UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JESSICA E. MCFADDEN
United States Air Force

ACM 37438 (f rev)

26 September 2013

Sentence adjudged 21 February 2009 by GCM convened at Lackland Air Force Base, Texas. Military Judge: William M. Burd.

Approved sentence: Bad-conduct discharge, confinement for 24 months, forfeiture of all pay and allowances, fine of $1,650.00, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Maria A. Fried; Major Shannon A. Bennett; Major Jennifer J. Raab; Major Ja Rai A. Williams; and Captain Travis K. Ausland.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Lieutenant Colonel Jeremy S. Weber; Major Coretta E. Gray; Captain Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and WIEDIE
Appellate Military Judges

UPON FURTHER REVIEW

PER CURIAM:

This case comes to us once again as a remand from our superior court. The appellant was convicted by a general court-martial of being absent without leave (AWOL), desertion, conspiracy to commit desertion, and making a false official statement, in violation of Articles 81, 85, and 107, UCMJ, 10 U.S.C. §§ 881, 885, 907. This Court affirmed the findings and sentence in a per curiam opinion on 15 March 2012.

United States v. McFadden, ACM 37438 (A.F. Ct. Crim. App. 15 March 2012) (unpub. op.), *vacated and remanded by* 71 M.J. 403 (C.A.A.F. 2012) (mem.).

The Court of Appeals for the Armed Forces (CAAF) vacated our decision and returned the case for our consideration of the following issue:

> WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO EXCUSE FOR CAUSE A COURT MEMBER WHO ACCUSED APPELLANT OF LYING BY OMISSION BY EXERCISING HER RIGHT TO REMAIN SILENT.

The CAAF ordered that we consider the granted issue in light of *United States v. Nash*, 71 M.J. 83 (C.A.A.F. 2012). *United States v. McFadden*, 71 M.J. 403 (C.A.A.F. 2012) (mem.).

After reviewing this case in light of *Nash*, we found that the military judge did not abuse his discretion by failing to excuse the court member and once again affirmed the approved findings and sentence on 19 March 2013. *United States v. McFadden*, ACM 37438 (f rev) (A.F. Ct. Crim. App. 19 March 2013) (unpub. op.), *rev'd*, __ M.J. ___ (C.A.A.F. 2013) (mem.).

On 4 September 2013, the CAAF granted the appellant's petition for review on the issue of whether one of the judges who participated in the 19 March 2013 decision was unconstitutionally appointed. In the same order, the Court vacated our decision and remanded the case for further review by a properly appointed Court of Criminal Appeals in light of *Ryder v. United States*, 515 U.S. 177 (1995), and *United States v. Carpenter*, 37 M.J. 291 (C.M.A. 1993), *vacated*, 515 U.S. 1138 (1995). *United States v. McFadden*, __ M.J. ___ (C.A.A.F. 2013) (order granting review).

Our decision today reaffirms our earlier decision.

Background

The appellant was charged with, inter alia, two specifications of desertion under Article 85, UCMJ. She pleaded guilty to the lesser included offense of AWOL under Article 86, UCMJ, for both specifications. At trial, the prosecution tried to prove she intended to desert each time. Thus, her intent to remain away permanently became one of the central issues at trial and was the subject of the court member's question that is involved in the specified issue.

The appellant testified in her own defense. She denied that she ever formed the intent to remain away permanently during either of the charged absences. After the prosecution cross-examined her, the military judge asked the appellant if, after she was

apprehended, she ever told two of the investigators assigned to her case that she was intending to come back. Her response was that they never asked her. Following up on the judge's questions, the trial counsel asked her if a third investigator had inquired if she intended to return to base. After the trial defense counsel's objection to the question as being "beyond the scope" was overruled, the appellant answered that she was asked such a question "but I used my right to remain silent at the time." On re-direct examination she once again denied that she intended to remain away permanently.

