UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant MICHAEL B. GRANT
United States Air Force

ACM S31768

17 October 2011

Sentence adjudged 17 December 2009 by SPCM convened at Lackland Air Force Base, Texas. Military Judge: W. Thomas Cumbie.

Approved sentence: Bad-conduct discharge, reduction to E-4, and a reprimand.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Deanna Daly; Major Naomi N. Porterfield; Captain Joseph Kubler; and Gerald R. Bruce, Esquire.

Before

GREGORY, WEISS, and SARAGOSA
Appellate Military Judges

PER CURIAM:

A special court-martial composed of officer members convicted the appellant in accordance with his pleas of one specification of dereliction of duty by providing alcohol to an underage female and two specifications of a violation of a lawful general order,[1] by wrongfully developing a personal, intimate, or sexual relationship with two Airmen who were technical trainees while he was a military training instructor, in violation of Article 92, UCMJ, 10 U.S.C. § 892. The special court-martial panel also found the appellant

[1] Air Education and Training Command Instruction 36-2909, *Professional and Unprofessional Relationships*, ¶ 4.3.3 (2 March 2007).

guilty of making a false official statement to detectives, in violation of Article 107, UCMJ, 10 U.S.C. § 907. The adjudged and approved sentence included a reprimand, reduction to the grade of E-4, and a bad-conduct discharge.

The appellant raises four issues on appeal: (1) whether the testimony of the appellant's commander euphemistically recommending a punitive discharge and highlighted during the prosecutor's sentencing argument materially prejudiced the appellant's substantial rights, (2) whether the appellant's sentence was excessively severe in light of the disparity with a related case, (3) whether the action of the convening authority should be set aside where the personal data sheet (PDS) considered by the convening authority excluded the appellant's deployment, combat service, and Global War on Terrorism Expeditionary Medal, and (4) whether the military judge violated Mil. R. Evid. 901 by finding that the testimony of Airman (Amn) DM was sufficient to authenticate Facebook messages purportedly sent by the appellant and received by her.[2]

For now, we address only the third and fourth issues, as the remaining issues depend on whether the bad-conduct discharge is actually approved after remand to the convening authority.

Facebook Messages

The appellant asks that we set aside the finding of guilty on Specification 1 of Charge II or, in the alternative, set aside the bad-conduct discharge for what he asserts was error by the military judge in the admission of copies of Facebook messages, in violation of Mil. R. Evid. 901.

We review a military judge's ruling on the admission of evidence for an abuse of discretion. *United States v. McCollum,* 58 M.J. 323, 335 (C.A.A.F. 2003) (citations omitted); *United States v. Robles-Ramos*, 47 M.J. 474, 476 (C.A.A.F. 1998) (applying abuse of discretion standard of review for admissibility of uncharged misconduct); *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995) (applying abuse of discretion standard of review for motions to suppress). "[A] military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *Ayala*, 43 M.J. at 298.

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Mil. R. Evid. 901(a). "[A]uthentication is a component of relevancy (evidence admitted as something can have no probative value unless that is what it really is)." *United States v. Blanchard*, 48 M.J. 306, 309 (C.A.A.F. 1998). The "[a]ppearance, contents, substance, internal patterns, or other distinctive

[2] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

characteristics, taken in conjunction with the circumstances" may be sufficient to conform with the requirements of Mil. R. Evid. 901. *See* Mil. R. Evid. 901(b)(4).

The Facebook messages introduced in this case contained the name "Mike Grant" next to each entry purportedly entered by the appellant. Each message also contained a photograph of the appellant wearing his military uniform. Amn DM testified that she knew the messages were from the appellant, "Because all of his pictures were on there. He had added us right after like – we had like just seen him at the BX and then we went to my room and I checked my Facebook, and he had just added us. And he talked about like our flight and stuff and he gave me his number on Facebook." She further testified that she "texted" the appellant at the phone number he gave her via the Facebook messages and corresponded with him that way as well. Finally, she testified that she and the appellant made plans and she relied on the information the appellant gave her for those plans via the Facebook messages.

After review of the messages admitted and the testimony regarding the messages, we find no violation of Mil. R. Evid. 901 and conclude the military judge did not abuse his discretion by admitting the Facebook messages.

The Staff Judge Advocate's Recommendation

The appellant asks that we set aside the Action of the convening authority because the information provided in the PDS attached to the staff judge advocate recommendation (SJAR) failed to reflect the appellant's combat service during a deployment to Al Udeid AB, Qatar, from 11 August 2007 to 4 February 2008, in support of Operations ENDURING FREEDOM, IRAQI FREEDOM, and the Combined Joint Task Force HORN OF AFRICA.[3] For this service he received the Global War on Terrorism Expeditionary Medal. Reference to this decoration is also omitted from the PDS.

Errors or omissions in a SJAR are waived absent plain error. *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005) (citing *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)). To prevail, the appellant must show plain and obvious error that materially prejudiced a substantial right. *Id.* Although the convening authority's vast power to grant clemency makes the threshold for prejudice low, the appellant must nevertheless make "some colorable showing of possible prejudice." *Id.* at 436-37 (quoting *Kho*, 54 M.J. at 65).

In this case, the PDS provided to the convening authority was the same one provided to the members at trial, without objection by the defense. Additionally, this combat service history was not mentioned in the clemency matters presented to the convening authority. It appears that this missing information was not noticed until this

[3] This information is reflected on Defense Exhibit AD, which is the certificate awarding the Global War on Terrorism Expeditionary Medal.

appeal. While the missing information was otherwise contained in some of the defense exhibits presented to the members for consideration at sentencing, none of these documents were submitted by the defense with the clemency matters. Furthermore, while the trial defense counsel's submission requests that the convening authority consider the defense exhibits presented at trial, there is no indication in the Addendum to the SJAR that the record of trial or any of the defense exhibits admitted at trial were provided to the convening authority for consideration.[4] There is nothing in the record of trial that would indicate the convening authority used his discretion to review these defense exhibits which may have supplemented the information on the PDS. As such, we find the omission of the appellant's combat service and corresponding decoration from the PDS is error.

Turning to the issue of prejudice, we note the adjudged and approved sentence included a reprimand, reduction to the grade of E-4, and a bad-conduct discharge. We also note that the possibility of a bad-conduct discharge was heavily litigated during the sentencing proceedings. Prior to the current offenses, the appellant's service had been characterized as "exceptional" and no other derogatory data was presented at trial. Given these facts and the focal point of the appellant's sentencing case, we are not convinced that knowledge of the appellant's combat service history would have had no impact on the convening authority's Action. After carefully considering the entire record in this case, we find the appellant has made a colorable showing of possible prejudice, and thus find it necessary to correct the error by remanding for a new action.

Conclusion

The findings 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). We affirm the findings and set aside the convening authority's action. The record of trial is returned to The Judge Advocate General for remand to the convening authority for post-trial processing consistent with this opinion.

[4] This Court does not intend this comment to indicate that the convening authority had an obligation to consider these documents. Rules for Courts-Martial 1105 and 1107 require the convening authority to consider any written matters submitted. Had the appellant submitted copies of the documentary evidence introduced at trial, the convening authority would have been obligated to consider it.

Thereafter, Article 66, UCMJ, will apply.

OFFICIAL

ANGELA E. DIXON, TSgt, USAF
Paralegal Specialist