UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
FLEMING, HAYES, and MORRIS
Appellate Military Judges

UNITED STATES, Appellant
v.
Specialist PHILIP E. THOMPSON, JR.
United States Army, Appellee

ARMY MISC 20220663

Headquarters, Fort Stewart
J. Harper Cook, Military Judge
Colonel Joseph M. Fairfield, Staff Judge Advocate

For Appellant: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Jacqueline J. DeGaine, JA; Major Jennifer A. Sundook, JA; Captain Timothy R. Emmons, JA (on brief).

For Appellee: Lieutenant Colonel Dale C. McFeatters, JA; Jonathan F. Potter, Esquire; Major Joyce C. Liu, JA; Captain Andrew R. Britt, JA (on brief).

15 March 2023

SUMMARY DISPOSITION AND ACTION ON APPEAL
BY THE UNITED STATES FILED PURSUANT TO
ARTICLE 62, UNIFORM CODE OF MILITARY JUSTICE

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

FLEMING, Senior Judge:

In accordance with Article 62, Uniform Code of Military Justice [UCMJ], the government appeals the military judge's ruling to exclude Special Agent (SA) AA's testimony, in toto, because of his exposure to appellee's immunized statement. Upon review of the entire record, we deny the government appeal, concluding the military judge did not abuse his discretion in excluding the testimony and his findings of fact are supported by the record and not clearly erroneous.

BACKGROUND

Appellee is charged at a general court-martial with two specifications of murder, three specifications of accessory after the fact to murder, one specification of child endangerment, and one specification of conspiracy to commit aggravated assault, in violation of Articles 118, 78, 134, and 81 UCMJ, 10 U.S.C. §§ 918, 878, 934, and 881.

United States Army Criminal Investigation Command [CID] SA AA interviewed appellee twice in March of 2017 regarding his role in the murder of two soldiers. Appellee's two interviews, as was CID policy at the time, were not recorded. More than two years later, in June of 2019, appellee pleaded guilty under an aider and abettor theory of liability to two specifications of premeditated murder. In September of 2019, appellee conducted another interview with SA AA, this time under a grant of testimonial immunity. This September 2019 interview, occurring over the course of two days, lasted approximately "8 to 10 hours." In December of 2021, this court held appellee's plea was improvident, set aside the findings of guilty and sentence, and authorized a rehearing.[1]

The government proceeded with appellee's rehearing and interviewed SA AA in mid-November 2022. During that interview, SA AA discussed details of appellee's case that he had learned during appellee's immunized interview in September 2019. The military judge found SA AA "shared immunized information with the current trial team" "after the prosecution team warned him to not reveal any immunized information to them."[2] Government counsel disclosed SA AA's spillage to defense counsel. The defense then filed a motion *in limine* to exclude SA AA's testimony as being tainted by appellee's immunized interview.

On 29 November 2022, after a motion hearing, the military judge granted the defense motion *in limine* to exclude, in toto, SA AA's testimony. On 1 December 2022, the military judge granted the government's request to reconsider his ruling but, upon reconsideration, affirmed his ruling. The government filed a notice of appeal under Article 62, UCMJ and Rule for Courts-Martial [R.C.M.] 908.

Beyond contesting the government's substantive appeal of the ruling excluding SA AA's testimony, appellee asserts the government appeal lacks jurisdiction because: (1) the government trial counsel failed to state in his notice

---

[1] *United States v. Thompson*, 81 M.J. 824 (Army Ct. Crim. App. 2021).

[2] Although we do not base any of our analysis or decision on SA AA's inappropriate disclosure, as it appears the military judge did not use this fact as a basis to exclude SA AA's testimony, we do pause to note his spillage, even in the face of the government team's warning, illustrates he could not separate the immunized and non-immunized statements in his mind.

that the contested matter was substantial proof of a fact *material* in the proceedings; (2) the record of proceedings filed with this court included only the written verbatim transcript and not the audio recording; and (3) the government appeal challenges only a question of fact, rather than a question of law.

LAW AND DISCUSSION

Jurisdiction

Regarding Article 62, UCMJ appeals, the government may appeal a military judge's ruling "which excludes evidence that is substantial proof of a fact *material* in the proceeding." *See* UCMJ Art. 62. As to the timeline and procedural requirements for filing an Article 62, UCMJ appeal, R.C.M. 908(b)(6) requires the trial counsel to "promptly and by expeditious means" forward the appeal with "a statement of the issues being appealed" and "the record of the proceedings" or "a summary of the evidence" if the record has not been completed.

As to appellee's first two jurisdictional arguments, we find them unpersuasive. Although we are confused not only by the trial counsel, Captain CLS, omitting the word "*material*" in his notice, but also by this glaring omission escaping the attention of his technical supervisors, we determine his scrivener's error does not amount to a loss of jurisdiction.[3] Similarly, we find this court possesses jurisdiction in this case when provided with a written verbatim transcript, although *sans* audio recording, in light of the generous allowances under R.C.M. 908(b)(6) permitting a mere summary of the evidence to suffice for jurisdiction.[4] While the government's haphazard approach to the filing of this appeal is far from best practice, we deem their errors in this case are not jurisdictional.

When deciding appeals brought under Article 62, UCMJ, this court "may act only with respect to matters of law." *United States v. Baker*, 70 M.J. 283, 288 (C.A.A.F. 2011). "On questions of fact, [this] court is limited to determining whether the military judge's findings are clearly erroneous or unsupported by the record." *United States v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995). Appellee cites *United States v. Tucker*, 20 M.J. 602 (N.M.C.M.R. 1985), for the proposition this court lacks jurisdiction because appellant only appeals a question of fact. We disagree. Appellant's Article 62 appeal is *not* solely requesting to appeal a question

---

[3] Captain CLS's notice of appeal asserted the Staff Judge Advocate, Lieutenant Colonel TS, "authorized the notice of appeal in accordance with Army Regulation 27-10."

[4] When provided with a certified written verbatim transcript, we are left to ponder what, if any, prejudice could remotely exist in omitting the audio recording forming the basis of that certified written verbatim transcript, that would prevent this court from possessing jurisdiction.

of fact, but also the military judge's ruling excluding evidence based on his application of the law to his findings of fact. We note our superior court, limited by Article 67(c)(4) UCMJ to acting *only* with respect to matters of law, has addressed whether immunized testimony tainted the prosecution of a service member. *See e.g. United States v. Mapes*, 59 M.J. 60, (C.A.A.F. 2003); *United States v. McGeeney*, 44 M.J. 418, 423 (C.A.A.F. 1996).

We review a military judge's decision to exclude evidence for an abuse of discretion. *See United States v. Keefauver*, 74 M.J. 230, 233 (C.A.A.F. 2015) (citations omitted). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019) (cleaned up). The abuse of discretion standard requires "more than a mere difference of opinion[;]" rather, the military judge's ruling must be "arbitrary . . . , clearly unreasonable, or clearly erroneous." *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014) (cleaned up).

Special Agent AA's Testimony

Appellant avers the military judge's ruling excluding the testimony of SA AA, in toto, was unsupported by the facts or clearly erroneous. We disagree. When an accused shows he has testified under a grant of immunity, the government faces "the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." *Kastigar v. United States*, 406 U.S. 441, 461-62 (1972). The government "must do more than negate the taint; it must affirmatively prove that its evidence is 'derived from a legitimate source wholly independent of the compelled testimony.'" *McGeeney*, 44 M.J. at 423 (quoting *Kastigar*, 406 U.S. at 460). The government must show by a preponderance of the evidence that the prosecution is based on sources untainted by immunized testimony. *Id.*

In in his initial ruling, the military judge discussed SA AA's testimony where he asserted "nothing in those immunized sessions [from September 2019] 'clarified' what he then knew about the alleged murders from the accused's point of view, 'even a little bit.'" The military judge then referenced that during later questioning SA AA "revealed that the accused had 'minimized' his involvement" in his September 2019 interview and "SA [AA] admitted that such 'minimization' by the accused made [SA AA] feel more certain that the accused's earlier version of events [from March 2017] was the true account."

Based on an analysis of this testimony, the military judge found SA AA's "absolute denial that the immunized sessions 'did not clarify anything...even a little bit' about the incident itself [was] an overstatement which detracted from his credibility on this point." The military judge found "the reverse to be true: that the

immunized sessions did influence [SA AA], his knowledge of the case, and his ability to testify free from the taint of his exposure to the immunized sessions."

In next ruling on the government motion to reconsider, the military judge expounded upon his initial findings of fact regarding SA AA stating:

> Not only [has SA AA's] anticipated *testimony* been so colored, so has his subjective *belief* that the non-immunized and non-'minimized' statements are the more accurate statements of the accused. At some immeasurable level, his belief stands to impact the factfinder indirectly in the form of his credibility on the stand. Stated another way, SA [AA] presents as a confident witness, resolute that his testimony accurately reflects his memory. Yet, the Government has not disproven that his confident resoluteness is in any way the product of the immunized statements.[5]

As we find the military judge's finding is neither clearly erroneous nor unsupported by the evidence, and he did not abuse his discretion in excluding Special Agent AA's testimony, we will not disturb his ruling.

CONCLUSION

The government's appeal under Article 62 is DENIED. The record of trial is returned to The Judge Advocate General.

Judges HAYES and MORRIS concur.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court

[5] The military judge also addressed the government request to permit SA AA to testify on untainted matters stating "the court was prepared to proceed in this fashion at the outset of this *Kastigar* litigation. However, [SA AA's] testimony and conduct made it clear to the court that such a detailed examination would not change the result" because his testimony was so colored by his subjective belief.