IN THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES OF AMERICA v. Keith E. BARRY Special Warfare Operator Senior Chief (E-8) U.S. Navy	**FINDINGS OF FACT & CONCLUSIONS** USCA Dkt No. 17-0162/NA DATE: 24 October 2017

Background

On 19 June 2017, the United States Court of Appeals for the Armed Forces (C.A.A.F.) ordered a fact finding hearing on the following question: Whether senior civilian and military leaders exerted unlawful command influence on the convening authority?

On 18 August 2017, a hearing was held to resolve a defense Motion to Compel Discovery. After that hearing, an *in camera* review was conducted of the disputed material. A portion of this material was released to the defense. The motions, exhibits presented during the hearing, all of the material reviewed *in camera*, and the portion released to the defense counsel were each marked as appellate exhibits and appended to the record of this *DuBay* Hearing.

As that hearing approached, the government made a motion requesting the court Clarify the Detailing of the defense team. In response, the defense filed a Motion to Dismiss for Unlawful Command Influence based on an alleged effort to tamper with the composition of the defense team. The motions and exhibits presented during the hearing were marked as appellate exhibits and appended to the record of this *DuBay* Hearing. As discussed towards the end, the issue was resolved (at least for this trial judge) when this court determined the counsel requested by the accused were the counsel who would represent him at the hearing. Both sides have provided proposed findings if the C.A.A.F. believes the issue merits further inquiry. Based on the court's resolution of the issue, the Motion to Dismiss was not granted as the appropriate action was to return the record to the C.A.A.F. in accordance with the *DuBay* Order.

Finally, prior to the *DuBay* Hearing, the defense filed an additional Motion to Compel Discovery and the government filed a Response. I denied the motion by email prior to the *DuBay* Hearing. In this court's view, all of the material in that particular motion related to information that could be established through testimony of already-identified witnesses without the need for additional discovery. Additionally, the information requested did not, in the view of this court, relate to the certified issue for the *DuBay* Hearing.

The *DuBay* Hearing was held on 26 & 27 September 2017.

Findings of Fact

During the processing of the appellant's case, from pretrial through action, Rear Admiral (RADM) Patrick J. Lorge was the General Court-Martial Convening Authority (GCMCA) for Naval District Southwest – San Diego.

RADM Lorge had another tour as a GCMCA (Naval District Washington) and other convening authority experience during his prior Navy tours. He was an experienced convening authority, particularly during the processing of the appellant's case.

From July, 2012 through June, 2015, Vice Admiral (VADM) Nanette DeRenzi was The Judge Advocate General (TJAG) of the Navy.

On 19 February 2014, VADM DeRenzi met with the RADM Lorge, in his office in San Diego, California (CA). The visit was a courtesy call. It was in conjunction with another function VADM DeRenzi was attending in San Diego, CA.

During the courtesy call, each admiral discussed issues facing them given their current areas of responsibility.

VADM DeRenzi discussed with RADM Lorge the fact that RADM Lorge and other commanders were facing difficult tenures as convening authorities due to the political climate surrounding sexual assault. She told RADM Lorge that every three or four months decisions were made regarding sexual assault cases that caused further scrutiny by Congress and other political and military leaders. She also told RADM Lorge that a good deal of her time was being taken up with testimony and visits to both Capitol Hill and the White House.

This meeting occurred well before the subject case involving this appellant. VADM DeRenzi was not making any effort to influence (whether lawfully or unlawfully) any action in the appellant's case or any other case currently pending before RADM Lorge. VADM DeRenzi was simply discussing the realities of the current environment in which she and commanders were operating at the time, particularly in relation to sexual assault.

Prior to and after this meeting, RADM Lorge was generally aware of the political pressures on the military justice system in relation to sexual assault.

RADM Lorge did not have recollection of specific comments from civilian or military leaders about sexual assault or particular knowledge of other sexual assault cases garnering attention arising in the Navy or other services. He was aware generally that the military justice system was receiving pressure from many fronts in relation to sexual assault.

On 31 March 2014, Captain (CAPT) Christopher W. Plummer, acting in RADM Lorge's temporary absence as the GCMCA, referred two allegations of sexual assault against the appellant to a general court-martial. No unlawful command influence affected this decision. No evidence was presented suggesting any improper motivation for this preferral decision.

On 31 October 2014, the appellant was convicted of a single charge and specification of sexual assault. He was sentenced to three years confinement and a dishonorable discharge.

On 29 January 2015, RADM Lorge's SJA, Commander (CDR) Dominic Jones, through his Staff Judge Advocate Recommendation (SJAR), advised RADM Lorge the recent amendments to Article 60, UCMJ, did not restrict RADM Lorge's authority to take action on the findings and sentence in appellant's case.

On 26 February 2015, CDR Jones, through an addendum to the original SJAR, incorrectly advised RADM Lorge that the recent amendments to Article 60, UCMJ, actually did restrict his authority to take action on the findings and sentence in this case.

Based on the incorrect advice, RADM Lorge affirmed both the findings and the sentence in the case. Because of the advice given, RADM Lorge did not review the case with any particular special attention when he took his original action in appellant's case.

On 16 March 2015, the Navy-Marine Corps Court of Criminal Appeals remanded the case back to RADM Lorge for corrective post-trial processing. The case was remanded so the convening authority could properly be advised about the full range of potential action he could take in the appellant's case and for a new SJAR and action.

On 13 April 2015, CDR Jones signed another "addendum" to the original SJAR. This addendum informed RADM Lorge that the recent amendments to Article 60, UCMJ, did not restrict his authority to take action on the findings and sentence. While no new SJAR was completed, the defense was allowed to present additional matters in clemency (although CDR Jones was initially reluctant to allow this to occur).

Between 13 April 2015 and 3 June 2015, RADM Lorge spent a significant amount of time reviewing the Record of Trial, the clemency submissions, and talking with his lawyers about the appellant's case. He reviewed the case closer than any other case he had reviewed as a convening authority, either before or after this case.

During his review, RADM Lorge developed significant concerns about the case. His particular concerns were related to his perception the trial judge was not objective, his belief that the appellant may not have committed the crime for which he stood convicted, and his belief that the appellant had not received a fair trial.

In the discussions with his SJA and other lawyers, RADM Lorge continued to express his concerns about the trial the appellant had received. RADM Lorge told multiple people he was not sure the accused committed the crime for which he stood convicted.

Throughout this time, CDR Jones was advising RADM Lorge to affirm the findings and sentence in the case. CDR Jones strongly, and on multiple occasions, advised RADM Lorge not to set aside the findings or sentence in the case or order a retrial. CDR Jones reminded RADM Lorge of the political pressures on the system and that RADM Lorge should not make a political decision, but rather leave that to the appellate courts that would hear the appellant's case.

On 30 April 2015, VADM Crawford, then a RADM and the Deputy Judge Advocate General (DJAG) of the Navy, met with RADM Lorge in RADM Lorge's office in San Diego. While he is referred to as VADM Crawford in the findings of fact; he was a RADM at all times relevant to the case at hand.

While it was a courtesy visit and the appellant's case was not the sole matter of discussion,

the appellant's case was a portion of the purpose for the meeting. Additionally, VADM Crawford knew prior to the meeting that RADM Lorge wanted to talk about a particular case.

RADM Lorge told VADM Crawford he was having trouble taking action in the appellant's case and that he was struggling with the decision. VADM Crawford told RADM Lorge that RADM Lorge had smart lawyers so let them figure it out. Importantly, CDR Jones was strongly and contemporaneously advising RADM Lorge to approve the findings and sentence in the appellant's case. CDR Jones was, contemporaneously, also telling RADM Lorge he could not order a new trial for the appellant.

Additionally, during this meeting, VADM Crawford either told RADM Lorge "not to put a target on his back" or, by similar comments, left RADM Lorge with the impression that not affirming the findings and sentence in the appellant's case would put a target on RADM Lorge's back. RADM Lorge, close in time to this meeting, told LCDR John Dowling, the Deputy SJA, about the meeting and the comment about putting a target on RADM Lorge's back. LCDR Dowling was surprised by the content of the discussions which is why the comments were so memorable for him.

