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UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman MARK A. NIELAND
United States Air Force

Misc. Dkt. 2006-08

29 January 2007

GCM convened at Bolling Air Force Base, District of Columbia, on 31 October 2006. Military Judge: Jennifer A. Whittier.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, Major Matthew S. Ward, Captain Daniel J. Breen, and Captain Jefferson E. McBride.

Appellate Counsel for Appellee: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Timothy M. Cox.

Before

BROWN, MATHEWS, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MATHEWS, Judge:

This case is before us on an appeal by the United States, pursuant to Article 62, UCMJ, 10 U.S.C. § 862, of rulings by the military judge suppressing the results of a government search and the appellee's admissions to government agents. We have carefully considered the record of trial and the excellent trial and appellate briefs prepared on these issues by both sides. For the reasons set forth below, we hold the military judge did not abuse her discretion in granting the suppression motions and we deny the government's appeal.

Factual Background

The facts adduced during the suppression hearing in the court below were as follows: in January 2006, a confidential informant for the Air Force Office of Special Investigations (AFOSI) reported having seen child pornography on a personal computer owned by the appellee. According to the informant, the appellee had music files stored on his computer, and the informant owned an "iPod" portable music player capable of storing and playing such files. The appellee agreed to allow the informant to download some of his music to the iPod. While looking through the contents of the computer, the informant accidentally stumbled on images that appeared to depict nude children engaging in sexual activity. The informant notified AFOSI Special Agent (SA) W about the images four days later. SA W promptly contacted the military magistrate by telephone to obtain a search authorization for the appellee's car and on-base quarters, which the magistrate granted. SA W subsequently prepared an affidavit memorializing the information given the magistrate.

Although the appellee was not present at the beginning of the search, he showed up while it was in progress and was detained and handcuffed. He was given a proper rights advisement and made several incriminating statements during the search and immediately afterward, when images depicting what appeared to be child pornography were discovered on his computer.

Procedural History

Once the AFOSI completed its investigation, the appellee's commander preferred charges alleging, *inter alia*, that the appellee knowingly possessed child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(A).[1] That specification was referred to a general court-martial, and trial convened on 31 October 2006. The appellee's trial defense counsel moved to suppress the evidence seized from the computer, arguing the military magistrate did not possess sufficient information to determine probable cause. The defense also moved to suppress the appellant's admissions as a fruit of the purportedly illegal search. The government opposed both motions. At trial, the government called SA W and the military magistrate to testify about how the search was authorized.

The significance of the lapse of time between the search and the appellee's trial soon became apparent in the varying recollections of the two government witnesses. SA W recalled providing the magistrate with a wealth of information about the informant and the investigation, including the fact that the informant had worked with AFOSI on at least a half-dozen prior occasions and had proven reliable in each case, as well as the story of how the informant stumbled on the images on the appellee's computer in the first place.

[1] Assimilated under Clause 3 of Article 134, UCMJ, 10 U.S.C. § 934.

The military magistrate, however, did not recall being given these details, and the affidavit prepared by SA W was almost entirely devoid of such information. The agent testified that the affidavit was meant to be merely a "synopsis" of the information provided to the magistrate, but admitted to making an out-of-court statement that the affidavit contained "everything" told the magistrate. He further testified that he still had the notes he used when briefing the magistrate; however, the government did not attempt to offer them as evidence.

The magistrate testified she believed the informant even though she did not know the informant's name, did not know whether the informant provided the information under oath, and did not know anything about the extent, subject matter, or frequency of the informant's work with the AFOSI.[2] The magistrate said she considered *the agent* to be credible, and he vouched for the informant, so she was "comfortable" the informant could be trusted. When prompted, she added the fact that the informant estimated the age of one of the persons in the pictures as, about 10 years old, gave her confidence that the pornographic images were illegal, because "a 10 year old does not, at all, look like an 18 year old."

The military judge entered detailed findings of fact summarizing the conflicting testimony of the witnesses and the documents offered by the government. Although she did not explicitly resolve the conflicts between the testimony of the witnesses and the documents offered by the government, her findings and conclusions clearly indicate that she favored the magistrate's version of events over the agent's. The military judge found the magistrate's probable cause determination to be a "mere ratification" of the judgment of SA W, rather than the product of an independent evaluation of evidence sufficient to render a probable cause determination. She further found the information provided to the magistrate was so lacking that the "good faith exception" could not properly be applied to the defective search. Finally, she concluded the appellee's confession was tainted by the unlawful search and the taint was not, under the circumstances, purged by the rights advisement he had received. The military judge therefore granted the appellee's motions to suppress both the search and the appellee's statements.

