the investigators.

Based on this testimony, and considering all of the surrounding facts and circumstances, it is clear that SSgt C saw herself as part of the law enforcement team and acted accordingly. The mere fact that, based on her initial confusion, SSgt C did not think to advise the appellant of her Article 31, UCMJ, rights before "spontaneously" asking her questions about the offense she had just seen committed did not relieve her of her legal obligation to do so. Absent such warnings, the appellant's statements to SSgt C were inadmissible into evidence against her. Because the improperly admitted statements provided the sole basis for the false official statement charge now under review, her conviction of that offense cannot stand.[1]

This prejudicial error does not require that we order a rehearing on sentence. If we can determine to our satisfaction that "absent any error, the sentence adjudged would have been of at least a certain severity, then a sentence of that severity or less will be free of the prejudicial effects of error" and we may reassess the sentence accordingly. *United States v. Moffeit,* 63 M.J. 40, 41 (C.A.A.F. 2006) (citing *United States v. Sales,* 22 M.J. 305, 307 (C.M.A. 1986)). However, "if the error at trial was of constitutional magnitude, then the court must be satisfied beyond a reasonable doubt that its reassessment cured the error." *Moffeit,* 63 M.J. at 41 (quoting *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002)).

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[1] The improperly admitted statements did not impact any of the other charges of which the appellant was convicted.

Applying this analysis, and after careful consideration of the entire record, we are satisfied beyond a reasonable doubt that, in the absence of Additional Charge II and its Specification, the members would have adjudged a sentence of no less than a bad conduct discharge, confinement for 15 months, forfeiture of all pay and allowances, and reduction to E-1. In addition, we find this reassessed sentence appropriate for the offenses involved. Article 66(c), UCMJ, 10 U.S.C. § 866(c).

Conclusion

Additional Charge II and its Specification are dismissed. The remaining findings and sentence, as reassessed, are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred.[2] Article 66(c), UCMJ; *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the remaining findings and sentence, as reassessed, are

AFFIRMED.

Senior Judge ORR participated in this decision prior to his reassignment.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator

[2] The Court-Martial Order erroneously states the appellant was found guilty of Additional Charge I and that the appellant was convicted by both officer and enlisted members. We order that a new Court-Martial Order be issued that properly reflects the findings of Additional Charge I and the correct forum selection.