UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JOHN HENRY CUSTIS
United States Air Force

ACM S30875

31 October 2006

Sentence adjudged 7 January 2005 by SPCM convened at Minot Air Force Base, North Dakota. Military Judge: Kirk R. Granier.

Approved sentence: Bad-conduct discharge, confinement for 30 days, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Kimberly A. Quedensley.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Lieutenant Colonel Michael E. Savage.

Before

ORR, MATHEWS, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MATHEWS, Judge:

The appellant stands convicted, contrary to his pleas, of one specification each of conspiracy, operating a motor vehicle while registering .08 breath alcohol content, solicitation, disorderly conduct, and obstruction of justice, in violation of Articles 81, 111, and 134, UCMJ, 10 U.S.C. §§ 881, 911, 934. His approved sentence consists of a bad-conduct discharge, confinement for 30 days, and reduction to the grade of E-1. On appeal, he contends, inter alia, that the military judge erred by permitting the appellant's wife to testify about conversations she

had with the appellant, and that the addendum to the staff judge advocate's recommendation (SJAR) contains new matters and therefore should have been served on him for comment. We find no error and affirm.

Spousal Communications

The appellant was apprehended on suspicion of driving under the influence of alcohol (DUI) on Saturday, 24 April 2004. He provided a blood sample at the base hospital; in the ordinary course of events, that sample would have been tested the following Monday to determine its alcohol content. As it so happened, the appellant's wife worked at the hospital and was the on-call medical technician responsible for collecting blood samples that day. Because of her duties, she also was one of a small number of people who had access to the locked container where blood samples, like the appellant's, were stored prior to testing.

After the appellant provided his blood sample, he and his wife decided to draw a second sample and substitute it for the original. Following through on this plan, the appellant's wife obtained the necessary syringes from the base hospital, drew the second sample, swapped it for the first, and returned the first sample to the appellant. Later, the appellant confided in one of his coworkers, Airman First Class (A1C) B, that he had been apprehended for DUI, but that he was unconcerned because his wife "had his back." In fact, the second sample tested negative for the presence of any alcohol. Surprised at the test result, base law enforcement officials questioned the appellant's wife, who confessed to swapping the samples.

The appellant's wife appeared at trial and testified, over defense objection, about her conversation with the appellant; that the appellant cooperated in the drawing of the second sample; and that he took the first sample from her when she brought it home from the hospital. She also testified that the appellant "smelled of alcohol" and appeared to be intoxicated when she drew the first blood sample. The military judge, relying primarily on this Court's ruling in *United States v. Smith*, 30 M.J. 1022 (A.F.C.M.R. 1990), *aff'd on other grounds*, 33 M.J. 114 (C.M.A. 1991), concluded that the appellant's communications with his wife were not entitled to the spousal communication privilege of Mil. R. Evid. 504, because the communications were "intended to perpetuate a fraud on the court or the criminal proceeding" and thus fell within a common-law exception to the privilege. The appellant contends this ruling was in error, and that without his wife's testimony, he could not have been convicted of conspiracy, solicitation, or obstruction of justice.

We disagree. The military judge properly followed the law established by this Court in *Smith.* Moreover, even if we concluded the conversations were

privileged under Mil R. Evid. 504, the appellant would be no better off. His wife was still free to testify as she did about her observations and the conduct in which she and the appellant engaged. Her observations included the odor of alcohol emanating from the appellant's person and his apparent state of intoxication; the conduct included the appellant's cooperation in the drawing of a second sample and his acceptance of the purloined first sample. We find the evidence sufficient, even absent any mention of the conversations between the appellant and his wife, for a reasonable trier of fact to conclude that they conspired to impede, and did impede, investigation of the appellant's DUI.[1] Because it was the appellant who was at risk for punishment for driving under the influence, and the appellant who wound up in possession of the incriminating first sample, the members could also have reasonably concluded that he was the person who solicited this obstruction of justice. The appellant's comments to A1C B to the effect that he had nothing to fear from his drunk driving apprehension because his wife would protect him, are further evidence of his guilt.[2]

SJAR Addendum

The appellant next contends that the following passage from the addendum to the SJAR amounts to a "new matter" requiring service in accordance with Rule for Courts-Martial (R.C.M.) 1106(f)(7): "To not give AB Custis a bad-conduct discharge elevates his service to the level of Airmen who *have* served honorably, as well as giving him all the benefits that are meant to be a reward for honorable service." (emphasis in original). According to the appellant, this statement erroneously "implies that either the convening authority approve the bad conduct discharge or else the appellant may be retained and his service would be characterized as honorable. . . . [which] would not be fair to other airmen."

We consider the appellant's "new matter" claim de novo. *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997). Taken in context, the cited language represents nothing more than the staff judge advocate's (SJA) observations about the appellant's clemency request. The appellant, when asking the convening authority not to approve the bad-conduct discharge awarded at trial, pointed out that he had less than two months remaining on his term of enlistment and suggested that remitting the discharge would help him find a good job and allow him to keep his benefits under the GI Bill. Letters included by the appellant in his clemency package carried on these themes, variously asking the convening

[1] A conspiracy may be proven by conduct, even in the absence of any exchange of words. *Manual for Courts-Martial, United States (MCM),* Part IV, ¶ 5c(2) (2005 ed.). The 2002 edition of the *MCM*, in effect at the time of the appellant's offenses, contained identical provisions.

[2] Indeed, the appellant's comments to A1C B reveal "a significant part of the matter" discussed by the appellant and his wife – that she would take some action that would prevent his prosecution for drunk driving – and effectively waived any claim of privilege. *See United States v. McElhaney*, 54 M.J. 120, 132 (C.A.A.F. 2000).

authority to allow the appellant to "finish out his current enlistment," to permit the appellant to "be discharged honorably," or to "grant" the appellant an honorable discharge so that he could be "professionally and personally," "productive."

We find that the SJA's discussion of these comments from the clemency package was not a "new matter." *See United States v. Key,* 57 M.J. 246, 248-49 (C.A.A.F. 2002). *See also*, R.C.M. 1106(f)(7), Discussion. Assessing the appellant's ancillary complaint concerning the addendum – that the staff judge advocate failed to address the legal issues raised in the appellant's R.C.M. 1105 submission – we find the appellant was not prejudiced. *United States v. Hill,* 27 M.J. 293, 297 (C.M.A. 1988).

Remaining Issues

We have considered the remaining issues raised by the appellant and find them to be without merit. *See United States v. Booker,* 62 M.J. 703, 706 (A.F. Ct. Crim. App. 2006); *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

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

JEFFREY L. NESTER
Clerk of Court