Discussion

The United States may appeal any "order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding." Article 62(a)(1)(B), UCMJ, 10 U.S.C. § 862(a)(1)(B). Although the military judge's ruling does not exclude *all* of the

[2] The magistrate testified that, had she known the informant was "someone who was always coming and providing information" to the AFOSI she would have "thought longer . . . and maybe probed further" to evaluate the informant's credibility.

evidence available to the government,[3] it does exclude "substantial proof." Thus, the jurisdictional requirements for the government's appeal are satisfied. In ruling on such appeals, we "act only with respect to matters of law." Article 62(b), UCMJ. We reverse a military judge's evidentiary rulings only for an abuse of discretion. *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996). Such an abuse involves far more than merely a difference of opinion; the military judge's ruling must be arbitrary, fanciful, or clearly unreasonable or erroneous. *United States v. Peterson*, 48 M.J. 81, 83 (C.A.A.F. 1998). The government has failed to persuade us that it was.

The prosecution bore the burden at trial of proving by a preponderance of evidence that the search challenged by the appellee was lawful, or the good faith exception should apply. Military Rule of Evidence (Mil. R. Evid.) 311(e). To prevail on appeal, the government must now show the military judge abused her discretion by concluding that they did not carry their burden at trial. *United States v. Hobbs*, 62 M.J. 556, 559 (A.F. Ct. Crim. App. 2005). We consider the evidence in the light most favorable to the prevailing party – the appellee – to determine whether the military judge's findings of fact are reasonably supported by the record. *Reister*, 44 M.J. at 413; *United States v. Burris*, 21 M.J. 140, 144 (C.M.A. 1985); *United States v. Plants*, 57 M.J. 664, 665 (A.F. Ct. Crim. App. 2002). We consider the military judge's conclusions of law de novo. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995).

The government argues the military judge "wholly failed in her responsibilities" to enter findings of fact. Specifically, the government contends that because the military judge did not explicitly endorse the testimony of either SA W or the magistrate, appellate counsel and this Court are placed in the "unenviable situation" of having to infer which witness the military judge found more credible. While we appreciate the government's solicitude and agree the military judge's findings might have been better highlighted, it is obvious the military judge found the magistrate's testimony more accurate than the testimony of the agent.[4] The military judge's evaluation was not unsupported by the record; and, recognizing that she actually heard and saw the witnesses, we do not find she abused her discretion by entering findings consistent with the magistrate's recollection rather than the agent's. *See* Article 66(c), UCMJ, 10 U.S.C. § 866(c).

The military judge found the magistrate was presented with no information about the informant, no facts about the informant's track record, no details about the informant's discovery of child pornography, and no information to corroborate the

[3] The appellee did not, for example, challenge the government's right to present evidence concerning the original discovery of child pornography by the informant.

[4] The government contends that the military judge found SA W to be "not credible," and, relying on *United States v. Scalia*, 993 F.2d 984, 986 (1st Cir. 1993), urges he should instead "have been presumed to be truthful." We see no need to address the government's presumption-of-truthfulness argument, because the military judge did not find, either explicitly or implicitly, that the agent lied; only that, with the passage of time, his recollection was incorrect in some respects.

informant's story.[5] The testimony and documentary evidence presented at trial support these findings. The military judge further found that the magistrate based her decision on a "bare bones" claim that an unnamed informant saw child pornography in the appellee's possession, and a bald assertion by a government agent that the informant could be trusted. We see no abuse of discretion by the military judge in these findings, either.

Applying the law to these facts, we remain unable to find any abuse of discretion. We recognize that the probable cause determination of a neutral and detached magistrate is – as the military judge expressly noted at trial – ordinarily entitled to "substantial deference." *See, e.g., United States v. Mason*, 59 M.J. 416, 421 (C.A.A.F. 2004). This deference, however, is not without limit. The adequacy of the facts, and the independence of the magistrate, remains subject to review by the trial and appellate courts.

Commanders and magistrates may authorize searches only on a showing of probable cause. Mil. R. Evid. 315. To be valid, the probable cause determination must be made by an official who is "neutral and detached." *United States v. Rivera*, 10 M.J. 55, 58 (C.M.A. 1980) (citing *United States v. Ezell*, 6 M.J. 307, 310 (C.M.A. 1979)). A magistrate must evaluate information presented for a probable cause determination in a "practical, common-sense" manner, considering the totality of the circumstances, including the information itself, the basis of knowledge of the source of the information, and the reliability of that source. *United States v. Carter*, 54 M.J. 414, 418-19 (C.A.A.F. 2001). Where details are sparse and corroboration lacking, the magistrate may still find probable cause, if the informant is sufficiently reliable. This decision, however, must be rendered independently, based on the magistrate's own evaluation of the facts, or lack thereof, made available at the time of the request; the magistrate cannot abandon this responsibility in favor of merely ratifying the decisions of others. *United States v. Leon*, 468 U.S. 897, 914-15 (1984) (citing *Illinois v. Gates*, 462 U.S. 213, 239 (1983)); *Hobbs*, 62 M.J. at 559; *Carter*, 54 M.J. at 419; *United States v. Monroe*, 52 M.J. 326, 332 (C.A.A.F. 2000).

There is likewise support in the law for the proposition that a magistrate may not simply defer to the judgment of others when determining the reliability of an informant. *See, e.g., United States v. Adriance*, ACM 25662 (A.F.C.M.R. 4 Mar 1988) (unpub. op.); *United States v. Reddrick*, 90 F.3d 1276, 1280 (7th Cir. 1996); *United States v. Wilhelm*, 80 F.3d 116, 120 (4th Cir. 1996). *See also Spinelli v. United States*, 393 U.S. 410, 423

[5] The government contends the military judge should not have concerned herself with this factor because no investigator could obtain corroborating evidence short of actually conducting a search. We have more faith in the resourcefulness of law enforcement officers. An agent seeking to corroborate the informant's story could, for example, have attempted to verify that the informant owned an iPod and the appellee owned a computer, by asking the informant to produce the iPod and asking the appellee's dormitory roommate about the computer. An experienced agent could no doubt have found other opportunities for corroboration. It appears, however, that SA W was sufficiently familiar with *this* informant that he did not feel such corroboration was needed; indeed, he testified that he did not "do anything to try to corroborate anything" the informant told him.

(1969) (White, J. concurring) (police officer's sworn statement that informant has in the past been reliable is not itself enough to establish reliability).[6] Absent an inappropriate reliance on SA W's evaluation of the informant, the military judge concluded, there was insufficient data presented to make a probable cause determination. The information communicated by the AFOSI agent to the magistrate was too lacking in detail and corroboration to make up for the absence of data on which to make an independent evaluation of the informant's reliability.

Having found the magistrate's probable cause determination deficient, the military judge declined to allow the seized evidence under the good faith exception of *Leon.* The military judge concluded that the information presented to the magistrate was so lacking that no reasonable law enforcement officer would have believed it was sufficient for a probable cause determination. Again, we do not find the military judge abused her discretion in so ruling,[7] nor in concluding that the substantially-contemporaneous questioning of the appellee was tainted by the unlawful search. *See United States v. Conklin*, 63 M.J. 333, 339-40 (C.A.A.F. 2006). The military judge was not persuaded that the government carried its burden; and we cannot say, on balance, that she abused her discretion by being unconvinced.

Conclusion

For the forgoing reasons, the government's appeal is denied. The case is remanded to the trial court for further proceedings.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator

[6] Although the *Spinelli* decision has largely been superceded by *Illinois v. Gates*, 462 U.S. 213 (1983), our superior appellate court has instructed us that *Spinelli* remains a valuable guide for evaluating the totality of the circumstances test of *Illinois v. Gates. United States v. Hester*, 47 M.J. 461, 463 (C.A.A.F. 1998).

[7] In addition to the facts related above, the military judge noted that the search authority extended beyond the appellee's computer to include a search of his room for papers, magazines, and other writings, as well as a search of the appellee's vehicle, yet no information whatsoever was presented to the magistrate to justify these further intrusions.