UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

First Lieutenant DOUGLAS E. LONG
United States Air Force

ACM 37044 (rem)

30 March 2011

Sentence adjudged 02 May 2007 by GCM convened at Robins Air Force Base, Georgia. Military Judge: Gary M. Jackson (sitting alone).

Approved sentence: Dismissal and confinement for 77 days.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford, Major Shannon A. Bennett, Major Darrin K. Johns, Major Tiffany M. Wagner, and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen, Colonel Douglas P. Cordova, Lieutenant Colonel Matthew S. Ward, Lieutenant Colonel Jeremy S. Weber, Major Brendon K. Tukey, Captain Jason M. Kellhofer, Captain Joseph Kubler, Captain G. Matt Osborn, and Gerald R. Bruce, Esquire.

Before

BRAND, ORR, and GREGORY
Appellate Military Judges

UPON REMAND

PER CURIAM:

Contrary to his pleas, the appellant was found guilty by a military judge sitting alone of one specification of assault consummated by a battery and one specification of indecent acts with a child under 16 years of age, in violation of Articles 128 and 134,

UCMJ, 10 U.S.C. §§ 928, 934. The approved sentence consists of a dismissal and 77 days of confinement.[1]

This case is before our Court for the second time. In *United States v. Long*, ACM 37044 (A.F. Ct. Crim. App. 18 December 2009) (unpub. op.), *rev'd*, 69 M.J. 168 (C.A.A.F. 2010) (mem.), we affirmed the findings and sentence. However, on 20 May 2010, the Court of Appeals for the Armed Forces set aside our decision and returned the case to The Judge Advocate General for remand to the convening authority to order a factfinding hearing, pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), on the issue of de facto immunity. *Long*, 69 M.J. at 168. The hearing was conducted on 10 July 2010, and the military judge made extensive findings of fact and conclusions of law.

De Facto Immunity

The appellant asserts that he pled nolo contendere in the state court as a result of assurances given to him by the base legal office that, if he took the plea agreement, he would receive an administrative discharge rather than being court-martialed. The appellant asserts that he would not have pled nolo contendere at his civilian trial if he had known he was going to be court-martialed. The appellant relies on a conversation that his detailed Area Defense Counsel, Captain (Capt) RA, had with Capt MC, the base chief of military justice, wherein Capt MC advised that, once the appellant was convicted in civilian court, the military intended to pursue an administrative discharge. The appellant did not raise this issue at trial.

The government's position is that Capt MC did not have the authority or manifest to Capt RA an apparent authority to grant immunity. As Capt MC stated in his post-trial declaration, he advised Capt RA that his office planned to recommend to the convening authority an administrative discharge of the appellant after his civilian conviction. Capt MC did not imply or promise Capt RA that a discharge was certain.

During appellate review of the *DuBay* proceeding, the court may exercise its fact-finding power pursuant to Article 66, UCMJ, 10 U.S.C. § 866, and decide the legal issue. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). The military judge made extensive findings of fact which are supported by the record and we adopt them as our own. Based upon those findings, the military judge concluded that the appellant was not denied due process and he was not provided de facto immunity. We agree and reach the same conclusion.

[1] The military judge awarded the appellant with 77 days of pretrial confinement credit for a closely related charge in civilian court.

Under Rule for Courts-Martial (R.C.M.) 704(c), only a general court-martial convening authority may grant immunity and that authority may not be delegated. However, R.C.M. 704 recognizes in its discussion section other circumstances where de facto immunity may be granted. Specifically, this section states:

> Only general court-martial convening authorities are authorized to grant immunity. However, in some circumstances, when a person testifies or makes statements pursuant to a promise of immunity, or a similar promise, by a person with apparent authority to make it, such testimony or statements and evidence derived from them may be inadmissible in a later trial. Under some circumstances a promise of immunity by someone other than a general court-martial convening authority may bar prosecution altogether.

R.C.M. 704(c), Discussion.

> A *de facto* grant of immunity arises when there is an after-the-fact determination based on a promise by a person with apparent authority to make it that the individual will not be prosecuted. *De facto* immunity, commonly called "equitable immunity," triggers the remedial action of the exclusionary rule and permits enforcement of the agreement.

United States v. Jones, 52 M.J. 60, 65 (C.A.A.F. 1999) (citations omitted).

Courts have found situations where de facto immunity has occurred. *See*, *e.g.*, *United States v. Kimble*, 33 M.J. 284 (C.M.A. 1991) (promise by special court-martial convening authority was de facto immunity); *Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982) (promise by general court-martial convening authority's staff judge advocate amounted to immunity); *United States v. Spence*, 29 M.J. 630 (A.F.C.M.R. 1989) (finding de facto immunity when Air Force officials expressly and implicitly promised the appellant for eight months that he would be placed in therapy and not prosecuted).

Capt MC never conveyed to Capt RA that he had any authority to grant immunity; he merely posited that the legal office was going to wait to see the outcome of the civilian criminal case before moving on with the appellant's case. Capt MC did not tell Capt RA that the appellant had immunity nor did he say that he had discussed immunity with the staff judge advocate. Additionally, Capt RA never told the appellant, or anyone else, that the appellant had immunity. Even the appellant admitted he was never told there was a promise that he would not be prosecuted by the military. The appellant was not granted de facto immunity.

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 findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court