**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

---

**UNITED STATES**

**v.**

**Senior Airman JUSTIN B. HOWARD**
**United States Air Force**

**ACM 36466**

**25 June 2008**

Sentence adjudged 02 February 2005 by GCM convened at Altus Air Force Base, Oklahoma. Military Judge: Mary Boone.

Approved sentence: Dishonorable discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain John S. Fredland.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Captain Daniel Breen, and Captain Jefferson E. McBride.

Before

FRANCIS, BRAND, and HEIMANN
Appellate Military Judges



PER CURIAM:

Contrary to his pleas, the appellant was convicted of one specification of willful dereliction of duty, one specification of making a false official statement and one specification of rape, in violation of Articles 92, 107 and 120, UCMJ, 10 U.S.C. §§ 892, 907, 920. The approved sentence consists of a dishonorable discharge, confinement for three years, total forfeiture of all pay and allowances, and reduction to E-1.

There are three issues on appeal. The issues are: whether the military judge denied the appellant's due process right to a fair and impartial panel by using the liberal grant policy as a basis for granting a prosecution challenge for cause against Major MG,

contrary to the Court of Appeals for the Armed Forces' (C.A.A.F.) opinion in *United States v. James*, 61 M.J. 132 (C.A.A.F. 2005); whether the military judge erred by allowing the government to use evidence that the appellant had been diagnosed with a sexually-transmitted disease prior to his alleged rape of SM as aggravation evidence in presentencing, when no evidence indicated that SM had contracted the sexually transmitted disease; and whether this Court should remand the appellant's case for a sentence rehearing or provide meaningful sentencing relief when the military judge instructed the members that "military confinement facilities are corrective rather than punitive," contrary to C.A.A.F.'s opinion in *United States v. Holmes*, 61 M.J. 148, 149 (C.A.A.F. 2005), and when the assistant trial counsel stressed the corrective benefits of confinement in his sentencing argument.

*Background*

The appellant and ED were friends in September 2003. After an evening of drinking at, and closing down a local bar, Scooter's, ED called the appellant, who was on duty as a Security Forces member and a military working dog handler. She arranged to have the appellant meet her at the gate and assist her in gaining access to the installation without being stopped for drunk driving.[1] As arranged, the appellant went to the base entry gate, relieved the person working the gate, and waved ED onto the installation. He then followed ED to her residence.

While at the residence, the appellant called the desk sergeant and stated he was conducting a walking patrol. Later, he called back to say that wasn't true, and that he had been, in fact, f------. Shortly thereafter, the appellant was investigated for dereliction of duty and making a false official statement.[2]

On New Year's Eve 2003, the appellant met up with SM at Scooter's, where they were drinking. The appellant told SM about a party at a local residence. SM went to the residence, and the appellant showed up later. There, the alcohol consumption continued. Eventually, the appellant escorted SM to an unoccupied bedroom. SM was drunk, and recalled little of the events of the evening, but recalled the appellant having sex with her. The next morning, the appellant assured SM nothing had happened, and then drove her home. She reported the rape, and a rape protocol examination was performed. There was DNA evidence confirming the appellant had sex with SM. The appellant testified the sex was consensual, or at a minimum, he reasonably believed SM consented.

---

[1]This had happened in the past, where the appellant would wave ED or one of her friends onto base after they had been drinking. ED resided on base.

[2]About 11 days after ED had been interviewed regarding these allegations, ED reported that the appellant had raped her that evening. He was acquitted of that rape allegation.

*Challenge for Cause*

The first issue is whether the military judge denied the appellant's due process right to a fair and impartial panel by using the liberal grant policy as a basis for granting a prosecution challenge for cause against Major MG, contrary to the C.A.A.F.'s opinion in *United States v. James*, 61 M.J. 132 (C.A.A.F. 2005).

Major MG was a women's health nurse practitioner who did gynecological (GYN) care everyday. She had extensive experience with the colposcope (about which there would later be testimony at trial). Additionally, she had been a character witness in a different, unrelated court-martial. One of the two defense counsel in the case sub judice was the defense counsel in the other court-martial. Because the accused, in that case, did not receive a punitive discharge, Major MG was going to be a character witness at a future administrative discharge board. When asked during voir dire her reaction to the outcome of the other court-martial, she said she was very upset.

The trial counsel challenged Major MG for cause based upon her training, her past and future experiences with the trial process, and her prior and projected future work with the trial defense counsel. The military judge expressed concerned with Major MG's extensive training. The military judge granted the trial counsel's challenge based upon Major MG's expertise, specialized training with the colposcope, and the fact there were plenty of members and she, the military judge, could be "liberal" in granting the challenge.

