UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic PAUL C. KELLER III
United States Air Force

ACM 35736

28 September 2005

Sentence adjudged 17 July 2003 by GCM convened at Malmstrom Air Force Base, Montana. Military Judge: R. Scott Howard.

Approved sentence: Bad-conduct discharge and confinement for 5 months.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, and Major Andrew S. Williams.

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

STONE, SMITH, and MATHEWS
Appellate Military Judges

PER CURIAM:

We have reviewed the record of trial, the assignments of error, and the government's reply thereto. The appellant complains that the military judge erred in denying a challenge for cause of a court member and in limiting the cross-examination of a prosecution witness. Finding no error, we affirm.

The appellant challenged three court members for cause: Colonel Lawrence Jackson, Lieutenant Colonel (Lt Col) Robert Critchlow, and Captain Bradley MacDonald. The military judge granted the first and third challenge, but denied the second. On review, we give a military judge's ruling on challenges for cause based on assertions of actual bias "great deference," and will not reverse absent a "clear abuse of discretion." *United States v. Rolle,* 53 M.J. 187, 191 (C.A.A.F. 2000) (quoting *United States v. Rome, 47* M.J. 467, 469 (C.A.A.F. 1998) and *United States v. White,* 36 M.J.

284, 297 (C.M.A. 1993)). We are "less deferential" when we consider the military judge's ruling on challenges based on implied bias, applying an objective test to determine whether a reasonable, disinterested layperson would consider participation of the challenged member to be unfair. *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997). As the challenging party, the appellant bears the burden of persuasion that the challenge should be maintained. *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002).

Applying the standards above, we find no error in the military judge's ruling. We conclude that Lt Col Critchlow's attendance at a single half-hour meeting of the base Drug Reduction Oversight Committee and his fleeting contact with a witness were insufficient to sustain a challenge based on actual bias. We also conclude that there was no basis for a challenge based on implied bias. The committee meeting in question dealt only with issues of overall administration of the base urinalysis program, rather than an in-depth review of the workings of the laboratory or of any individual case. Moreover, the defense at trial did not challenge either the credibility of the one witness Lt Col Critchlow had contact with or the substance of his testimony. *Napoleon*, 46 M.J. at 283. Accordingly, we find no merit in this assignment of error.

Nor do we find merit in the appellant's other assignment of error. During the prosecution's case-in-chief, trial defense counsel sought unsuccessfully to cross-examine an expert witness, Dr. Vincent Papa, concerning specific acts of alleged misconduct by an employee of the Brooks Air Force Base Drug Testing Laboratory. The employee in question had signed a memorandum that was included in the litigation package documenting the appellant's positive urine tests for cocaine and methamphetamine. The trial defense counsel argued that the cross-examination was permissible under Mil. R. Evid. 608, 609, and 806. The military judge noted, however, that extrinsic evidence of specific acts of misconduct is generally not permitted to attack a witness' truthfulness. He therefore refused to permit trial defense counsel to cross-examine Dr. Papa concerning alleged misconduct by the author of the memorandum, although he did permit them latitude to question Dr. Papa about his opinion of the author's character for truthfulness, if they could establish a proper foundation.

We review the military judge's application of the Mil. R. Evid. under an abuse of discretion standard. *United States v. Strong*, 17 M.J. 263, 266 (C.M.A. 1984). Applying this standard, we find no error. The military judge correctly applied Mil. R. Evid. 608 and 806. When challenging a witness' credibility, extrinsic evidence of specific acts of misconduct may, in the discretion of the military judge, be inquired into only on cross-examination of that witness. Mil. R. Evid 608(b)(1), 608(b)(2). In order to delve into the author's purported misconduct, the trial defense team could have called the author as a hostile witness under Mil. R. Evid. 806. *See United States v. Marshall*, 31 M.J. 712, 714

(A.F.C.M.R. 1990), *aff'd*, 37 M.J. 260 (C.M.A. 1993). However, trial defense counsel elected to focus on more fruitful areas of inquiry instead.[1]

The 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

[1] We see no deficiency in this tactical decision. The author's explanation of the purported misconduct would no doubt have been more comprehensive – and therefore less helpful to the defense – than anything Dr. Papa could offer.