

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
C.L. REISMEIER, J.K. CARBERRY, B.L. PAYTON-O'BRIEN  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**JAMIE R. WALTON  
STAFF SERGEANT (E-6), U.S. MARINE CORPS**

**NMCCA 201000508  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 7 May 2010.

**Military Judge:** CDR Douglas Barber, JAGC, USN.

**Convening Authority:** Commanding General, Training and Education Command, Quantico, VA.

**Staff Judge Advocate's Recommendation:** Maj W.H. Torrico, USMC.

**For Appellant:** LT Michael R. Torrissi, JAGC, USN.

**For Appellee:** Capt Mark V. Balfantz, USMC.

**20 September 2011**

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**OPINION OF THE COURT**  
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**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS  
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

**PER CURIAM:**

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of one specification of violating a lawful general order (providing alcohol to a minor), two specifications of violating a lawful general regulation (fraternization), making a false official statement, adultery, and communicating indecent language, in violation of Articles 92, 107, and 134 Uniform Code of Military Justice, 10 U.S.C. §§ 892, 907, and 934. The convening authority approved the adjudged sentence of 180 days confinement, reduction

to E-1, forfeiture of \$1,447.20<sup>1</sup> pay per month for six months, and a bad-conduct discharge from the Naval Service.

The appellant now raises the following errors on appeal: (1) that his confession was involuntary; (2) that the investigator's statements created *de facto* immunity from prosecution at court-martial; (3) that the investigator violated the appellant's right against self-incrimination by not honoring his invocation of the right to remain silent; and (4) that the military judge erred in violation of Manual of the Judge Advocate General Instruction 5800.7E § 0141 (Ch-2, 16 Sep 2008) by admitting two adverse evaluations referencing misconduct for which the appellant received nonjudicial punishment (NJP).<sup>2</sup>

After careful examination of the record of trial and the parties' pleadings, we conclude that, after taking action in light of the Court of Appeals for the Armed Forces' recent opinion in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), the remaining findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

#### **Statement of Facts**

The appellant, then a married staff sergeant [SSgt], attended an advanced course at the Armed Forces School of Music [SOM]. For a time, the appellant served as a staff member at the SOM following his disenrollment from his class. Between July and October 2008, the appellant sent inappropriate emails or texts to junior enlisted Marines, commenting on their appearances or, in one instance, soliciting a private first class [PFC] to expose herself. Finally, the appellant met a 19-year-old lance corporal [LCpl] from the SOM, took her to dinner, provided her alcohol, and engaged in sexual intercourse with her at a local hotel.

The appellant's misconduct came to light after his affair with the LCpl became known to one of the other junior Marines to whom he had sent inappropriate texts, and she in turn notified a staff member. Once the command was alerted, an investigation ensued, leading to the questioning of the appellant that gave rise to a suppression motion and the first three assignments of error.

#### **Legal Analysis**

"A military judge's denial of a motion to suppress a confession is reviewed for an abuse of discretion. We will not disturb a military judge's findings of fact unless they are

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<sup>1</sup> The amount adjudged, though not in whole dollar amounts, was total pay for an E-1 at the time of trial.

<sup>2</sup> The last assignment of error was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

clearly erroneous or unsupported by the record. However, we review *de novo* any conclusions of law supporting the suppression ruling . . . ." *United States v. Chatfield*, 67 M.J. 432, 437 (C.A.A.F. 2009)(internal citations omitted). Where an individual makes an unambiguous invocation of his right to remain silent, law enforcement officials may not conduct further questioning unless they scrupulously honor the invocation of rights. *United States v. Delarosa*, 67 M.J. 318, 320 (C.A.A.F. 2009)(citing *Michigan v. Moseley*, 423 U.S. 96, 104 (1975)). If the invocation is ambiguous, officials are not obliged to cease questioning. They may attempt to clarify the ambiguity, but they are not required to do so. *Id.*

Two witnesses were called by the Government with regard to the confession. Master Gunnery Sergeant [MGySgt] F testified that he read the appellant his Article 31(b), UCMJ, rights, ensured that the rights were fully understood, and conducted the interrogation. Then-SSgt D was present to take notes and "record" the interview. Unfortunately, the notes and the testimony were not in full accord. However, the testimony of the two witnesses supported each other, even if they differed from the notes in some respect.

During the interview, the appellant asked whether he should get a lawyer, and affirmatively stated at one point that he didn't know whether he should get a lawyer. The notes of the conversation taken by SSgt D [Defense Exhibit A] are not crystal clear, but even they contain little more than equivocal statements regarding whether the appellant himself thought he needed counsel. However, MGySgt F testified that he told the appellant that such a decision was up to the appellant, but that if he wanted to stop, they'd stop the interview. At one point, the appellant indicated that he did want to stop, and that he wanted to ask MGySgt F some questions. The MGySgt appropriately told the appellant that he would need to seek advice elsewhere, including, if the appellant desired, legal advice either on base or at the larger, neighboring facility. The appellant terminated the interview, and left to speak with someone. Before leaving, MGySgt F instructed the appellant to return, so that the MGySgt could account for the appellant's whereabouts.

When the appellant returned, he was told, and acknowledged, that he was still under the original rights advisement. The appellant was eager to talk. His initial denial was replaced with an admission that he picked up the LCpl outside of the SOM, took her to dinner, had sex with her at a hotel, and returned her the following day. The appellant admitted to sending inappropriate text messages to junior Marines, but did not admit to providing the LCpl alcohol. Finally, the appellant asked for, and was granted, permission, to address the LCpl directly, apologizing for his conduct and instructing her to come forward with the truth.