A military judge's denial of a challenge for cause is reviewed for abuse of discretion. *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005) (citing *United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000)). If there is error, we must then determine whether it was prejudicial. *James*, 61 M.J. at 133. Any member whose presence on the court conflicts with the "interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality" must be removed for cause. Rule for Courts-Martial (R.C.M.) 912(f)(1)(N). This rule encompasses both actual and implied bias. *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007). There is no basis for the application of the "liberal grant" policy when the military judge is ruling on a government challenge for cause. *James*, 61 M.J. at 139.

In this case, the military judge explained the basis for her ruling by focusing specifically on Major MG's extensive background in the field of gynecology.[3] She was also concerned with Major MG's past and future participation in a court and board involving one of the trial defense counsel. Although the military judge said she could be "liberal," it is clear from the record that she was granting the challenge based upon bias,

[3]The military judge was aware that during the trial there would be testimony regarding the rape protocol examination.

and not because of a liberal grant policy. The military judge did not abuse her discretion, and she applied the correct law.

Assuming arguendo, the military judge erred, we then test this error for prejudice. We find no prejudice, given that the very member challenged by the trial counsel was later called by the trial defense counsel as a defense witness in the case sub judice.[4]

*Admission of Evidence*

The second issue is whether the military judge erred by admitting evidence in aggravation during presentencing that the appellant had been diagnosed with a sexually transmitted disease, genital warts. There was no evidence that SM had contracted the warts. The defense objected to this evidence as being inadmissible, and highly prejudicial, and the military judge denied the objection.

We review a military judge's decision to admit or exclude evidence under an abuse of discretion standard. *United States v. Dobson*, 63 M.J. 1, 19 (C.A.A.F. 2006); *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006). "[A] military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *Barnett*, 63 M.J. at 394 (quoting *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). Where there is clear evidence the appellant is aware of a medical condition, it may be admissible under R.C.M. 1001(b)(4) as a medical condition directly related to the offense. *United States v. Jones*, 44 M.J. 103, 104 (C.A.A.F. 1996). The military judge did not abuse her discretion when she permitted testimony regarding the appellant's condition.

*Erroneous Sentencing Instruction*

The third issue is whether this Court should remand the appellant's case for a sentence rehearing or provide meaningful sentencing relief when the military judge instructed the members that "military confinement facilities are corrective rather than punitive," contrary to C.A.A.F.'s opinion in *United States v. Holmes*, 61 M.J. 148, 149 (C.A.A.F. 2005), and when the assistant trial counsel stressed the corrective benefits of confinement in his sentencing argument. The appellee concedes the military judge erred in giving this instruction.

Reviewing the record of trial, we find the military judge gave an erroneous instruction. The government's sentencing argument contained one brief sentence in rebuttal that confinement was rehabilitative. Finding error, we must determine if this Court can reassess the sentence or if the case should be remanded for a rehearing.

---

[4]From the questions asked during voir dire by the defense counsel, it appears the defense was aware that Major MG had examined SM prior to the incident on 1 January 2004. She was called to testified in findings about that examination.

If this Court is confident that, "absent the error, the sentence would have been at least of a certain magnitude, then [we] may cure the error by reassessing the sentence instead of ordering a sentence rehearing." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)). Ultimately, a sentence can be reassessed only if we "confidently can discern the extent of the error's effect on the sentencing authority's decision." *United States v. Reed,* 33 M.J. 98, 99 (C.M.A. 1991)). If the appellate court cannot determine that the sentence would have been at least of a certain magnitude, it must order a rehearing. *United States v. Harris,* 53 M.J. 86, 88 (C.A.A.F. 2000); *United States v. Poole*, 26 M.J. 272, 274 (C.M.A. 1988).

We can make such a determination here. After carefully reviewing the record of trial, we are convinced beyond a reasonable doubt that absent the error, the sentence adjudged would have been at least a dishonorable discharge, confinement for three years, total forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. Further, we find this sentence to be appropriate for the appellant and his crimes. *United States v. Peoples*, 29 M.J. 426 (C.M.A. 1990); *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982).

*Conclusion*

The findings and the sentence[5], as reassessed, 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). Accordingly, the findings, and sentence, as reassessed, are

AFFIRMED.

OFFICIAL


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

[5] We note that the Court-Martial Order is incorrect in that it states the wrong forum and it has the wrong date for Specification 2 of Charge II. The government is ordered to issue a corrected copy.