UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DEMARIO A. FOSTER
United States Air Force

ACM 35933

20 October 2005

Sentence adjudged 5 February 2004 by GCM convened at MacDill Air Force Base, Florida. Military Judge: Mary M. Boone.

Approved sentence: Bad-conduct discharge, confinement for 16 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, Major Sandra K. Whittington, and Captain Christopher S. Morgan.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Kevin P. Stiens.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

BROWN, Chief Judge:

The appellant was tried by officer members sitting as a general court-martial at MacDill Air Force Base, Florida. Contrary to his pleas he was convicted of attempted larceny of $80,000; theft of $2,000; and forgery of checks in the amounts of $2,000 and $80,000, in violation of Articles 80, 121, and 123, UCMJ, 10 U.S.C. §§ 880, 921, 923. The members sentenced the appellant to a bad-conduct discharge, confinement for 16 months, and reduction to E-1. The convening authority approved the sentence as adjudged. Pursuant to Article 58b, UCMJ, 10 U.S.C. § 58b, the convening authority

waived $1,193.40, of the mandatory forfeitures for the maximum allowable period, effective 14 days after the sentence was adjudged for the benefit of the appellant's wife and children.

The appellant has submitted one assignment of error: Whether the court members detailed to his court-martial were improperly selected in violation of Article 25, UCMJ, 10 U.S.C. § 825, because of the systematic exclusion of African Americans.[1]

We have examined the record of trial, the assignment of error, and the government's response thereto. Finding no error, we affirm.

Background

The appellant's case was originally convened by the 21st Air Force Commander (21 AF/CC), Major General George N. Williams. General Williams selected eight officers to sit as court members and referred the charges and specifications to a general court-martial, pursuant to Special Order AC-18, dated 8 May 2003. On 30 June 2003, one of the detailed members was relieved and replaced pursuant to Special Order AC-32. On 1 July 2003, an Article 39a, UCMJ, 10 U.S.C. § 839a, session was held in this case. During this Article 39a, UCMJ, session, various motions were handled by the military judge and the parties. However, one motion, the appellant's motion for improper selection of officer members, was deferred and not decided because 21 AF still needed to supply discovery relating to the motion. This motion alleged the 21 AF/CC had systematically excluded lieutenants from sitting as court members. It did not allege exclusion based upon race.

The court reconvened on 4 February 2004, where another Article 39a, UCMJ, session took place. Between sessions, Headquarters (HQ) 21 AF was deactivated and the 18th Air Force Commander (18 AF/CC), Lieutenant General William Welser III, became the general court-martial convening authority for this case. The Article 39a, UCMJ, session was called to order pursuant to Special Order AB-23, HQ 18 AF. At this session, the defense withdrew its motion for improper panel selection.

Improper Selection of Court Members

As noted above, the appellant withdrew his motion at trial alleging that the 21 AF/CC had systematically excluded lieutenants from sitting as court members at his court-martial. Now the appellant, for the first time on appeal, alleges that the court members detailed to sit at his court-martial by the 18 AF/CC, were improperly selected in violation of Article 25, UCMJ, because of the systematic exclusion of African Americans.

[1] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

The appellant is African American. He alleges no court member detailed to sit as a member at his trial is African American. This Court has not been supplied with data as to the race of all the court members detailed to sit as court members, but accepts the appellant's assertion that none are African American.

Article 25(d)(2), UCMJ, requires a convening authority to select members who "in his opinion are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." "A military accused is not entitled to have a representative cross-section of the community detailed to his or her court-martial." *United States v. Upshaw*, 49 M.J. 111, 113 (C.A.A.F. 1998) (citing *United States v. Lewis*, 46 M.J. 338, 341 (C.A.A.F. 1997)); *see also United States v. White*, 48 M.J. 251, 254 (C.A.A.F. 1998).

Rule for Courts-Martial (R.C.M.) 912(b)(1) provides that, when evidence is discovered that court members may have been selected improperly, a party may move to stay the proceedings. R.C.M. 912 (b)(2) authorizes the military judge to stay the proceedings until the court members have been properly selected. Failure to make a timely motion waives the improper selection, unless the improper selection violates R.C.M. 501(a), 502(a)(1), or 503(a)(2). R.C.M. 912(b)(3). At trial, the defense did not request a stay under R.C.M. 912(b)(1). In fact, as noted above, the defense withdrew its motion for improper panel selection. However, because the government does not assert waiver, we will not decide this case on that basis.

Whether a court-martial panel was selected free from systematic exclusion is a question of law we review de novo. *United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000). Although a military accused does not have a right to a court panel composed of a cross-section of the military community, he "does have a right to [court] members who are fair and impartial." *United States v. Brocks*, 55 M.J. 614, 616 (A.F. Ct. Crim. App. 2001), *aff'd*, 58 M.J. 11 (C.A.A.F. 2002) (citing *United States v. Roland*, 50 M.J. 66, 68 (C.A.A.F. 1999)). "The defense shoulders the burden of establishing the improper exclusion of qualified personnel from the selection process. Once the defense establishes such exclusion, the [g]overnment must show by competent evidence that no impropriety occurred when selecting appellant's court-martial members." *Kirkland*, 53 M.J. at 24 (citations omitted).

In this case, the appellant has supplied *no evidence* that the 18 AF/CC improperly excluded qualified personnel from the selection process. Instead, he makes a broad assertion that because no member detailed to his court-martial is African American, the convening authority improperly excluded African Americans from consideration as members. As a general principle, it is proper to assume that a convening authority is aware of his duties, powers and responsibilities and performs them satisfactorily. *United States v. Townsend*, 12 M.J. 861, 862 (A.F.C.M.R. 1981). In the absence of any evidence

to the contrary, we will not assume that the convening authority in this case improperly excluded qualified personnel, including African Americans, from the selection process. The appellant has failed to satisfy his burden.[2] Accordingly, we find this assignment of error is without merit.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c) UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court

[2] We note the appellant does not assert that the exclusion of African Americans as members of his court-martial was designed to "pack the court" to achieve a particular result. Even if he had alleged that was the motivation, he would still have to present some evidence to raise this issue and shift the burden to the government. More than a mere allegation or speculation is required. *See United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). In this case, all the appellant has done is make an allegation.