RADM Lorge does not remember the specific comment about putting a target on his back. VADM Crawford denied making the comment. RADM Lorge said if the statement was made he would have taken it as a joke. However, RADM Lorge did believe he received legal advice from VADM Crawford and that approving the findings and sentence was the right answer in the appellant's case.

After this meeting, RADM Lorge and CDR Jones continued to discuss the appellant's case. CDR Jones continued to advise RADM Lorge to affirm the findings and the sentence. In an effort to give RADM Lorge another option, CDR Jones suggested putting something in the action that would communicate RADM Lorge's sincere and strong reservations about the appellant's case.

At some point after that advice, and prior to taking action, RADM Lorge then had a telephone call with VADM Crawford to discuss the proposed plan for action, i.e., putting language in the action that would communicate RADM Lorge's reservations about the case.

Although RADM Lorge does not remember the specific advice he was given by VADM Crawford, he did come away from the telephone call believing his proposed plan was the best he could do in the appellant's case.

RADM Lorge believes he was provided legal advice by VADM Crawford in both the in-person meeting and in the course of the telephone meeting.

RADM Lorge believed then, and continues to believe, the appellant's guilt was not proven beyond a reasonable doubt at his court-martial.

On 12 May 2015, RADM Lorge's Deputy SJA, LCDR Dowling, prepared an "addendum" to CDR Jones's 13 April 2015, "addendum". LCDR Dowling prepared the addendum in his capacity as the acting SJA in CDR Jones's absence.

On 3 June 2015, RADM Lorge approved the findings and sentence.

He included unique language, part of which read: "In my seven years as a General Court-Martial Convening Authority, I have never reviewed a case that has given me greater pause than the one that is before me now. The evidence presented at trial and the clemency submitted on behalf of the accused was compelling and caused me concern as to whether SOCS Barry received a fair trial or an appropriate sentence."

On 5 May 2017, after the C.A.A.F. had denied the appellant's appeal, RADM Lorge signed an affidavit related to the post-trial processing of this case. RADM Lorge was contacted for an affidavit by the appellant's trial defense counsel. Appellant's trial defense counsel learned of the meeting between RADM Lorge and VADM Crawford from someone who worked in the Navy-Marine Corps Appellate Government Division[1].

Also, on 5 May 2017, Lieutenant (LT) Meush filed his notice of appearance in the appellant's case by submitting a pleading with the C.A.A.F.

On 20 June 2017, Captain (CAPT) House, the Chief of the Navy-Marine Corps Appellate Defense Division, signed a detailing letter, assigning both LT Meush and CDR Mizer to appellant's case, specifically the ordered *DuBay* Hearing.

On 21 June 2017, at the request of the defense team, CAPT House detailed CDR Federico to appellant's case.

On 26 June 2017, CDR Federico sent an e-mail to the SJA for Commander, Naval Installations Command (CNIC), the convening authority for appellant's case, advising that he was detailed to represent the appellant at the *DuBay* Hearing.

On 5 July 2017, the defense requested discovery, including any "and all notes, memos, reports, emails, or written communications generated, received, or sent by VADM Crawford relating to this case."

On 25 July 2017, the government responded, "VADM Crawford's staff has indicated that no responsive documents or materials exist."

On 31 July 2017, the defense and prosecution interviewed VADM Crawford at the Pentagon. This interview was coordinated in advance by the defense with VADM Crawford's staff.

After the meeting, the defense again requested VADM Crawford's communications with both the CNO and Colonel Lecce orally and in writing.

On 2 August 2017, Colonel Lecce's aide, Captain Huisenga, informally asked CDR Don Ostrom, an officer at Appellate Defense, for guidance on how the Appellate Defense Division details appellate counsel to *DuBay* hearings. CDR Ostrom informed the defense that Colonel Lecce tasked LCDR Rachel Trest, currently assigned to the Office of the Judge

[1] To the extent there are concerns about an attorney, LCDR Justin Henderson, at appellate government sharing information with a trial defense counsel, the individual believed it was his only option. He was attempting to handle what he believed was a significant concern in the post-trial processing of the case in the best manner he could at the time. Again, understanding my lane, this court would suggest it is a strength in our system that advocates are concerned with both actual fairness and the perception of fairness.

Advocate General, Military Justice Division to draft a standard operating procedure addressing the detailing of defense counsel to *DuBay* hearings.

On 7 August 2017, Assistant Trial Counsel, LCDR Katherine Shovlin, sent LT Meusch an e-mail, copying other detailed and retained counsel, stating that a case involving a rehearing as to sentence, *McMurrin v. United States*, 2011 CCA LEXIS 598 (N-M. Ct. Crim. App. 2011), raised questions as to CAPT House's "authority to detail trial defense counsel." LCDR Shovlin expressed the government's desire to "figure this out prior to the Art. 39(a), so we can make sure all defense counsel are properly detailed to ensure a clean record."

On 8 August 2017, Colonel Valerie Danyluk, USMC, Director, Appellate Government, emailed CAPT House to express Colonel Lecce's view that a *DuBay* hearing is a "trial level function," and inquire if CAPT House detailed counsel to represent SOCS Barry. Colonel Danyluk carried this out even though she has made statements indicating she believes she is "conflicted from the case."

On 21 September 2017, RADM Lorge signed a second affidavit in this case. The second affidavit, done with the assistance of counsel, was an effort to better explain the matters contained in his first affidavit.

RADM Lorge did mistakenly believe the meeting with VADM DeRenzi occurred during the post-trial processing of the appellant's case when he signed both of his affidavits. He corrected this mistake during his testimony. Other than this correction, he reaffirmed all of the matters contained in the two affidavits that he signed related to this case.

VADM DeRenzi, RADM Lorge, and LCDR Dowling were all credible witnesses in this case.

ANALYSIS AND CONCLUSIONS

While the *DuBay* Order allows for this court to make conclusions of law and analysis, this trial judge does so with full understanding the issue will be reviewed *de novo* by the C.A.A.F. This court does so also with the understanding that it is a trial-level court and does not presume to advise the C.A.A.F. or with a belief the comments are in any way directive.

This court has attempted to detail what it believes are the relevant factual findings for the directed issue and to highlight a few of the factual issues related to the detailing of defense counsel. However, this court believes the issue raised related to the detailing of defense counsel, for the purpose of the hearing, was resolved and is moot as the detailed defense team represented the appellant throughout the hearing. While the timing of the Clarification of Detailing in relation to interviews and discovery requests may appear concerning, the defense team at the *DuBay* Hearing were the counsel requested by the appellant. They performed in a manner indicating they felt no undue or unlawful pressure.

No senior Department of Defense *civilian* leader put any type of pressure on the GCMCA in this case. RADM Lorge had no conversations with any civilian leader, and he did not mention anything about them in his affidavits and testimony.

During his testimony, he made clear that during the relevant time frame (post-trial action in this case), he only had a general sense of the external pressures on the military justice system. He did not recall specific comments made by civilian leaders, Congress, or the

White House. He also did not recall the specifics of any particular military justice cases, either in the Navy or any of the other services.

However, RADM Lorge does believe that pressure was placed on him by senior military leaders. During his testimony, and in his affidavits, RADM Lorge discusses this in some detail. In summary, based on comments by VADM DeRenzi (unrelated to the case at hand), comments by VADM Crawford (related to the case at hand), and confusing and difficult advice from his SJA at the time, RADM Lorge felt compelled to take the action taken in appellant's case.

Unintentionally and with no focus on any particular case, VADM DeRenzi focused RADM Lorge on external pressure on the system during her courtesy call on 19 February 2014. Her comments about the difficulties commanders faced in the military justice arena, the fact that every few months some military justice case garnered the attention of Washington, D.C., and the demands on her time from Congress and the White House all entered into RADM Lorge's decision-making process as he took post-trial action in the case. When he took action, these comments reaffirmed what he believed was the "landscape" commanders faced when dealing with these cases.

More concerning are the two meetings (one in person and one telephonic) between RADM Lorge and VADM Crawford during post-trial processing in this case. These two conversations were also factors in RADM Lorge's decision-making process on final action in the subject case.

In the first conversation, RADM Lorge's ultimate impression was that VADM Crawford believed RADM Lorge should approve the findings and sentence in the case. While VADM Crawford may not have said these actual words, based on the conversations during the meeting, RADM Lorge was clearly left with that belief after the meeting. The meeting confirmed the pressures on the system at a minimum.

During the telephone call, RADM Lorge was close to final action, and he was seeking reaffirmation that the planned course of action would achieve RADM Lorge's desired end state in the appellant's case. Specifically, RADM Lorge, now convinced he could not order a new trial, wanted to ensure that the action he took in the case communicated to appellate authorities RADM Lorge's significant reservations about the appellant's case. RADM Lorge left that telephone call with the impression that this was the best he could do in relation to the appellant's case.

Neither RADM Lorge nor VADM Crawford gave many specifics about the content of the conversations during the two meetings. However, RADM Lorge made clear he believes he received legal advice during the two meetings, and he relied on this advice when taking action in this case.

RADM Lorge could not or would not give an idea of how significant a factor these conversations played in the final action in the case. However, the almost contemporaneous statement from RADM Lorge to LCDR Dowling about being told not to put a target on his back offers important insight into both the content of these conversations and the pressure RADM Lorge believes came from the meetings.

An important third factor was the SJA's intransigence in his advice to RADM Lorge related to this case. As RADM Lorge was attempting to navigate his decision, the SJA was

reaffirming, on multiple occasions, the only course of action was the approval of both findings and sentence. The SJA went as far as to discuss how RADM Lorge should avoid political decisions and instead leave those to the appellate courts.

While RADM Lorge was advised about all of his options, all of the factors discussed above ultimately moved him to his final action. Without these pressures, RADM Lorge would have taken different action in the case, likely ordering a new trial.

What seems evident is RADM Lorge believes pressure was brought to bear on him to take particular action in this case. This pressure is more problematic given his SJA's unyielding (and poor initial advice) when RADM Lorge was trying to assess what action to take in this case. All of it led RADM Lorge to take an action that RADM Lorge thought was the "best" he could do in the appellant's case.

While this trial judge does not presume to advise the C.A.A.F. on whether this amounts to unlawful command influence, this court would offer a few observations it perceives as important:

a. RADM Lorge did not take the action he wanted to take in this case;

b. RADM Lorge was influenced by conversations with senior military leaders; specifically VADM DeRenzi and VADM Crawford when taking action in this case;

c. No evidence was presented during the hearing that there were any issues with the referral decision in this case;

d. The defense team (demonstrating their skill and competence) made an effort to re-litigate or demonstrate facts for appellate issues already resolved in this case, and, this trial court is focused on the particular issue presented;

e. While the appearance and timing of the "detailing" issue for defense counsel may have appeared problematic; this issue was resolved immediately at the beginning of the initial hearing. This trial judge simply denied the government motion and allowed the appellant to select his defense team. The appellant did so. The defense team performed during the hearing in a manner that suggested they felt no undue pressure on them from anyone at all. If this were a trial issue, even if there was some type of undue command influence, it was resolved by the specific relief ordered, i.e., the appellant's defense team remained intact. CAPT House said the same during his testimony.

As the judge who conducted the *DuBay* Hearing, it appears the final action taken in this case is unfortunate as it does not engender confidence in the processing of this case or the military justice system as a whole.

Actual or apparent unlawful command influence tainted the final action in this case. It did not affect the trial or the referral decision. At the very least, if this were a trial court decision, a new final action would be ordered in this case, or the stated desires of the original GCMCA would be respected and a new trial ordered.

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