

NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

UNITED STATES

v.

Aaron V. Wylde
XXX XX 0964
Private First Class
U.S. Marine Corps

(SPECIAL COURT-MARTIAL
(
(RULING ON DEFENSE MOTION
(FOR INVESTIGATIVE ASSISTANCE
(
(6 October 2010

STATEMENT OF THE CASE

The accused has been charged with multiple violations of two general orders prohibiting the possession, use, and distribution of spice, and with violations of Article 134 of the Uniform Code of Military Justice (UCMJ) for the manufacture, distribution (to a civilian "smoke shop") and introduction of spice onto a military aircraft. The charges resulted from a warrantless search of the accused's temporary barracks room aboard Naval Air Station, Fallon, Nevada, that he occupied during a unit training event being conducted at Fallon. The Government has justified the warrantless search as being the result of a medical emergency suffered by a Lance Corporal Michael Wiley and conducted within the parameters of Military Rule of Evidence (MRE) 314(i). The Defense has requested the Court order production of a Government investigator to assist the Defense in their investigation of this case at NAS Fallon. The Defense has proffered distance from the situs and a lack of Defense personnel resources as justification for the request. Appellate exhibit X pertains. The Government opposes the Defense motion and has so responded in AE XI.

FINDINGS OF FACT

The following findings of fact are made:

- FF 1. During the mid-morning hours on 4 May 2010, Lance Corporal Michael D. Wiley was observed running from his temporary barracks room at Naval Air Station (NAS), Fallon, Nevada, across a parking lot, ultimately coming to rest in a rock bed some 250 yards from his barracks.
- FF 2. Witnesses at the scene as the event occurred described LCpl Wiley jumping over a second story stairwell in his barracks building, laughing, running across a parking lot, yelling an obscenity at one point in the episode, and then stopping in the rocks. Emergency personnel were notified.
- FF 3. Medical and security first responders found LCpl Wiley balled up on the ground, face down and clothed in boxer shorts, a Marine Corps physical training shirt, no shoes and blood on his feet. He was described as being in an altered state of consciousness, rapid pulse rate, blue in the face, having thick white foam around his mouth, having difficulty breathing and unable to speak or respond to questions.

FF 4. Medical personnel, specifically, the NAS Fallon Assistant Fire Chief, with the support of security officers from NAS Fallon, requested and secured a key to LCpl Wiley's room for the purpose of identifying any potential source of LCpl Wiley's medical condition.

FF 5. No complex or unusual investigatory techniques were employed by the Assistant Fire Chief or the security personnel in going through the contents of the room, identifying and isolating medications found in the room, and ultimately finding the then-unidentified leafy substance in one of the backpacks in the room.

FF 6. The search of the room was terminated at the finding of the leafy substance in the backpack, and no further investigation was done at the scene or in the room until after a command authorized search was conducted in the room later the same day.

FF 7. Medical personnel decided to bypass the on-base medical clinic and LCpl Wiley was transported by ambulance to an off-base civilian medical facility (Banner Hospital) approximately 6 miles away from the scene of the incident, approximately 8 to 10 minutes away by surface transportation.

FF 8. Witnesses at the scene of the incident at NAS Fallon have been identified and have provided written statements that were produced by the Government during the motion hearing in this case. However, it is possible that additional persons witnessed LCpl Wiley's incident on 4 May 2010 who were not interviewed at the scene.

STATEMENT OF THE LAW

An accused is entitled to investigative or other expert assistance as a matter of military due process when necessary for an adequate defense. In the usual case, the investigative, medical, and other expert services available in the military are sufficient to permit the Defense to adequately prepare for trial. *U.S. v. Garries*, 22 M.J. 288 (CMA 1986); *U.S. v. Gunkle*, 55 M.J. 26 (CAAF 2001). However, an accused must demonstrate something more than a mere possibility of assistance from a requested expert; the Defense must demonstrate that there exists a reasonable probability both that (1) an expert would be of assistance to the Defense; and (2) that denial of expert assistance would result in a fundamentally unfair trial. *U.S. v. Kelly*, 39 M.J. 235, 237 (CMA 1994); *U.S. v. Gunkle*, 55 M.J. 26 (CAAF 2001); *U.S. v. Bresnahan*, 62 M.J. 137, 143 (CAAF 2005). The CAAF has adopted a three-pronged test for determining the first element of this analysis, that is, the necessity element. First, the defense must show why the expert assistance is needed. Second, what the expert assistance would accomplish for the Defense must be provided. And third, why is the Defense counsel unable to gather and present the evidence that the expert assistance would be able to develop? *U.S. v. Gonzalez*, 39 M.J. 459, 461 (1994). An accused who successfully demonstrates the need for investigatory or expert assistance must accept military investigatory or expert services offered by the Government, and cannot compel the Government to fund private assistance, where such services are made available to the Defense under an order of confidentiality. *U.S. v. Short*, 50 M.J. 370, 373 (CAAF 1999); *U.S. v. True*, 28 M.J. 1057 (NMCCA 1989). Defense counsel are expected to educate themselves to attain competence in defending an issue presented in a particular case. While due process requires that the accused be given the "basic tools" necessary to present a

defense, defense counsel are responsible for doing their homework. *U.S. v. Kelly*, 39 M.J. 235, 238 (1994), citing *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

