UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JACOB L. SCOTT
United States Air Force

ACM S31838

13 December 2011

Sentence adjudged 14 May 2010 by SPCM convened at McConnell Air Force Base, Kansas. Military Judge: Joe W. Moore.

Approved sentence: Bad-conduct discharge, confinement for 190 days, forfeiture of $964.00 pay per month for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; and Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Joseph Kubler; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

GREGORY, Senior Judge:

A special court-martial composed of officer members convicted the appellant contrary to his pleas of one specification alleging multiple uses of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, and sentenced him to a bad-conduct discharge, confinement for 190 days, forfeiture of $964.00 pay per month for 6 months, and reduction to the grade of E-1. The convening authority approved the sentence adjudged. The appellant argues that a court member failed to disclose bias toward a Government sentencing witness and thereby deprived him of the impartial panel required for a fair trial.

Lieutenant Colonel (Lt Col) M was one of ten officers detailed to the special court-martial panel convened to try the appellant. During voir dire, trial defense counsel questioned Lt Col M about his professional relationship with Major (Maj) H, a fellow squadron commander and potential sentencing witness:

> Q. Sir, just to follow-up on that one question. How do you know Maj [H]?
>
> A. Maj [H] was the acting squadron commander for the LRS. Every Tuesday we have a wing stand up and he sits two seats down from me in the stand up. The LRS is similar to the Operation Support Squadron, which I command, in that a lot of our operations kind of overlap. Munitions, guns, those types of things. Chemical defense type stuff for the aircrew. So, anytime there was an issue that comes up, he and I would get together to discuss it at commander level, since Colonel [D] was gone.
>
> Q. So you know him on a professional level then?
>
> A. Professional, yes.
>
> Q. Do you know him on a social level as well?
>
> A. We're both members of the Airlift Tanker Association. He's the president of the Airlift Tanker Association. So, at the convention, those type things. But nothing that we go out together as a couple or anything.
>
> Q. And at least don't go out and all that kind of stuff?
>
> A. Right.

Trial counsel followed up with a few questions:

> Q. Do you feel that your relationship with Maj [H] will in any way affect the weight you give to his testimony?
>
> A. No.
>
> Q. Do you feel that you'll consider his testimony at equal weight to everyone else's testimony?
>
> A. Yes.

Counsel did not challenge Lt Col M, and he became the court president. Maj H provided relatively brief sentencing testimony about the general impact of the appellant's drug abuse on the unit's mission, manning, and morale, and agreed with defense counsel

during cross-examination that negative unit impacts are not unique to the appellant, but apply anytime someone loses access to secure areas such as the flight line.

Based on a post-trial comparison of Lt Col M's responses with his responses in a case tried about a month earlier with a different defense counsel and military judge, the appellant asserts that Lt Col M was "deceptive" in his responses and "minimized" his familiarity with Maj H. In the prior case, *United States v. Hutcheson*, *aff'd*, ACM S31814 (A.F. Ct. Crim. App. 7 July 2011) (unpub. op.), trial defense counsel engaged in much more extensive questioning of Lt Col M concerning his relationship with Maj H, then Captain (Capt) H, and the military judge granted an implied bias challenge against him based on both his association with Maj H and his interactions with the base legal office on a pending nonjudicial punishment action for drug abuse. In a Motion to Attach Documents, the appellant submitted select pages from the prior trial to document Lt Col M's responses, and, in support of his accusation that Lt Col M was deceptive, the appellant quotes Lt Col M as saying that he would be "more likely to believe what [Capt H] states because of his interaction with him, knowing his caliber, his integrity." *Hutcheson*, at 100. The appellant, however, omits the remainder of the response: "Not anymore than any other person, just with the fact—I know of him and his—what he does—his job, what he does for a living, he's in the same circumstances that I am as a commander." *Id*.

Even more important to the issue is the follow-up with Lt Col M contained on page 111 of the *Hutcheson* record of trial, a page omitted from the appellant's motion[1] but provided by Government counsel in their Motion to Submit Documents:

> DC: Yes, sir. But as sure as you—without making an absolute, being as sure as you possibly can be, would you give [Capt H's] testimony any greater weight than that of a Senior Airman or that of a civilian?
>
> [Lt Col M]: As long as both are telling the truth, I wouldn't give any different weight to one particular person's testimony than the others.
>
> DC: But would you believe [Capt H] more than somebody else because of your frequency of interactions with him and because of your feeling that he does have such high level of integrity?
>
> [Lt Col M]: Again, it would depend on what the question was, what the answer was—as far as his answer goes, I would have no reason to discount either Senior Airman or [Capt H's] question or answer based on the fact each one of us is sworn to the integrity, one of our core values. So,

[1] The appellant submitted pages 98-106, 108-110, 112-119, and 142-148.

> regardless, I would take everybody's information into account in making my decision in this case.

The appellant argues that the responses of Lt Col M in the *Hutcheson* case show that his responses in the appellant's case were "deceptive."

To trigger a post-trial evidentiary hearing regarding court member misconduct, an appellant must make a "colorable claim" of court member dishonesty concerning a material matter that would have provided a valid basis for challenge if answered correctly. *United States v. Sonego*, 61 M.J. 1, 3-4 (C.A.A.F. 2005) (citing *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984)). In *Sonego*, a court member answered that he was not predisposed to a particular punishment based on the charged drug offense, but, according to an affidavit submitted by the appellant's trial defense counsel, that same court member stated in a court-martial held about a month later that anyone convicted of a drug offense should receive a bad-conduct discharge.[2] The Court found that the affidavit constituted a colorable showing that the member had provided conflicting answers on a material matter and returned the case for an evidentiary hearing into whether the *McDonough* test for a new trial based on juror non-disclosure had been met.

Having considered the record of Lt Col M's responses concerning Maj H in both the appellant's court-martial and in the earlier *Hutcheson* trial, we find neither conflict nor dishonesty in his answers. In both cases, Lt Col M disclosed his professional relationship with Maj H, and in both cases he ultimately stated that he would not give his testimony more weight than any other witness based on that relationship. The inquiry in the appellant's case was obviously more to the point, but in both cases the inquiry reached the *same* point: in the appellant's case Lt Col M agreed that he would "consider [Maj H's] testimony at equal weight to everyone else's testimony"; in the prior case, he stated that "[a]s long as both are telling the truth, I wouldn't give any different weight to one particular person's testimony than the others." The appellant has failed to make a colorable showing of court member dishonesty, and no evidentiary hearing is required.

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).

[2] No transcript of the member's answers in the later proceeding was available because the trial resulted in an acquittal.

Accordingly, the findings and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court