

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class PRESTIN E. LONG
United States Air Force

ACM 36683

29 October 2007

Sentence adjudged 24 January 2006 by GCM convened at Incirlik Air Base, Turkey. Military Judge: Adam Oler.

Approved sentence: Bad-conduct discharge, confinement for 3 months, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Karen L. Hecker, and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, Major Matthew S. Ward, and Captain Jamie L. Mendelson.

Before

SCHOLZ, JACOBSON, and THOMPSON
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

Contrary to his pleas, the appellant was found guilty by a general court-martial composed of officer and enlisted members of making false official statements and impeding an investigation, in violation of Articles 107 and 134, UCMJ, 10 U.S.C. §§ 907, 934. Those same members found him not guilty of larceny and of two additional specifications of making a false statement. The military judge found the appellant not guilty of absence without leave pursuant to a motion under Rule for Courts-Martial (R.C.M.) 917. The members sentenced the appellant to a bad-conduct discharge, confinement for 3 months, reduction to the grade of E-1 and a reprimand.

On appeal the appellant asserts he was denied a fair trial when the military judge did not grant a mistrial after a prosecution witness commented on the appellant's assertion of his right to counsel.¹

Background

The facts surrounding the denial of the request for mistrial are undisputed. During its case-in-chief, the prosecution called Senior Master Sergeant (SMSgt) L, the appellant's first sergeant. The trial counsel asked SMSgt L if the appellant had approached him to give him documents related to the case. SMSgt L responded by saying the appellant had approached him and began talking about his case. SMSgt L related to the members that he told the appellant, "You cannot talk to me about this, you have asked for a lawyer, you need to talk to your lawyer about it." At that point the trial defense counsel objected and asked for session under Article 39(a), UCMJ, 10 U.S.C. § 839(a). After the members were excused, the trial defense counsel asked for a mistrial pursuant to R.C.M. 915. The trial counsel suggested that the matter could be cured by an instruction.

The military judge called the members back into the courtroom and instructed them that the statement by the witness was inappropriate and that the appellant had a constitutional right to counsel. The military judge instructed the members that they should not, under any circumstances, consider the fact that the appellant consulted with a defense counsel. He further told them the fact that the accused consulted counsel had absolutely nothing to do with the court-martial, and that any consideration of that would violate the appellant's rights and be improper.

The military judge asked the members if they understood that it would be improper for them to consider that the appellant consulted with a defense counsel, and the members answered affirmatively. He then asked them if they could fully disregard the comment in its entirety, and again the members answered in the affirmative. At that point the members were again excused and another session pursuant to Article 39(a), UCMJ, was called to order. Neither party objected to the military judge's instruction. The trial defense counsel did not request any additional instructions and turned down the opportunity to individually question the court members, but did maintain his request for a mistrial. The military judge declined to grant the motion for a mistrial, noting that the members were adamant in their ability to follow his instructions. He also terminated the trial counsel's questioning of SMSgt L. There was no other mention of the appellant's assertion of his rights during the remainder of the trial.

¹ Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Analysis

We review a military judge's denial of a motion for a mistrial for an abuse of discretion. *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003). Our superior court has recognized that a mistrial is an unusual and disfavored remedy and should be applied only as a last resort to protect the guarantee for a fair trial. *Id.*; see also *United States v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993). In many cases a military judge can avoid having to declare a mistrial by giving curative instructions and ensuring that the court members understand the instructions. *United States v. Evans*, 27 M.J. 34, 39 (C.M.A. 1988). Whether the court members were properly instructed is reviewed *de novo*. *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002).

We find that the military judge properly instructed the members in this case, and that the instructions were sufficient to avoid any prejudice to the appellant. The comment by SMSgt L was brief, isolated, not exploited by the trial counsel, and immediately addressed by the military judge. We also note that the members acquitted the appellant of three of the seven specifications against the appellant. This further supports a finding that the members were able to disregard the improper comment, and that the appellant was not prejudiced. We find the improper comment was harmless beyond a reasonable doubt. See *United States v. Sidwell*, 51 M.J. 262 (C.A.A.F. 1999).

The military judge did not abuse his discretion in denying a mistrial, and we find that under the entire circumstances of this case the appellant received a fair trial.

Conclusion

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 findings and sentence are

AFFIRMED.

OFFICIAL



STEVEN LUCAS, GS-11, DAF
Clerk of the Court