ANALYSIS

The Defense written motion for the investigative assistance from a Government agent was supplemented by oral argument during an Art. 39a session on 1 October 2010. During the motions session, the Defense argued that a Government investigator dedicated to the Defense was needed (first element) to (1) investigate the manner in which the first responders investigated PFC Wylde's barracks room; (2) assist in the collection of evidence (this purpose was equivocally asserted in inconsistent sentences within the motion); and (3) to assist the Defense in preparing for the cross-examination of Government investigators. The distance between the Defense counsel and the NAS Fallon, issues surrounding authentication of any Defense generated photos or other evidence, and the inequitable distribution of investigatory assets in the military were further proffered in support of the Defense request for the assignment of a Defense investigator.

As for the second prong of the analysis, what the investigative assistance would accomplish for the Defense, the proffer was that a dedicated Defense investigator could track down and respond to leads, track down additional witnesses who may have been present at the scene at the time of the incident, take additional witness statements and re-question witnesses who have already provided written statements. In addition, the Defense has asserted an assigned investigator from the Criminal Investigative Division (CID) would be an expert on CID's own police procedures and will provide valuable insight to the Defense on the procedures generally followed by their crime scene investigators.

The third element of the analysis, why the Defense is unable to gather and present the evidence that the expert assistance would be able to develop, was not adequately developed by the motion or at the Article 39a session. Given the distance between the accused and his counsel located at Naval Air Station, Miramar, California, having a Defense investigator at NAS Fallon would likely be convenient. However, the distance alone, unsupported by other justifying circumstances, does not support the production of a Defense investigator in this case. The Defense points out that such an assignment would tend to lessen the unfair incongruity of resources between the Government and Defense counsel. However, the Defense never proffered why it was unable to undertake or accomplish the tasks requested of an assigned Defense investigator. The Defense provides in its motion, that Government insistence that the Defense supplement already existing investigative products in the case with investigation of its own, "...confuses an issue of fairness with one of capability." While an investigator already located at NAS Fallon may be convenient for some of the tasks identified by the Defense as needing to be accomplished, there can be little doubt but that Defense personnel, supplemented by funding for travel by the Convening Authority, are completely capable of accomplishing the identified tasks remaining for preparation of the Defense case. For tasks such as questioning witnesses, the Defense could be expected to be more capable.

There is nothing within the Defense task list that is difficult to understand or complex. There were no CID investigators at the accused's and LCpl Wiley's barracks room for the initial warrantless search that resulted in discovery of the contraband. It was a simplistic process

capable of being fully explored with interview and cross-examination of the participating witnesses. Insofar as the Defense has asserted that the subsequent probable cause search that CID personnel did participate in is not in issue, their investigative training and techniques to accomplish that search are similarly not in question. However, there was nothing complex about the subsequent more thorough search of the room by CID personnel for which investigative assistance would be necessary. Unlike in the *Ake v. Oklahoma* case, in this case there has not been anything identified by the defense in its motion or in the subsequent motions hearing that is "seriously in question" and for which investigative assistance is truly necessary.

I further find that denial of the defense motion to produce a Government investigator would not result in a fundamentally unfair trial. Failing to provide that which the Defense is imminently capable of providing for the accused will not result in an unfair trial for the accused.

The Government should anticipate judicial rulings beneficial to the Defense in matters such as foundation and authentication where the Defense has produced evidence on its own and the reliability of the evidence can not reasonably be questioned. Nothing should be interpreted from this ruling to discourage the Government from requesting investigative assistance on behalf of the Defense for any matter requested by the Defense.

BURDEN OF PROOF

The burden of proof for this motion is assigned to the Defense as the moving party, and the standard is by a preponderance of the evidence.

CONCLUSION AND ORDER

The Court finds that the Defense has not met its burden to demonstrate by a preponderance of the evidence that investigative assistance is necessary for an adequate defense in this case. The Defense motion is denied. So ordered this 6th day of October, 2010.



G. L. SIMMONS
LtCol, USMC
Military Judge

CERTIFICATE OF SERVICE

This ruling was electronically served on counsel on 6 October 2010.



G. L. SIMMONS