UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Lieutenant Colonel BRUCE E. GOOCH
United States Air Force

ACM 37303

24 November 2009

Sentence adjudged 09 June 2008 by GCM convened at Sheppard Air Force Base, Texas. Military Judge: William M. Burd.

Approved sentence: Dismissal and a reprimand.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Michael A. Burnat, Major Lance J. Wood, and Major Imelda L. Paredes.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain John M. Simms, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JACKSON, Senior Judge:

Contrary to the appellant's pleas, a panel of officers sitting as a general court-martial convicted him of one specification of making a false official statement, three specifications of engaging in conduct unbecoming an officer and a gentleman, and one specification of fraternization, in violation of Articles 107, 133, and 134, UCMJ, 10 U.S.C. §§ 907, 933, 934. The adjudged and approved sentence consists of a dismissal and a reprimand. On appeal the appellant asks this Court to set aside his findings and sentence with prejudice, order new post-trial processing, or grant other appropriate relief.

The basis for his request is that he opines: (1) his court-martial panel did not include a member or members of his race and therefore the process for selecting members for his court-martial was improper; (2) the evidence is legally and factually insufficient to support his conviction for engaging in conduct unbecoming an officer by attempting to engage in an unprofessional relationship with then-Senior Airman (SrA) MKG, an enlisted person under his command; (3) his conviction involving SrA MKG should be set aside because the members improperly reconsidered their finding of not guilty and found him guilty without receiving a reconsideration instruction from the military judge; (4) after discovering the improper reconsideration and learning of the military judge's inclination to dismiss the conviction involving SrA MKG, his trial defense counsel were ineffective in urging the military judge not to dismiss his conviction involving SrA MKG; (5) his sentence to a dismissal is inappropriately severe; and (6) he is entitled to new post-trial processing because after his court-martial but before action on his case, the special court-martial convening authority (SPCMCA) engaged in unlawful command influence by sending an e-mail to the entire base condemning the appellant's conduct and noting that the appellant had been sentenced to a dismissal and had been held accountable for his crimes.[1] Finding no prejudicial error, we affirm.

Background

In approximately September 2005, the appellant, a married man and the commander of the 82nd Mission Support Squadron, Sheppard Air Force Base, Texas, began making attempts to engage in an unprofessional relationship with SrA MKG, an enlisted individual within his squadron.[2] The attempts consisted of frequent personal questions, invitations to his house when his wife was absent, and an uninvited visit to SrA MKG's residence. SrA MKG rebuffed the appellant's advances and the appellant ceased his attempts.

In approximately July 2006, the appellant began a sexual relationship with First Lieutenant (1st Lt) J-M J, his squadron section commander and a subordinate officer whom he supervised and rated. The two had sexual intercourse at her residence approximately 12 to 15 times and the relationship continued until May 2007, when 1st Lt J-M J departed for a new duty station. During a portion of this same time period, 1st Lt J-M J was not the only subordinate upon whom the appellant had designs. He not only told SrA ADW, another enlisted member within his squadron, that he wanted her to stand still so he could look at her buttocks and that he would have sexual intercourse with her if he could, he began a physical relationship with then-Airman First Class (A1C) TMJ, a student relocation clerk in his squadron.[3] His relationship with A1C TMJ consisted of mutual hugging, kissing, and fondling in the command duty section. On a few occasions

[1] Issues 1 and 5 are filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[2] By the time of trial, then-Senior Airman MKG had separated from the United States Air Force.
[3] By the time of trial, then-Airman First Class TMJ had separated from the United States Air Force.

during this time period, the appellant exposed his penis to A1C TMJ and obliquely requested fellatio.

In May 2007, the appellant went on temporary duty to Florida and while he was gone allegations were made regarding the appellant. As a result, on 25 July 2007, agents with the Air Force Office of Special Investigations (AFOSI) summoned the appellant to an office for an interview. After a proper rights advisement, the appellant waived his rights, agreed to answer questions, confessed to engaging in an inappropriate physical relationship with A1C TMJ but denied having had a sexual relationship with 1st Lt J-M J.

On 19 December 2007, the general court-martial convening authority referred the aforementioned charges to a general court-martial. Only one prospective member of the appellant's race (African-American) was initially selected to serve on the appellant's court-martial but she was removed at her request for personal reasons. At trial, the defense moved to dismiss the charges and specifications for an improper court-martial panel selection. After hearing argument, the military judge denied the appellant's motion—finding no unlawful command influence, finding no diversity requirement under Article 25, UCMJ, 10 U.S.C. § 825, and finding that those involved in the selection of the appellant's court-martial panel did not consider race, sex, or command experience in selecting the prospective court members.

