UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DAVON L. HARRIS
United States Air Force

ACM S30392 (f rev 2)

31 January 2007

Sentence adjudged 6 May 2003 by SPCM convened at Minot Air Force Base, North Dakota. Military Judge: Kurt D. Schuman (sitting alone).

Approved sentence: Confinement for 4 months and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Colonel Carlos McDade, Lieutenant Colonel Mark R. Strickland, Major Sandra K. Whittington, Major Jennifer K. Martwick, and Captain Timothy M. Cox.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major John C. Johnson, and Captain C. Taylor Smith.

Before

BROWN, MATHEWS, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

THOMPSON, Judge:

This case is before us for the third time. When it was first presented, the appellant asserted three issues: (1) Whether the staff judge advocate (SJA) was disqualified from preparing the staff judge advocate recommendation (SJAR) and its addendum; (2) Whether the convening authority's action failed to approve the sentence; and (3) Whether the military judge erred in not dismissing all the charges where the appellant's immunized testimony tainted the decision to prosecute him. We found error as to the first

and second issues, and remanded for new post-trial processing and a new action, reserving review of the error alleging improper use of immunized testimony until completion of these tasks. *United States v. Harris*, ACM S30392 (A.F. Ct. Crim. App. 9 Feb 2005) (unpub. op.). We remanded yet again when the new SJAR incorrectly advised the convening authority that the immunity issue had been resolved against the appellant at the appellate level. *United States v. Harris*, ACM S30392 (A.F. Ct. Crim. App. 7 Nov 2005) (unpub. op.).

A new SJAR was completed and served on the appellant. On 11 June 2006, the convening authority took action on the appellant's case, and approved only so much of the sentence as provided for confinement for four months and a reduction to the grade of E-1. The convening authority disapproved the bad-conduct discharge as a form of relief for extended post-trial processing delays.

With a complete and correct action finally in place we turn to the remaining assignment of error. At trial the appellant moved to dismiss all charges and specifications on the basis that the decision to prosecute him was tainted by statements the appellant made under grant of immunity. The military judge denied the motion. The appellant now argues that the military judge erred and the conviction should be set aside. We find no merit to this assignment of error and affirm.

Background

On or about 18 September 2002, a urinalysis revealed the presence of tetrahydrocannabinol in a sample provided by the appellant. On 9 October 2002, the Air Force Office of Special Investigations (OSI) completed a report of investigation regarding the appellant's alleged use and possession of marijuana and obstruction of justice. The report included admissions made by the appellant in March of 2002 that he used and possessed marijuana. The report also included statements from Airman Basic (AB) G and Airman M regarding the appellant's involvement with marijuana, and the appellant's alleged attempt to get them to change their stories.

On 21 January 2003, the appellant was granted testimonial immunity and ordered to answer questions and testify regarding allegations against AB G. On 30 January 2003, the appellant was interviewed, pursuant to the grant of immunity, by two trial counsel assigned to prosecute AB G. On 6 February 2003, AB G was court-martialed. AB G pled guilty and the appellant did not testify. Charges were preferred against the appellant on 4 April 2003.

In response to the motion, the appellant's commander testified he made the decision to prosecute the appellant for use and possession of marijuana and obstruction of justice no later than November 2002. He further testified that he made the decision based on the OSI report and the urinalysis, and that he did not discuss the contents of the

immunized interview with the legal office staff. The two trial counsel, who interviewed the appellant while he was under the grant of immunity, testified they did not discuss details of the interview with anyone involved in the appellant's case. The SJA testified that he did not discuss details of the immunized interview with either of the trial counsel who interviewed the appellant.

Analysis

Once an accused has provided information under a grant of immunity, the government has a heavy burden to establish that its decision to prosecute is untainted by immunized testimony. *Kastigar v. United States*, 406 U.S. 441, 461 (1972); *United States v. Allen*, 59 M.J. 478, 482 (C.A.A.F. 2004). An accused and the government should be in substantially the same position after the immunized testimony was given as they were beforehand. *Kastigar,* 406 U.S. at 461. The burden is on the government to prove "by a preponderance of the evidence that the prosecutorial decision was untainted by the immunized testimony." *United States v. Olivero*, 39 M.J. 246, 249 (C.M.A. 1994); *Allen*, 59 M.J. at 482.

"A military judge's finding that the [government's] decision to prosecute . . . [was] independent of the immunized testimony should not be overturned on appeal unless it is clearly erroneous or unsupported by the evidence." *United States v. McGeeney*, 44 M.J. 418, 423 (C.A.A.F. 1996) (citing *Samples v. Vest,* 38 M.J. 482, 487 (C.M.A. 1994)). The military judge in the present case entered six pages of extensive written findings of fact and conclusions of law into the record. After a careful reading of the record we adopt the military judge's findings of fact. The military judge found, and we concur, that the decision to prosecute the appellant was not tainted by the appellant's immunized statements, and that none of the evidence against the appellant was derived directly or indirectly from the immunized statements. We find that the military judge applied the correct standards and that his ruling was neither clearly erroneous nor unsupported by the evidence.

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

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator