UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, **Appellant** **v.** **Technical Sergeant (E-6)** **SAMUEL A. WICKS,** **USAF,** **Appellee**	)))))))))	**Misc. Dkt. No. 2013-08** **ORDER** **Special Panel**

Pursuant to Rule 21 of this Court's Rules of Practice and Procedure, an Appeal Under Article 62, UCMJ, 10 U.S.C. § 862, was filed with this Court by counsel for the United States on the 13th day of March, 2013.

Background

The appellee is charged with: violating a lawful general regulation by wrongfully attempting to develop and conduct personal and/or sexual relationships with three female airmen while they were trainees and he was a military training instructor (MTI) at Lackland Air Force Base between 2010 and 2011; engaging in indecent conduct with one of those trainees by sending her a sexually explicit video-recording; and obstructing justice by telling one of the trainees to lie to investigators about her personal contact with the appellee.

At a pretrial session, the military judge suppressed all evidence found during an analysis of the appellee's cellular phone as well as all derivative evidence. The military judge further held the Government had failed to satisfy its burden of showing that the evidence would have been inevitably discovered. After the military judge denied a Government request for reconsideration, the Government appealed the military judge's ruling pursuant to Article 62, UCMJ.

Jurisdiction and Standard of Review

"Prosecution appeals are disfavored and are permitted only upon specific statutory authorization." *United States v. Bradford*, 68 M.J. 371, 372 (C.A.A.F. 2010) (citing *United States v. Wuterich*, 67 M.J. 63, 70 (C.A.A.F. 2008)). The statute at issue in the present appeal authorizes the Government to appeal "[a]n order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding," in a court-martial

where a punitive discharge may be adjudged. Article 62(a)(1)(B), UCMJ; Rule for Courts-Martial (R.C.M.) 908(a) and (b).

We review a military judge's ruling on a motion to exclude evidence for an abuse of discretion. *Wuterich*, 67 M.J. at 77 (citation omitted). We review findings of fact under the clearly erroneous standard and conclusions of law de novo. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). In contrast to our powers of review under Article 66(c), UCMJ, 10 U.S.C. § 866, in ruling on Government appeals under Article 62, UCMJ, this Court "may act only with respect to matters of law." Article 62(b), UCMJ; R.C.M. 908(c)(2). We cannot find our own facts in addition to or contrary to the facts found by the military judge, nor can we substitute our interpretation of his facts. *United States v. Baker*, 70 M.J. 283, 287 (C.A.A.F. 2011); *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007); *United States v. Pacheo*, 36 M.J. 530, 533 (A.F.C.M.R. 1992); *United States v. Terry*, 66 M.J. 514, 517 (A.F. Ct. Crim. App. 2008). When reviewing a ruling on a motion to exclude evidence, "'we consider the evidence in the light most favorable to the prevailing party.'" *Id.* at 288 (quoting *United States v. Cowgill*, 68 M.J. 388, 390 (C.A.A.F. 2011) (quoting *United States v. Reister*, 44 M.J. 409, 415 (C.A.A.F. 1996))).

Facts

The appellee was a military training instructor (MTI) at Joint Base Lackland, Texas, whose duties included instructing new recruits during basic training. At one point, he developed a personal relationship with TSgt Roberts, a fellow MTI at Lackland. In November of 2010, while the two were at the appellee's house, TSgt Roberts began to look at text messages on the appellee's smart phone (phone) while he was asleep. The military judge did not make findings of fact about what TSgt Roberts specifically observed during that viewing. By early December 2010, TSgt Roberts and the appellee were no longer involved in a personal relationship.

In May 2011, the appellee left his phone on a desk in his duty station. Unbeknownst to the appellee, TSgt Roberts took the phone and looked at several text messages that suggested he had been in contact with former female trainees. She also saw pictures of several women who she recognized as prior trainees in the squadron, as well as a video recording of a male (who she believed to be the appellee) masturbating. TSgt Roberts kept the phone at her home and lied to the appellee when he asked if she knew where it was.

Approximately three weeks later, TSgt Roberts confronted the appellee about the information she had seen on his phone. He acknowledged sending the text messages and told TSgt Roberts to "get out of his face." The two parted company without any discussion about the whereabouts of the phone.

In the May-June 2011 time frame, the appellee contacted SrA LB and told her a co-worker had taken his phone and there might be an investigation. The appellee was SrA LB's MTI during basic training between December 2010 and February 2011 and the two had stayed in contact until April 2011. He told her not to worry and, if asked, to say she and the appellee had no contact after she graduated from basic training. Her impression was that the appellee was a little worried when he talked to her and was encouraging her not to say anything.[1]

In January 2012, Detective AR, a Security Forces investigator, contacted TSgt Roberts concerning an ongoing investigation into MTI misconduct at Lackland. At the time of this meeting, the appellee was not suspected of wrongdoing. During the interview, TSgt Roberts told the detective that she had seen text messages on the appellee's phone that she believed was evidence of misconduct. TSgt Roberts told Detective AR that she had downloaded the contents of the appellee's phone onto her iTunes account while he was asleep. She also provided Detective AR with the last names of two prior trainees (SrA LB and A1C SW).[2] During the interview, TSgt Roberts told Detective AR that she had confronted the appellee about the information she discovered on the phone and that the appellee acknowledged having sent the text messages.

The next day, TSgt Roberts gave Detective AR the SIM card from the appellee's phone, but did not inform her of how she obtained the card. Although Detective AR did not know TSgt Roberts had stolen the phone and SIM card, she believed that the data belonged to the appellee and had been taken from him without his consent or knowledge. Detective AR spoke to the base legal office, but did not request a search authorization to review the contents of the phone. The SIM card was subsequently analyzed but no information was found.

On 17 January 2012, TSgt Roberts brought the appellee's phone to Detective AR. TSgt Roberts lied to the detective, saying it belonged to a third person. After TSgt Roberts left, Detective AR turned on the cell phone and reviewed an indeterminate number of text messages. When she did the search, Detective AR was unaware of specifically what text messages TSgt Roberts had previously seen.

The military judge found that Detective AR "did not mirror the actions" taken by TSgt Roberts and instead engaged in a "general search" of the phone. The detective testified that there were so many texts in the phone that she reviewed and scrolled through them until something caught her attention. She did not make copies of the messages she reviewed nor take notes about what she saw as she anticipated a full analysis and extraction of the phone would be conducted. During this initial review, Detective AR recalled seeing a text referencing an airman's name (Amn KS) and,

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[1] Charges were referred, alleging the appellee had an improper relationship with SrA LB and also obstructed justice through this communication.

[2] Although charges were preferred involving A1C SW, they were not referred to trial.

through a review of flight rosters, determined the appellee had been the MTI for an airman by that name. She also saw a picture of a female airman dressed partially in a military uniform.[3]

Based on this review, Detective AR was able to corroborate some of the information provided by TSgt Roberts. She again spoke with the legal office for guidance and was told to get the information from the phone. There appears to have been no discussion concerning a need to obtain a search authorization before analyzing the phone's contents. The phone was sent to the Bexar County Sherriff's Office for forensic analysis. After reviewing the results, Detective AR realized the appellee was the only person whose information was on the phone (up to this point, TSgt Roberts had maintained that the phone belonged to someone other than the appellee).

On 28 March 2012, the phone was shipped to a commercial company for examination. An analyst searched the 45,000 text messages on the phone for texts involving three particular phone numbers and created a report. The information in his report reflected texts that would have been viewable by both TSgt Roberts and Detective AR and a small number that would not have been accessible as they were "deleted" items.[4]

Based on information contained within the texts, Detective AR spoke with Amn KS who said that SrA LB and the appellee had been involved in some type of personal relationship. In March 2012, Detective AR interviewed SrA LB in person. Detective AR brought the texts to the interview but did not show them to SrA LB. Rather, the detective referred to the text messages and SrA LB confirmed the information contained in the messages. SrA LB's perspective was that the investigators already had all the information and only sought her confirmation of the matters. Prior to that time, SrA LB had not reported any interactions with the appellee.

Military Judge's Conclusions of Law

The military judge concluded that TSgt Roberts was acting in her private capacity when she searched the appellee's phone in November 2010 and in seizing and searching the phone in May 2011. Accordingly, the military judge concluded TSgt Roberts' actions did not violate the appellee's Fourth Amendment[5] rights, citing to *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (holding the Fourth Amendment is "wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private

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[3] Detective AR testified that, in the absence of any other information, once she became aware of the names of the three women (two of which were provided to her by TSgt Roberts based on her review of the phone and one of which she learned through her own review of the phone), her normal course of business would be to either call the women or send them a questionnaire asking about their knowledge of MTI misconduct. Based on their responses, Detective AR would have then decided whether to interview the women in person.

[4] These phone numbers belonged to SrA LB (whose name had originally been provided to Detective AR by TSgt Roberts in her 10 January 2012 interview), and two other female airmen, AIC LR and SrA KR.

[5] U.S. CONST. amend. IV.

individual not acting as an agent of the Government or with the participation or knowledge of any governmental official'" (citations omitted)).

However, relying on *Jacobsen* and *Walter v. United States*, 447 U.S. 649 (1980), the military judge held, that "to the extent [the detective] exceeded the scope of TSgt Roberts's review," it was in violation of the Fourth Amendment as she was permitted under the law to "go only as far as th[at] private search." The military judge considered the "scope" of TSgt Roberts's review to be limited to only the items she actually observed, and it was unlawful for the detective to inspect other text messages without a search authorization. Because the Government was unable to show with sufficient specificity which text messages TSgt Roberts saw when she went through the phone, all evidence recovered by Detective AR from the appellee's phone as well as any evidence derived from those texts (to include the information relating to SrA LB) was obtained in violation of the Fourth Amendment.[6]

The military judge also concluded the Government had not met its burden of showing that the information on the phone would have been inevitably discovered, given Detective AR's lack of effort to secure a warrant or to even explore the possible ramifications of searching a stolen phone known to contain the appellee's personal information.

Private and Government Search

Warrantless searches and seizures are presumptively unreasonable. *See*, *e.g.*, *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986) (warrantless searches presumptively unreasonable); *United States v. Daniels*, 60 M.J. 69, 71–72 (C.A.A.F. 2004) (citing *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967)). Mil. R. Evid. 311(a) provides that evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused upon timely objection. The prosecution has the burden of establishing the admissibility of the evidence by a preponderance of the evidence. Mil. R. Evid. 311(e)(1). Derivative evidence obtained from the search may be admitted only if the military judge finds by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure, that the evidence ultimately would have been obtained by lawful means even if the unlawful search or seizure had not been made, or that the evidence was obtained with good faith reliance on the issuance of an authorization to search or seize. Mil. R. Evid. 311(e)(2).

Having reviewed the record, we find the military judge's findings of fact "are well within the range of the evidence permitted under the clearly-erroneous standard." *United*

[6] We agree with the military judge's finding that the appellee did not abandon his expectation of privacy simply because he did not file a police report after discovering the phone was stolen.

States v. Norris, 55 M.J. 209, 215 (C.A.A.F. 2001). We review his conclusions of law de novo. *United States v. Ayala*, 43 M.J. 296 (C.A.A.F. 1995).

We agree with the military judge's conclusion that TSgt Roberts's private searches of the appellee's phone do not implicate the Fourth Amendment, no matter how unreasonably she acted. *Jacobsen*, 466 U.S. at 113; *Walter*, 447 U.S. 649; *Reister*, 44 M.J. at 415-16; *United States v. Portt*, 21 M.J. 333, 334 (C.M.A. 1986) (where airman opened locker in private capacity and summoned law enforcement after finding evidence of drug use, "subsequent opening of the locker was simply a continuation of that entry"). Accordingly, we conclude that the exclusionary rule was not triggered by any private invasion of appellee's privacy.

Detective AR could view and the Government could take possession of the texts, photograph, and video-recording seen by TSgt Roberts without implicating Fourth Amendment concerns. *Burdeau v. McDowell*, 256 U.S. 465, 475-76 (1921) (Government may retain for use against owner incriminating documents which were stolen by private individuals, without governmental knowledge or complicity, and turned over to the Government).

However, we disagree with his conclusion that Detective AR's review of the text messages was limited to the precise messages seen by TSgt Roberts. When, as here, law enforcement personnel take possession of evidence from a third party following a private search, the Government's subsequent actions are examined and tested under the Fourth Amendment. *Jacobsen*, 466 U.S. at 115 ("additional invasions of [the owner's] privacy . . . must be tested by the degree to which they exceeded the scope of the private search"). The key question is whether law enforcement officials are limited to only examining files inspected by the private party (as the military judge found) or whether all readily observable data on the electronic device is within the scope of the initial private search and thus can be obtained by law enforcement.

We are unaware of any military cases addressing this specific question, but we adopt the reasoning and conclusion of the Fifth Circuit in an analogous case to find Detective AR did not exceed the scope of TSgt Roberts's private search. In *United States v. Runyan*, 275 F.3d 449 (5th Cir. 2001), Runyan's wife found several computer disks belonging to her husband. After viewing some of the disks and finding child pornography, she turned all the disks over to law enforcement. Detectives examined not only the files the wife had observed, but also examined the contents of all the seized evidence, to include disks the wife had not searched. During the search, additional child pornography was located on the disks that the wife saw.

The court likened a computer disk to a closed container and held that "[i]n the context of a closed container search . . . the police do not exceed the private search when they examine more items within a closed container than did the private searchers." *Id*. at

464. Applying the Eleventh Circuit's analysis in *United States v. Simpson,* 904 F.2d 607, 610 (11th Cir.1990), the court stated that "[i]n the context of a search involving a number of closed containers, this suggests that opening a container that was not opened by private searchers would not necessarily be problematic if the police knew with substantial certainty, based on the statements of the private searchers, their replication of the private search, and their expertise, what they would find inside. Such an 'expansion' of the private search provides the police with no additional knowledge that they did not already obtain from the underlying private search and frustrates no expectation of privacy that has not already been frustrated." *Id.* at 463. The court concluded that "a defendant's expectation of privacy with respect to a container unopened by the private searchers is preserved unless the defendant's expectation of privacy in the contents of the container has already been frustrated because the contents were rendered obvious by the private search." *Id.* at 463-64. Thus, the police do not engage in a new search for Fourth Amendment purposes each time they examine a particular item found within the container. *Id.* at 465.

We find the Fifth Circuit's reasoning to be persuasive and conclude the military judge incorrectly interpreted the law when he held that Detective AR's search had to exactly mirror TSgt Roberts's search in order to be lawful. We read the Supreme Court precedent to be more concerned with the scope of the private party's search and the corresponding frustration of the appellee's right to privacy rather than creating an uncompromising rule based only on examining the Government's success in precisely replicating the physical intrusion already perpetrated by the private party.

Detective AR's viewing of the appellee's phone is analogous to examination of the computer disks in *Runyan*. Before TSgt Roberts took the phone, the phone and its contents were akin to a "closed container" in which the appellee maintained a privacy interest. However, once TSgt Roberts breached the container by looking at the messages, the appellee's expectation of privacy with respect to all of the text messages (with the exception of the deleted texts) was frustrated. This fact is borne out by the appellee's own action in calling SrA LB and telling her that there might be an investigation as a result of the text messages.

Given that, Detective AR did not violate the Fourth Amendment when she viewed different text messages located on the phone. Detective AR's search was no different in character than the one conducted by TSgt Roberts, even though the individual text messages that were opened by the former may have been different.[7]

[7] Our ruling is with respect only to the text messages maintained on the phone and that would have been available to both TSgt Roberts and Detective AR via a typical search consisting of opening the message. We find the appellee did not forfeit his expectation of privacy to content on the phone that was not included in the text messages (i.e. e-mails) or to deleted text messages that required additional software to examine. *See generally United States v. Walter*, 447 U.S. 649 (1980) (use of a film projector to view seized film was outside the scope of the private party's initial search).

To conclude otherwise would find a constitutional violation whenever law enforcement happens to see an item that the private searcher did not see and "would over-deter the police, preventing them from engaging in lawful investigation of containers where any reasonable expectation of privacy has already been eroded." *Runyan*, 275 F.3d at 465. It would also lead law enforcement to "waste valuable time and resources obtaining warrants based on intentionally false or mistaken testimony of private searches," instead of confirming the validity of the private searcher's claim prior to initiating that process. *Id.*

Similarly, the extraction of the text messages relating to the three women by the Sheriff's Office and the commercial company was not an unconstitutional expansion on the original private search. Each non-deleted text extracted by those entities was viewable by TSgt Roberts when she conducted her private search, and therefore the appellee's expectation of privacy in the texts was frustrated. Although the better practice would have been for Detective AR to seek a search warrant prior to having those text messages extracted, we do not find the extraction to have been unconstitutional.

Conclusion

We find that Detective AR's search of the phone did not exceed the private party's search in any manner that rendered it unconstitutional. The Fourth Amendment did not require Detective AR's search and the evidence derived from it to be suppressed, and the judge's ruling to the contrary was error.

On consideration of the Appeal by the United States under Article 62, UCMJ, it is by the Court on this 24th day of June, 2013,

ORDERED:

That the United States' Appeal Under Article 62, UCMJ, is hereby **GRANTED**. The ruling of the military judge is vacated and the record is remanded for further proceedings.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court