During sentencing deliberations, the court-martial president, in seeking advice on sentence reconsideration, advised the military judge and the counsel that the members had initially found the appellant not guilty of the offense involving SrA MKG but reconsidered the finding at the request of one of the members and subsequently found the appellant guilty of that offense. The members had not received instructions from the military judge on the proper procedures for conducting the reconsideration. The military judge informed the counsel he was inclined to dismiss the finding involving SrA MKG but wanted their opinions.

Both trial counsel and trial defense counsel opined the error was a procedural error that did not violate the appellant's constitutional rights and asked the military judge not to dismiss the respective finding. The military judge specifically asked the appellant if he agreed with his trial defense counsel's position of not dismissing the respective finding, and the appellant agreed. The military judge decided to let the respective finding remain and instructed the members accordingly.

Following the appellant's conviction but prior to action, the SPCMCA sent an e-mail to the base community addressing the appellant's and another commander's misconduct, highlighting the appellant and the other commander were held accountable for their actions and opining the military justice system works.

Court-Martial Panel Selection

An accused has a constitutional and a statutory right to a fair and impartial jury. *United States v. Downing*, 56 M.J. 419, 421 (C.A.A.F. 2002). However, an accused "does not have a '*per se*' right to have a person of his own race appointed as a member of his court-martial." *United States v. Hodge*, 26 M.J. 596, 600 (A.C.M.R. 1988), *aff'd*, 29 M.J. 304 (C.M.A. 1989). "Article 25(d)(2)[, UCMJ,] requires a convening authority to select court-martial members who, 'in his opinion are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.'" *United States v. Upshaw*, 49 M.J. 111, 112 (C.A.A.F. 1998) (quoting Article 25(d)(2), UCMJ). In fulfilling his obligation, a convening authority may rely on his staff to nominate court members. *United States v. Marsh*, 21 M.J. 445, 449 (C.M.A. 1986).

While race is not a criteria for selecting or excluding prospective court members under Article 25, UCMJ, a convening authority or his surrogates cannot systematically excluded prospective members. *United States v. Kirkland*, 53 M.J. 22, 24-25 (C.A.A.F. 2000). "Whether a court-martial panel was selected free from systematic exclusion is a question of law we review *de novo*." *Id*. at 24. "As a general principle, it is proper to assume that a convening authority is aware of his duties, powers and responsibilities and that he performs them satisfactorily." *United States v. Townsend*, 12 M.J. 861, 862 (A.F.C.M.R. 1981). The defense has the initial burden of establishing the improper exclusion of qualified personnel from the selection process. *Kirkland*, 53 M.J. at 24. More than a mere allegation or speculation is required. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F.1999). "Once the defense establishes such exclusion, the [g]overnment must show by competent evidence that no impropriety occurred when selecting [the] appellant's court-martial members." *Kirkland*, 53 M.J. at 24.

In the case at hand, the military judge made extensive findings of fact, and we are bound by those findings of fact unless they are clearly erroneous. *United States v. Burris*, 21 M.J. 140, 144 (C.M.A. 1985) (quoting *United States v. Middleton*, 10 M.J. 123, 133 (C.M.A. 1981)). The military judge found that race was not considered in selecting the appellant's court-martial panel and that the appellant failed to meet his initial burden of establishing the improper exclusion of qualified personnel. We agree.

The testimony of the military justice paralegal responsible for selecting the appellant's court-martial pool, Master Sergeant KM, made clear that race, gender, and command experience were not considered in selecting the appellant's court-martial pool. Thus, the military judge's findings of fact are not clearly erroneous. Moreover, the fact that there were no members of the appellant's race on the panel does not establish a systematic exclusion of members of his race, or any race, from the court-martial panel. At the end of the day, the appellant offers mere allegations or speculation of impropriety.

He has failed to meet his burden, and we find no improper exclusion of qualified personnel from his court-martial panel selection process.

Legal and Factual Sufficiency

In accordance with Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

We have considered the evidence produced at trial in a light most favorable to the government and find a reasonable fact finder could have found all of the essential elements of the specification of engaging in conduct unbecoming an officer by attempting to engage in an unprofessional relationship with SrA MKG. Specifically we note that SrA MKG testified that on more than one occasion the appellant called her on her personal cell phone and posed personal questions to her, invited her to his house when he thought his wife would be absent, and visited SrA MKG uninvited at her residence. Such evidence legally supports the appellant's finding of guilt on this specification.

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973). We have carefully considered the evidence and are convinced beyond a reasonable doubt that the appellant is guilty of this specification.

Members' Reconsideration of Finding

> Members may reconsider any finding reached by them before such finding is announced in open session. . . . If such a proposal is made in a timely manner the question whether to reconsider shall be determined in closed session by secret written ballot. Any finding of not guilty shall be reconsidered if a majority vote for reconsideration. . . . If a vote to

> reconsider a finding succeeds, the procedures in [Rule for Courts-Martial] R.C.M. 921 shall apply.

R.C.M. 924.

The procedural requirements for reconsideration of a finding have the force of law and are of binding application in trials by court-martial. *United States v. Boland*, 42 C.M.R. 275, 277 (C.M.A. 1970). The procedural requirements are a valuable right accorded an accused, the violation of which may have a substantial effect upon the findings ultimately adjudged against an accused. *Id.* Absent evidence to the contrary, members are presumed to follow a military judge's instructions. *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000) (citing *United States v. Loving*, 41 M.J. 213, 235 (C.A.A.F. 1994); *United States v. Holt*, 33 M.J. 400, 408 (C.M.A. 1991)).

"An error which affects a substantial right of an accused is presumptively prejudicial." *Boland*, 42 C.M.R. at 278. While the presumption "may yield to compelling evidence in the record that no harm actually resulted, a silent record is insufficient to rebut the presumption." *Id*. (citing *United States v. Pierce*, 41 C.M.R. 225 (C.M.A. 1970)).

In the instant case, the members erroneously disregarded the military judge's clear and cogent instructions concerning reconsideration. Moreover, they reconsidered a not guilty finding after one member moved for reconsideration and without the benefit of additional reconsideration instructions. While it is unknown whether the members voted for reconsideration by secret, written ballot and whether they had the requisite majority for reconsideration, what is clear is that they failed to obtain and thus consider additional reconsideration instructions from the military judge and in so doing deviated from the military judge's earlier instructions. Under the circumstances, the members' reconsideration was improper.

However this does not end our inquiry. We need to determine whether the appellant merely forfeited this issue, thus making this appeal a matter for plain error review, or whether the appellant waived this issue. While "forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938))). When "an appellant intentionally waives a known right at trial, it is extinguished and may not be raised on appeal." *Id*. (citing *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008)).

An accused may knowingly and voluntarily waive many rights and Constitutional protections. *Id*. at 314 (quoting *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995)); *United States v. Edwards*, 58 M.J. 49, 52 (C.A.A.F. 2003). Additionally, "absent some

affirmative indication by Congress' intent to preclude waiver, . . . statutory provisions are subject to waiver." *Edwards*, 58 M.J. at 52 (quoting *Mezzanatto*, 513 U.S. at 201). Axiomatically, the appellant's rights concerning reconsideration of findings derive not from the United States Constitution but from Presidential policy. *See* R.C.M. 924. Here it is clear from the record that the military judge discussed the error with the appellant and his counsel, informed them that he was inclined to dismiss the respective finding, and asked them how they wanted to proceed. It is also clear that the appellant, through counsel, specifically asked the military judge not to dismiss the respective finding. In short, by asking the military judge not to dismiss the respective finding, the appellant waived the error.

Ineffective Assistance of Counsel Claim

Without question, service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000)). Claims of ineffective assistance of counsel are reviewed under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). Where there is a lapse in judgment or performance alleged, we ask: (1) whether the trial defense counsel's conduct were in fact deficient, and, if so (2) whether the counsel's deficient conduct prejudiced the appellant. *Strickland*, 466 U.S. at 687; *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991).

The appellant bears the heavy burden of establishing that his trial defense counsel were ineffective. *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001). Counsel are presumed to be competent and we will not second guess the trial defense counsel's strategic or tactical decisions. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993). "To make out a claim of ineffective assistance of counsel, the accused must rebut this presumption by pointing out specific errors made by his defense counsel which were unreasonable under prevailing professional norms." *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987).

"The reasonableness of [the] counsel's performance is to be evaluated from [the] counsel's perspective at the time of the alleged error and in light of all the circumstances." *Id*. "In making [the competence] determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id*. (quoting *United States v. Cronic*, 466 U.S. 648, 690 (1984)) (alteration in original). "Acts or omissions that fall within a broad range of reasonable approaches do not constitute a deficiency." *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001).

The appellant asserts his trial defense counsel were ineffective because they urged the military judge not to dismiss the conviction involving SrA MKG. We need not

decide whether the appellant's trial defense counsel were ineffective because the appellant waived any error associated with the members' improper reconsideration of the finding, to include any error made by his counsel in urging the military judge not to dismiss the respective finding.

Moreover, assuming the appellant did not waive any error made by his counsel in urging the military judge not to dismiss the respective finding, he is still "estopped" from complaining because the military judge specifically asked if he concurred with his counsel's decision not to ask for a dismissal, and the appellant stated he concurred. An appellant cannot create or exacerbate an error and then take advantage of a situation of his own making. "Invited error[, as in the case here,] does not provide a basis for relief." *United States v. Raya*, 45 M.J. 251, 254 (C.A.A.F. 1996) (citing *United States v. Johnson*, 26 F.3d 669, 677 (7th Cir. 1994)).

Lastly, assuming waiver and invited error are inapplicable, the appellant is still not entitled to relief. In response to the appellant's ineffective assistance of counsel assertions, the government submitted a post-trial affidavit from Major CH and Captain JE, the appellant's trial defense counsel. Both assert that it would have been counter-productive to their sentencing goals to ask for dismissal of the specification, and Major CH asserts that dismissing the respective finding could have resulted in the replacement of the perceived favorable court-martial panel with a less than favorable panel. In short, they aver they made a tactical decision not to move to dismiss the finding.

When conflicting affidavits create a factual dispute, we cannot resolve it by relying on the affidavits alone without resorting to a post-trial fact finding hearing. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). However, in the case sub judice, the affidavits do not conflict. All agree that trial defense counsel urged the military judge not to dismiss the finding. Thus, we can resolve this issue without resorting to a post-trial fact finding hearing. Under these facts, we find that the trial defense counsel made a tactical decision in urging the military judge not to dismiss the finding and their actions do not amount to ineffectiveness of counsel. Simply put, the appellant waived any error, the appellant is estopped from complaining of any error, and the appellant's counsel made a tactical decision, one we will not second guess, in urging the military judge not to dismiss the finding.

Inappropriately Severe Sentence

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United*

States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

In this case, the appellant, by his actions, seriously compromised his standing as a commissioned officer and a military member. He preyed upon subordinates in his command and discarded his "command," "officership," and "integrity" to satisfy his selfish, sexual desires. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offenses of which the appellant was found guilty, we do not find the appellant's sentence, one which includes a dismissal, inappropriately severe.

Post-Trial Advice and Unlawful Command Influence

Proper completion of post-trial processing is a question of law, which this Court reviews de novo. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F 2000). We review questions of unlawful command influence de novo, deferring to the military judge's findings of fact unless they are clearly erroneous. *United States v. Denier*, 43 M.J. 693, 698 (A.F. Ct. Crim. App. 1995), *aff'd*, 47 M.J. 253 (C.A.A.F. 1997). The military judge did not make any findings of fact on this issue, thus in resolving this issue we will look to the record.

The prohibition against unlawful command influence arises from Article 37, UCMJ, 10 U.S.C. § 837, which provides, in part, "No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . in reaching the findings or sentence in any case." Article 37(a), UCMJ. Additionally, the burden of production on unlawful command influence issues is on the party raising the issue; here the burden rests with the appellant. *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A. 1994).

In determining whether or not unlawful command influence exists, "[t]he test is [whether there exists] 'some evidence' of 'facts which, if true, constitute unlawful command influence, and [whether] the alleged unlawful command influence has a logical connection to the court-martial in terms of its potential to cause unfairness in the proceedings.'" *United States v. Harvey*, 64 M.J. 13, 18 (C.A.A.F. 2006) (quoting *Biagase*, 50 M.J. at 150). Once the appellant has met the burden of production and proof, the burden shifts to the government to "prove beyond a reasonable doubt: (1) that the predicate facts do not exist; or (2) that the facts do not constitute unlawful command influence; or (3) that the unlawful command influence will not prejudice the proceedings or did not affect the findings and sentence.'" *Id.* (quoting *Biagase*, 50 M. J. at 151).

In the case at hand, the appellant has failed to meet his burden of production. At best he offers conjecture of unlawful command influence and there "must be something more than an appearance of evil to justify action by an appellate court. . . . 'Proof of [command influence] in the air . . . will not do.'" *Stombaugh*, 40 M.J. at 213 (quoting *United States v. Allen*, 33 M.J. 209, 212 (C.A.A.F. 1991)) (second alteration in original). Nowhere in the SPCMCA message did he attempt to interfere with the appellant's clemency or influence the GCMCA. Rather the SPCMCA simply informed the base populous of the results of the appellant's and another commander's courts-martial, opined the appellant and the other commander were held accountable for their serious misconduct, and extolled the fairness of the military justice system.[4]

Such hardly rises to the level of unlawful command influence and it would be unreasonable to suggest otherwise. Moreover, there is no evidence that SPCMCA's actions affected the appellant's clemency and the GCMCA's action. The appellant submitted an extensive clemency package, comprised, in part, of recommendations from a court-martial panel member and active duty members within the SPCMCA's command, and the GCMCA considered the appellant's clemency package and assertions of unlawful command influence prior to taking action in the appellant's case. Put simply, we find no unlawful command influence and the appellant is not entitled to new post-trial processing.

Conclusion

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

[4] On this latter point the special court-martial convening authority noted that the appellant and the other commander were convicted of some of the charges and acquitted of other charges.

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court