As the military judge noted, the transcript of the interview was not verbatim, and did not track the testimony of the witnesses in all respects. At one point, the notes indicate that the appellant responded affirmatively when asked whether he was sure he did not want to talk. Contradicting the notes, both witnesses testified that the appellant never said he didn't want to talk. Further, MGySgt F testified that there were long pauses and things missing from the quoted passages such that the transcript failed to capture the actual conversation.

The military judge concluded that the witnesses presented credible testimony, supporting the military judge's determination that he was not confident that the transcript "precisely reflects what was said during the interview." We find no abuse of discretion in the military judge's determination as to what was said during the exchanges with the appellant. As the military judge noted, the interview was conducted in calm conversational tones, with no suggestion of overbearing or coercive conduct. The appellant was a staff non-commissioned officer in the Marine Corps. He was not in custody. He was free to leave, and in fact, did terminate the interview and left at one point. Similarly, his ambiguous references to counsel did not amount to a request for counsel, although he was permitted to leave and seek an attorney if he so desired. Our own view of the transcript causes us to conclude, as did the military judge, that the recorder associated single answers to multiple questions, creating gaps, ambiguity and contradictions within the notes. Likewise, we, like the military judge, find the testimony offered on the motion to be persuasive.

Accordingly, we find no abuse of discretion in the military judge's conclusions that the appellant's confession was voluntary and that the appellant's right to remain silent was not violated.

As to the appellant's claim of *de facto* immunity, when a purported grant of immunity is made by an officer having apparent authority, any required remedy turns upon the extent of detrimental reliance upon the grant. *United States v. McKeel*, 63 M.J. 81, 83 (C.A.A.F. 2006). Here again, the interview notes confused the issue. According to the notes, MGySgt F made the following statements at two different places in the interview:

My advice for you is that if you've done this, and you are honest, it doesn't have to go to court-martial. But, if you continue to deny it, and we investigate this situation and the same information comes out later . . . I'm not making a deal with you. This is how this can play out with all of this specific information and evidence . . . .

Do you know how this can turn out? You need to talk to me. You need to tell me what happened so that I can do something for you.

DE A. Other purported statements that arguably suggested an enticement or promise were also made, but were not as direct as these.

We, like the military judge, considered these statements when making our determination that the appellant's confession was an act of free will and not the result of an unlawful inducement. We note that as to the suggestion that these statements might convey an offer of leniency, no evidence was offered to suggest that the appellant relied in any way upon, or was otherwise induced by, what he now claims to be a manifest suggestion of leniency. We, like the military judge, also separately considered whether the statements, in context, amounted to a *de facto* grant of immunity, and similarly conclude that they did not, as there was neither an indication that MGySgt F had authorization to immunize the appellant, nor an indication that the appellant "honestly and reasonably believed that an official had promised him transactional immunity." *Samples v. Vest*, 38 M.J. 482, 487 (C.M.A. 1994); *United States v. Churnovic*, 22 M.J. 401, 405 (C.M.A. 1986). Had there been evidence to suggest that the appellant relied upon statements made during the interview suggesting immunity, this analysis might be closer. However, in the absence of any evidence establishing a belief on the part of the appellant that he had been immunized, as a matter of law, the appellant "is not entitled to invoke transactional immunity as a bar" to his prosecution. *Samples*, 38 M.J. at 487.

As for his final assignment of error, the appellant claims that the military judge erred in violation of JAGINST 5800.7E (JAGMAN) § 0141 by admitting two adverse evaluations referencing misconduct for which the appellant received NJP. We review the military judge's decision to admit evidence for an abuse of discretion. *United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009). We find no abuse in this case.

JAGMAN § 0141 provides that "records of nonjudicial punishment" must relate to an offense committed prior to trial and during the appellant's current enlistment, provided that the records not extend to offenses committed more than two years prior to any offense then before the court. The JAGMAN's prohibition against admitting "stale" NJPs has been extended to counseling entries from service records that refer to stale NJPs. *United States v. Wren*, 36 M.J. 1188 (N.M.C.M.R. 1993). In this case, the records at issue - performance evaluations - reflected the underlying misconduct that triggered the NJP. References to the NJP were redacted. At trial, defense counsel argued strenuously against admission, noting that the only reason the records were created was because imposition of NJP required creation of an adverse fitness report. Assuming that to be correct, the appellant invites us to extend the service regulation prohibiting admission of records of NJP to include records that document misconduct without reference to the NJP, simply because the NJP prompted the entry. We decline to apply the prohibition so broadly.

### **Failure to State Offenses**

We finally consider the appellant's convictions under the General Article in light of CAAF's decision in *Fosler*. The appellant's convictions for adultery and indecent language cannot be affirmed. Neither specification under Charge V included the terminal elements of the General Article either explicitly or by necessary implication. We conclude with respect to sentencing that the members would properly have considered all the evidence adduced regarding the adultery of which they convicted the appellant, even if in light of a lower limit on their sentencing discretion. The evidence of the adultery was inextricably linked to the offenses of which the appellant was properly convicted. As for the indecent language, the evidence added little to the remainder of the offenses before the court. "[T]he sentencing landscape would not have been drastically changed" by the absence of the specifications below. We are satisfied beyond a reasonable doubt that the members would have adjudged a sentence no less than that approved by the convening authority in this case. *United States v. Craig*, 67 M.J. 742, 746 (N.M.Ct.Crim.App. 2009), *aff'd*, 68 M.J. 399 (C.A.A.F. 2010); *see also United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006); *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986).

### **Conclusion**

The findings of guilty to Charge V and its two specifications are set aside. Charge V and its two specifications are dismissed. We otherwise affirm the findings and the sentence as approved by the convening authority.

For the Court

R.H. TROIDL  
Clerk of Court