UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant RYAN M. DAVIS
United States Air Force

ACM S31184

28 December 2007

Sentence adjudged 28 September 2006 by SPCM convened at Robins Air Force Base, Georgia. Military Judge: Gary L. Jackson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 114 days, a reprimand, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Griffin S. Dunham.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Captain Jason M. Kellhofer, Captain Jamie L. Mendelson, and Captain Donna S. Rueppell.

Before

JACOBSON, PETROW, and ZANOTTI
Appellate Military Judges

PER CURIAM:

A military judge, sitting alone as a special court-martial, found the appellant guilty in accordance with his plea of one specification of desertion, in violation of Article 85, UCMJ, 10 U.S.C. § 885. He was sentenced to a bad-conduct discharge, confinement for 114 days, reduction to E-1, and a reprimand. The convening authority approved the findings and sentence.

Before this Court, the appellant argues that the military judge abused his discretion in admitting the appellant's estranged wife's testimony regarding the financial and

emotional consequences the appellant's desertion inflicted upon the family.[1] We disagree. We have also considered the appellant's second asserted error[2] and as a result of our opinion on the first, find it is also without merit. Accordingly, we affirm the findings and sentence.

Background

The appellant deserted his unit on 16 March 2006 when he failed to return from approved leave.[3] He had traveled to the Philippines to begin a life with his pregnant girlfriend. He stated during his providence inquiry that he intended to remain away permanently before he left. The record indicates that the appellant spoke with a law enforcement officer shortly after he was expected to return back to the United States, and told him he did not intend to return to the country.

At the time the appellant left the United States, he was married with two additional dependents: a child from his wife's previous marriage and a child between them. The children were 11 and 5 at the time of trial. The couple was estranged and the appellant was living in an apartment apart from his family, but the appellant continued to assist with their bills.

In the prosecution's case on sentencing, trial counsel offered testimony from the appellant's estranged wife as evidence in aggravation under Rule for Courts-Martial (R.C.M.) 1001(b)(4). In an effort to paint a picture of financial problems resulting from the offense, the appellant's wife testified that: she was not employed at the time he had deserted the military and left the family, although she had been actively seeking employment prior to his departure; she ultimately landed a job about three months after his desertion, albeit for minimum wage; and the appellant had left her with about $2,000 in a joint savings account which she quickly depleted in an effort to pay the bills. With respect to an impact on her benefits, the appellant's wife testified that she had to obtain public support via food stamps[4] and that her Tricare health benefits were canceled about a month after the appellant's desertion.[5] Finally, the appellant's wife testified about the impact of his desertion on her daughters, stating that both were crying a lot, both were attending counseling, that the youngest daughter sat at the window for five hours on her

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[1] Specifically, the issue presented is, "Whether the military judge abused his discretion by allowing appellant's estranged wife to testify in aggravation about the financial and emotional consequences of appellant's desertion when his decision to desert was completely independent of his decision to stop financially and emotionally supporting his family and therefore not 'directly related' to the offense."

[2] "Whether trial counsel committed plain error during his presentencing argument when he repeatedly appealed to the military judge's emotions by referencing the financial and emotional consequences of appellant's decision to abandon his family."

[3] The approved leave was from 1-15 March 2006.

[4] From the record, it appears these benefits were sought prior to the appellant's desertion because the appellant's wife stated they were finally received, after a delay, sometime around mid-March.

[5] The appellant's wife testified that she had received Medicaid benefits in lieu of Tricare benefits.

birthday waiting for the appellant to return only to be disappointed when he did not, and that both were finally recovering only to be hurt again upon the appellant's actual return.

Trial defense counsel objected to the spouse's testimony as not relevant under R.C.M. 1001(b)(4) because it was not "directly relating to or resulting from" the offense to which the appellant was convicted. The military judge overruled the objection and admitted the evidence.

Discussion

We review the military judge's ruling for abuse of discretion. *United States v. McElhaney*, 54 M.J. 120, 129 (C.A.A.F. 2000): *United States v. Wilson*, 47 M.J. 152, 155 (1997). Rule for Courts-Martial 1001(b)(4) limits evidence in aggravation to those matters "directly relating to or resulting from" the offenses to which the appellant has been found guilty. That Rule states that "[e]vidence in aggravation includes . . . evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense." *Id.* The appellant argues that because desertion is a uniquely military offense, only impact on the unit can be considered as "directly relating to or resulting from" the offense. The appellant argues that absent a charge of "failure to provide adequate support for his family," evidence of financial and emotional impact on the family is not admissible because it is not directly relating to the offense of desertion.

The appellant attempts to draw too broad a line between impact on the unit and impact on his family. An argument similar to the appellant's was made and rejected in *Wilson*, 47 M.J. 152. There the appellant was convicted of disrespect towards a superior commissioned officer by making inflammatory statements about an officer outside of that officer's presence. *Id.* The officer learned about them through a third party and testified about the psychological impact of hearing the substance of the statements. *Id.* at 153-54 The trial defense counsel argued the offense was an offense against the military and the impact was upon the mission, and therefore, any impact on the officer to whom the disrespect was aimed was too remote to be directly related to the appellant's offense. *Id.* at 153. The military judge disagreed, finding from the circumstances in that case that the officer had been impacted due to the personal nature of the statements. *Id.* at 154. In reviewing the military judge's decision, our superior court stated that "[w]hether a circumstance is 'directly relat[ed] to or results from the offenses' calls for considered judgment by the military judge, and we will not overturn that judgment lightly." *Id.* at 155. Similarly, in *United States v. Jones*, 44 M.J. 103, 104 (C.A.A.F. 1996), our superior court held evidence of the appellant's HIV status was properly considered as a matter in aggravation under R.C.M. 1001(b)(4), even though the appellant was convicted of adultery, but acquitted of aggravated assault. Applying this precedent alone, we reject the appellant's argument that the military judge abused his discretion in admitting the testimony.

Moreover, the record does not factually support the appellant's conclusion that his "collateral paternal failure [had] nothing to do with him staying away from his unit." Rather, the record reveals that the appellant admitted that he left precisely because he had domestic and financial issues with his wife, and because he wished to be with his pregnant girlfriend in the Philippines. The appellant also attempted to minimize the impact his desertion had on the unit and its members by projecting the blame for any unit impact on his wife's calls to the unit for help for her family.

Finally, the military judge acknowledged his ability to keep the evidence in context during the arguments on admissibility, admonishing trial counsel that he would not consider it as "deserting the family," and noting in his ruling that defense counsel's objections spoke more to weight than admissibility in light of R.C.M. 1001(b)(4). We find from the record that the military judge properly considered the evidence in context and did not abuse his discretion in admitting it into the record. This assignment of error is without merit.

Additionally, in light of the above, we hold that trial counsel's arguments on this evidence were not improper. The trial counsel's argument was nothing more than zealous advocacy on behalf of the government. *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). Thus, the appellant's second assignment of error is also without merit.

Conclusion

The 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 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

Judge PETROW did not participate.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court