After trial defense counsel's re-direct examination, the court members asked the appellant questions. One exchange occurred as follows:

> Q: . . . You testified today on numerous accounts of overt deception, and to me you seem to have a heightened intuition of other people's motives. For example, you were aware that perhaps Airman [D] might tell people X, Y, Z, so you told her certain things. Have you also heard of lying by omission – so – exercising your right to remain silent. So, how is your testimony today regarding never intending to desert the Air Force permanently different from your previous pattern of deception?
>
> A: Because, before, I had never formed the intent to remain away permanently. And I've already admitted to going AWOL, which I take responsibility for, but I don't want people to think that my intent was to never come back.

At a subsequent Article 39(a), UCMJ, session, the trial defense moved that a mistrial be declared because one of the court members, based on the prosecution's line of questioning, "accused [the appellant] of lying by omission by exercise of her right to remain silent."

The court denied the defense request for a mistrial but gave the following instruction to all of the members: "You may not consider the accused's exercise of her right to remain silent in any way adverse to the accused. You may not consider such exercise as lying by omission."

United States v. Nash

The *Nash* case involved a Marine staff sergeant accused of taking indecent liberties with and committing indecent acts with children as well as possessing child pornography. During the trial, one of the court members sought to ask Nash's wife, who was a witness: "Do you think a pedophile can be rehabilitated?" *Nash*, 71 M.J. at 85. Because both trial and defense counsel objected, the question was not asked. However, the military judge eventually decided to individually voir dire the member. Based on his answers, the judge denied a defense motion to have the member removed for cause. In denying the motion,

the judge concluded that even if the question "superficially indicate[d] a tendency to draw conclusions," any remaining bias or prejudgment was eliminated and he was convinced the member could enter deliberations with an open mind. *Id*. at 87.

The Navy-Marine Corps Court of Criminal Appeals (CCA) found no actual bias, but held the military judge erred by not addressing any test for implied bias on the record. The CCA found that the member was impliedly biased because if his question were to be "viewed through the eyes of the public, focusing on the appearance of fairness, the record reveals that [the member] had not maintained an open mind, but rather had prematurely and unfairly determined that [Nash] was a pedophile" and was guilty before instructions were given and deliberations had begun. *Id*. at 88 (internal quotation marks and citations omitted).

Analyzing the case in light of an accused's right to an impartial and unbiased panel, the CAAF affirmed *Nash* on the basis of actual bias. *Id*. at 88-89. The CAAF held that the military judge abused his discretion by denying defense counsel's challenge on the basis of actual bias. *Id*. at 84-85, 89. The Court instructed that "[a]ctual and implied bias 'are separate legal tests, not separate grounds for a challenge." *Id*. at 88. It wrote that "[a]ctual bias is personal bias which will not yield to the military judge's instructions and the evidence presented at trial." *Id*. (citing *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987)).

The CAAF found that the question the member asked the accused's wife revealed that the member had already formed an opinion as to Nash's guilt. Further, they found that by prejudging Nash at that point in the trial, the member demonstrated he was not able to follow the judge's instructions to keep an open mind until the close of evidence.[1] *Id*. at 89. The Court found that although the military judge instructed the members before and during trial that "it was of vital importance that [they] retain an open mind" on the question of guilt or innocence until the close of evidence and instructions were given, the challenged member had not done that as evidenced by his question. *Id*. at 85, 89-90. In other words, that member's question displayed a bias that did "not yield to the military judge's instructions." *Id*.

Discussion

"As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005) (quoting *United States v. Wiesson*, 56 M.J. 172, 174 (C.A.A.F. 2001)). As *Nash* illustrates, an essential aspect of this right is the right to have an unbiased panel. *Nash*, 71 M.J. at 88, 89.

[1] The Court of Appeals for the Armed Forces also found the trial judge's voir dire to be "ineffectual" due to the leading nature of the questions and predictable answers, some of which raised "additional concerns." *United States v. Nash*, 71 M.J. 83, 89 (C.A.A.F. 2012).

As our superior court recognized in *Nash*, a judge's ruling on actual bias is reviewed for an abuse of discretion and is afforded "great deference." *Id*. at 89; *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004).[2] The reason for this deferential standard is because much depends on the judge's observation of the members' demeanor and sincerity during voir dire and the judge's decision that a member can indeed remain impartial. The *Nash* Court likened this determination to that of a factual question for which the judge is entitled to a "greater latitude of judgment." *Nash*, 71 M.J. at 88-89 (citing *United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993)). In contrast, "less deference" is given to rulings on implied bias, because a finding of bias would depend on what the general public might conclude from a set of circumstances. *Strand*, 59 M.J. at 458.

At the outset, we note that this case differs from *Nash* in three aspects. First, the court member in *Nash* was specifically challenged for cause and the defense asked that the individual be removed from the panel. *Nash*, 71 M.J. at 86. In the present case, the court member was not specifically challenged or otherwise asked to be removed; rather, the defense requested a mistrial. Second, in *Nash*, the possible bias was addressed on the record, enabling the reviewing courts to apply the appropriate tests. For example, the record allowed the CAAF to determine that the individual voir dire did nothing to dispel the bias because the military judge had asked leading questions which elicited "predictable" and "problematic" answers. *Id*. at 89. Here, because the court member was never challenged, we do not have a similarly developed record. Third, in *Nash*, the court member's bias went to the ultimate issue of guilt, in that it appeared to presume guilt in contravention of the military judge's instructions to keep an open mind. Here, the potential bias went to the accused's credibility.

Despite these differences our mandate from the CAAF is clear: to determine whether the military judge abused his discretion for failing to excuse for cause a court member who appeared to accuse the appellant of lying by omission by exercising her right to remain silent. Since the trial defense counsel in this case did not make a motion to excuse the court member who asked the suspect question, we must determine whether the military judge abused his discretion by not removing the court member *sua sponte*. *Strand*, 59 M.J. at 458 (citing *United States v. Downing*, 56 M.J. 419 (C.A.A.F. 2002); *United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000)); *United States v. Velez*, 48 M.J. 220, 225 (C.A.A.F. 1998).

In this case, it appears that the court member in question had concluded that asserting one's Fifth Amendment[3] right equated to lying by omission. However, unlike

[2] Despite the standard enunciated in the specified issue, the Government argues that the standard of review is plain error under *United States v. Calamita*, 48 M.J. 917 (A.F. Ct. Crim. App. 1998). We agree that this standard was not met either. However, given our decision, this would not have changed the outcome.
[3] U.S. CONST. amend. V.

the member in *Nash*, who had obviously not obeyed the military judge's instructions to keep an open mind about Nash's guilt or innocence, the record in this case does not indicate that the court member here similarly disregarded a duty or an instruction.

Additionally, once the issue became apparent, curative instructions were given not only to the court member who asked the question, but to all of the court members. Each member stated they understood. This is important. Absent evidence to the contrary, this Court may presume that court members follow the military judge's instructions. *See United States v. Stewart*, 71 M.J. 38 (C.A.A.F. 2012); *United States v. Quintanilla*, 56 M.J. 37 (C.A.A.F. 2001); *United States v. Taylor*, 53 M.J. 195 (C.A.A.F. 2000); *United States v. Morris*, 13 M.J. 297 (C.M.A. 1982); *United States v. Ricketts*, 1 M.J. 78 (C.M.A. 1975). *See also Bruno v. United States*, 308 U.S. 287 (1939).

Given this long line of precedent that we should trust that the court members will follow the instructions given to them, coupled with the lack of any evidence that the court member who asked the question would "not yield to the military judge's instruction," we find no reason to disturb the findings of the court-martial. To hold otherwise would require us to presume, without any evidence, that these court members (including the member who asked the question) lacked integrity or were insincere when they said they understood the military judge's instruction not to use the appellant's exercise of her Fifth Amendment right against her. We cannot make that presumption, and find no abuse of discretion in the military judge's decision.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court