UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JOHN T. BALDWIN
United States Air Force

ACM 34686

17 January 2003

Sentence adjudged 13 June 2001 by GCM convened at Charleston Air Force Base, South Carolina. Military Judge: Harvey Kornstein and Mary Boone (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Lieutenant Colonel Brandon A. Burnett, Major Jeffrey A. Vires, and Major Kyle R. Jacobson.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major Adam Oler.

Before

SCHLEGEL, STONE, and ORR, W.E.
Appellate Military Judges

OPINION OF THE COURT

STONE, Judge:

Consistent with his pleas, the appellant was convicted at a general court-martial of indecent acts with a minor in violation of Article 134, UCMJ, 10 U.S.C. § 934. The adjudged and approved sentence was a bad-conduct discharge, confinement for four months, and reduction to E-1.

This appeal presents the issue of whether the military judge violated Rule for Courts-Martial (R.C.M.) 505(e) when she assigned herself to replace the military judge

who presided over the court-martial when it first assembled. As a preliminary inquiry, however, we must determine whether the appellant's failure to object to the substitution, combined with his written request to be tried by the substituted judge, constituted an affirmative waiver of this issue. We find that it does and affirm.

Background

The appellant's court-martial initially convened on 9 February 2000. Colonel Harvey Kornstein was the detailed military judge, and the appellant submitted a written request to be tried by him alone. After inquiring into the appellant's understanding of the request and the rights being waived, Judge Kornstein approved it and announced the court-martial was assembled. After arraignment, but before entering his pleas, the appellant moved to suppress incriminating statements he made about the sexual molestation of his minor stepdaughter. Judge Kornstein granted the motion, and the government appealed. Our court reversed the military judge's ruling on the motion to suppress, *United States v. Baldwin*, 54 M.J. 551 (A.F. Ct. Crim. App. 2001), *aff'd*, *United States v. Baldwin*, 54 M.J. 464 (2001), and the case was returned for further processing.

The next session of the court-martial was on 13 June 2001, some 16 months after the initial session. Colonel Mary Boone, in her capacity as the Chief Military Judge of the Eastern Circuit, detailed herself to the case and sent notice of the substitution to the parties by letter dated 31 May 2001. The appellant had entered into a pretrial agreement whereby he agreed to be tried by a military judge sitting alone. Accordingly, the day before trial began, the appellant executed a written request to be tried by judge alone, wherein he specifically acknowledged that Judge Boone was the judge currently detailed to his case.

At trial, Judge Boone noted that Judge Kornstein was the previously detailed military judge and that he was "one of our Reserve Military Judges." After stating she was properly certified, sworn, and detailed, she offered the appellant an opportunity to question and challenge her, and he declined. A short while later, she advised the appellant of his rights with respect to forum, noting that if he requested trial by judge alone, "That would be me in your case since we've now switched judges—I say switched in that [Judge Kornstein] is not currently performing any duties, active duties for the Air Force." After ensuring the appellant fully understood his forum rights and had an opportunity to discuss them with his defense counsel, Judge Boone accepted the appellant's request and re-assembled the court. Thereafter, the case proceeded to re-arraignment and trial.

After trial, the appellant learned that Judge Kornstein had served as the presiding judge in a court-martial elsewhere in the Eastern Circuit that ended the day prior to the commencement of his trial. The appellant now contends that his election to go before Judge Boone alone was based upon the mistaken belief that Judge Kornstein was

unavailable to preside over his trial. In this regard, he notes that prior to trial, his counsel checked a computerized roster of Air Force judge advocates to determine Judge Kornstein's status. The roster reflected that Judge Kornstein was in a "reassigned" status, but failed to specify his exact duty assignment. The appellant says this led him to assume that Judge Kornstein was no longer a military judge. Further, he believes that Judge Boone's statement that Judge Kornstein was not currently performing "active duties" for the Air Force reinforced this misperception.

Discussion

R. C. M. 505(e)(2) permits a change of military judge after assembly of the court-martial "only when, as a result of disqualification under R.C.M. 902 or for good cause shown, the previously detailed military judge is unable to proceed." Our superior court has held that an appellant's "failure to object to a change of judge and his request for a bench trial before the new judge 'irrevocably waived all conceivable objections to the substitution.'" *United States v. Kosek*, 46 M.J. 349, 350 (1997) (citing *United States v. Hawkins*, 24 M.J. 257, 259 (C.M.A. 1987)).

On these facts, we find that the appellant voluntarily and intentionally relinquished this issue. Assuming that the appellant initially believed Judge Kornstein was no longer a military judge based upon the computer roster, this misperception should have been cleared up when Judge Boone advised him--prior to making his forum decision--that he was "one of our Reserve Military Judges."

Because Judge Boone's detail to appellant's case was not challenged, we do not have a sufficiently developed record to permit review of the justification for the change of judge. We need not reach the merits of that issue, however, because we hold that any error was affirmatively waived. *Kosek*, 46 M.J. 349.

In accordance with the opinion above, the approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (2000). Accordingly, the approved findings and sentence are

AFFIRMED

Senior Judge SCHLEGEL did not participate.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator