UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain EDWARD T. HUDSON
United States Air Force

ACM 37249
(Misc. Dkt. No. 2010-12)

23 August 2010

Sentence adjudged 04 December 2007 by GCM convened at Lackland Air Force Base, Texas. Military Judge: Dawn R. Eflein.

Approved sentence: Dismissal and confinement for 4 years.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford, Major Shannon A. Bennett, Major Darrin K. Johns, Major Jennifer J. Raab, and Frank J. Spinner, Esquire (civilian counsel).

Appellate Counsel for the United States: Colonel Don M. Christensen, Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain Charles G. Warren, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and GREGORY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JACKSON, Senior Judge:

Contrary to his pleas, a panel of officers sitting as a general court-martial found the appellant guilty of two specifications of divers indecent acts with a child in violation of Article 134, UCMJ, 10 U.S.C. § 934.[1] The court members sentenced the appellant to a

[1] The alleged offenses and the arraignment occurred before 1 October 2007, prior to the enactment of the new Article 120, UCMJ, 10 U.S.C. § 920. Thus, it was proper to charge the appellant under Article 134, UCMJ, 10

dismissal, ten years of confinement, and forfeiture of all pay and allowances. Pursuant to a post-trial agreement, the convening authority set aside and dismissed the finding on Specification 1 of the Charge and approved only so much of the sentence that called for a dismissal and four years of confinement.[2] On appeal, the appellant asks this Court to set aside the remaining finding of guilty and the sentence, to dismiss Specification 2 and the Charge, to grant his petition for a new trial, or to grant other appropriate relief.

As the basis for his request, he asserts that: (1) the evidence is legally and factually insufficient to support his conviction on Specification 2 and the Charge; (2) the military judge abused her discretion by denying the defense challenge for cause against a court member, Lieutenant Colonel (Lt Col) DB; (3) an appearance of unlawful command influence exists with respect to the decision to prefer the Charge and its Specifications; (4) his due process right to timely post-trial processing was violated when it took 209 days from the date of trial until action and when 579[3] days have elapsed from the time of docketing[4] with this Court; and (5) he is entitled to a new trial[5] because of newly discovered evidence or fraud on the court—namely, a post-trial affidavit from his daughter, SH, wherein she asserts that she lied to the court-martial about whether she had told CG, the alleged victim in Specification 2 of the Charge, about indecent acts allegations made by MKZ, the alleged victim in the dismissed specification. Finding no prejudicial error, we affirm the findings and the sentence and deny the appellant's petition for a new trial.

Background

In July 2004, the appellant and his wife, OH, moved to San Antonio, Texas where he was assigned to a training squadron at Randolph Air Force Base. While living there,

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U.S.C. § 934, rather than under the new Article 120, UCMJ. *See* Drafter's Analysis, *Manual for Courts-Martial, United States*, A23-15 (2008 ed.).

[2] The convening authority took the aforementioned action in return for the appellant's promise to waive the following trial and appellate issues: (1) dismissal of Specification 1 of the Charge due to a statute of limitations violation; (2) consequent motion for a mistrial, as to findings and sentencing, based upon the dismissal of Specification 1 of the Charge; (3) consequent motion for a sentencing rehearing based upon the dismissal of Specification 1 of the Charge; (4) consequent petition for a new trial based upon the dismissal of Specification 1 of the Charge; (5) any challenge to the finding of guilty on Specification 2 of the Charge based upon the admission of underlying evidence supporting Specification 1 of the Charge under Mil. R. Evid. 414; (6) any challenge to the sentence based upon the admission of underlying evidence supporting Specification 1 of the Charge under Rule for Courts-Martial 1001(b)(4) and Mil. R. Evid. 403; and (7) any other issue raised in his 31 March 2008 motion for appropriate relief.

[3] Although the appellant's brief specifies 579 days, as of the date of this opinion over 750 days have elapsed since the appellant's case was docketed with this Court. The appellate defense counsel filed twelve motions for enlargement of time with the appellant's consent. The last motion for enlargement of time was filed on 12 February 2010, and the appellant's brief and assignment of errors was filed on 19 February 2010.

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

[5] The appellant does not raise this as an assignment of error; however, he filed a petition for a new trial on 30 June 2010. For the sake of judicial economy, this Court will address the appellant's petition for a new trial in this opinion.

they maintained a relationship with CG, OH's niece and the alleged victim in Specification 2 of the Charge. In March 2005, CG told SH that the appellant had inappropriately touched her with a massager. On 5 May 2006, agents with the Air Force Office of Special Investigations (AFOSI) initiated an investigation against the appellant after receiving information of alleged sexual abuse from the local child protective services.

At the conclusion of the investigation, the report of investigation (ROI) was forwarded to the appellant's squadron commander, Major AC, who, after reviewing the evidence, decided not to prefer charges against the appellant. The legal office forwarded the ROI to Colonel (Col) RN, the appellant's group commander, who, after reviewing the evidence, likewise decided not to prefer charges. The servicing staff judge advocate forwarded the ROI to the wing commander, the special court-martial convening authority. After reviewing the ROI, the wing commander asked Col ED, the wing inspector general, to review the ROI in his role as an impartial, senior officer and to determine whether the evidence warranted a preferral of charges. Col ED reviewed the ROI, determined that the evidence warranted a preferral of charges, and preferred the charge against the appellant.

At trial, after Lt Col DB and the other members were selected as court members but before opening statements, the military judge advised the members that to avoid the appearance of inappropriate conduct, she and the lawyers involved in the case were not allowed to speak to them outside the court-martial. The next morning prior to trial, the staff judge advocate advised the military judge that earlier that morning Lt Col DB had sought his advice on whether and how to revise a previous answer he had given the court during voir dire.[6] The staff judge advocate testified that he terminated the conversation and contacted the military judge.

Lt Col DB testified that he did not intend to violate the military judge's order but needed advice on addressing the issue. After additional voir dire, the appellant's trial defense counsel, citing implied bias, challenged Lt Col DB for cause. The military judge, opining that Lt Col DB did not do anything wrong and that the handling of this issue would make observers more confident in the military justice system than less, denied the challenge against Lt Col DB. Lt Col DB remained on the panel as a court member.

CG, ten years old at the time of trial, testified that: (1) in March 2006, she spent the night at the appellant's residence and while there she awoke to find the appellant touching her "private part" with his two fingers; (2) sometime afterwards but before April 2006, she was watching the television in the appellant's bedroom and the appellant touched her "private part" with his fingers and licked her "private part" with his tongue;

[6] During voir dire, Lieutenant Colonel (Lt Col) DB testified that he did not know the appellant; however, after reflection, Lt Col DB believed that he may have known the appellant.

(3) during that same timeframe, the appellant took her hand and placed it on his "private part;" and (4) in April 2006, she was at the appellant's residence and while there the appellant touched her "private part" with his fingers and placed his "private part" on her leg. The appellant's trial defense counsel cross-examined CG on her recollection of events and the military judge questioned CG. The members declined to question CG.

The appellant testified in his own defense and denied the allegations. The appellant also admitted evidence of his good military character, character for law-abidingness, character for truthfulness,[7] and evidence of CG's poor character for truthfulness. The trial counsel cross-examined the appellant and the members asked him questions. At the conclusion of the evidence, the court members found the appellant guilty of both offenses.

Legal and Factual Sufficiency of the Findings

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, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))). In 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 that a reasonable fact finder could have found beyond a reasonable doubt all of the essential elements of the specification in question. On this point, we note that the previously mentioned testimony from CG is legally sufficient to support the appellant's conviction. As he did at trial, the appellant impugns CG's credibility in his brief. However, the trier-of-fact heard CG's testimony, the appellant's testimony, and testimony about the appellant's character. They also observed the demeanor of these witnesses and opted to believe CG over the appellant. In short, CG's testimony legally supports the appellant's conviction for indecent acts with a child.

Lastly, 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

[7] The appellant's squadron and group commander are two of the individuals who testified about the appellant's good military character and character for truthfulness.

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, 10 U.S.C. § 866(c); *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973). We have carefully considered the evidence under this standard and are convinced beyond a reasonable doubt that the appellant is guilty of Specification 2 and the Charge.

Excusal of Court Member

An accused has a constitutional and regulatory right to a fair and impartial panel. *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004) (citing *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001)). "Because 'a challenge for cause for actual bias is essentially one of credibility,' the military judge's decision is given 'great deference' because of his or her opportunity to observe the demeanor of court members and assess their credibility . . . ." *United States v. Miles*, 58 M.J. 192, 194-95 (C.A.A.F. 2003). However, we give less deference to a military judge's finding of implied bias because a finding on implied bias is objectively "viewed through the eyes of the public, focusing on the appearance of fairness." *Strand*, 59 M.J. at 458 (quoting *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998)). "[I]mplied bias exists when, regardless of an individual member's disclaimer of bias, 'most people in the same position would be prejudiced [i.e. biased].'" *Id*. at 459 (alteration in original) (citing *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000)).

The military judge did not abuse her discretion in denying the appellant's challenge for cause against Lt Col DB. The record makes clear that Lt Col DB did not disobey, at least not intentionally, the military judge's orders. While the preferred method might have been for Lt Col DB to address his issue with the military judge in open court, the method he chose would not cause a casual observer to question the fairness of the court-martial. We agree with the military judge that Lt Col DB's concerns and the manner in which he sought to address his concerns would likely make observers more confident in the military justice system than less. Accordingly, the military judge did not abuse her discretion in denying the appellant's challenge for cause.

Unlawful Command Influence

The prohibition against unlawful command influence arises from Article 37(a), UCMJ, 10 U.S.C. § 837(a), 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 . . . ." 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 there has been unlawful command influence, "[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 *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)).

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).

Here, the appellant has failed to meet his burden of production. At best, he offers a general allegation and innuendo of unlawful command influence. While the threshold for triggering an unlawful command influence inquiry is low, "a bare allegation or mere speculation" is not sufficient to warrant such inquiry. *Stombaugh*, 40 M.J. at 213. Everyone involved in the preferral process testified on this issue and there is no evidence that the wing commander, his servicing staff judge advocate, or anyone involved in the preferral process improperly influenced the preferral. The wing commander was well within his right to ask an impartial senior officer of his staff to review the evidence and advise on whether a preferral was warranted. *See* Rule for Courts-Martial (R.C.M.) 306, Discussion (noting that "[e]ach commander in the chain of command has independent, yet overlapping discretion to dispose of offenses within the limits of that officer's authority" and that "[a] decision by a commander ordinarily does not bar a different disposition by a superior authority"). As such, we find no unlawful command influence.

Post-Trial Processing

We review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citing *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004); *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003)). In making our determination, we follow our superior court's guidance in using the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Moreno*, 63 M.J. at 135 (citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)).

For courts-martial completed after 11 June 2006, we apply a presumption of unreasonable delay when the convening authority does not take action within 120 days of the completion of trial. *Id.* at 142. Once this due process analysis is triggered by a facially unreasonable delay, we analyze each factor and make a determination as to whether that factor favors the government or the appellant. *Id.* at 136 (citing *Rheuark v. Shaw*, 628 F.2d 297, 303 (5th Cir. 1980)).

A general court-martial is complete, and thus ready for action by the convening authority, after the record of trial has been authenticated and forwarded with a staff judge advocate recommendation to the convening authority. *See* R.C.M. 1104(e). The court-martial adjourned on 9 April 2008, the military judge authenticated the record of trial on 18 April 2008, and the convening authority took action in this case on 1 July 2008. Seventy-four days elapsed between the completion of trial and the date of the Action, certainly not a sufficient amount of time to trigger a *Moreno* analysis.[8]

The appellant's allegation of a post-trial delay with the docketing of his case with this Court is also without merit. For courts-martial completed after 11 June 2006, we apply a presumption of unreasonable delay when the case is not docketed to this Court within 30 days of the Action. *Moreno*, 63 M.J. at 142. Once this due process analysis is triggered by a facially unreasonable delay, we analyze each factor and make a determination as to whether that factor favors the government or the appellant. *Id.* at 136 (citing *Rheuark*, 628 F.2d at 303). Twenty days elapsed between the convening authority's Action and the docketing of the appellant's case with this Court, certainly not a sufficient amount of time to trigger a *Moreno* analysis.

Moreover, assuming, arguendo, that any post-trial delay was facially unreasonable the appellant still is not entitled to relief. When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we need not engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt and that no relief is warranted.

Petition for a New Trial

Under Article 73, UCMJ, 10 U.S.C. § 873, and R.C.M. 1210, an accused may petition The Judge Advocate General for a new trial within two years of the convening authority's approval of the court-martial sentence. The proper venue for a petition for a new trial depends on the stage of appellate proceedings in the case at the time the petition is filed. The appellant's petition is appropriately before us because his appeal was pending before us at the time the petition was filed. *See* Article 73, UCMJ; R.C.M. 1210(e).

Petitions for a new trial "are generally disfavored." *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993). They should be granted "only if a manifest injustice would

[8] Even if this Court were to define completion of trial as the last date of adjournment, the appellant still would not be entitled to relief. Eighty-three days elapsed between the last court-martial adjournment and the Action, a time insufficient to trigger a *Moreno* analysis.

result absent a new trial . . . based on proffered newly discovered evidence." *Id.* The decision whether to grant the petition is within our sound discretion. *United States v. Brooks*, 49 M.J. 64, 68 (C.A.A.F. 1998) (quoting *United States v. Bacon*, 12 M.J. 489, 492 (C.M.A. 1982)). We "have the 'prerogative' of weighing '[the evidence] at trial against the' post-trial evidence 'to determine which is credible'" and we may exercise broad discretion in finding facts. *Id*. (quoting *Bacon*, 12 M.J. at 492).

R.C.M. 1210(f)(2) provides that

> a new trial shall not be granted on the grounds of "newly discovered" evidence unless the petition shows that:
>
> (A) The evidence was discovered after the trial;
>
> (B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and
>
> (C) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

R.C.M. 1210(f)(3) states that "[n]o fraud on the court-martial warrants a new trial unless it had a substantial contributing effect on a finding of guilty or the sentence adjudged."

We find the petitioner has not met the standard for a new trial under R.C.M. 1210. Assuming that SH provided perjured testimony, we do not find that the evidence would probably have produced a substantially more favorable result for the appellant or that it had a substantial contributing effect on the finding of guilty or the sentence adjudged. As SH highlights in her post-trial affidavit, her testimony had nothing to do with CB's allegations against the appellant. Her testimony only concerned whether SH told CB about another alleged victim's allegations. CB's testimony was the sole evidence against the appellant and the court members convicted the appellant, notwithstanding his evidence, on the basis of CB's testimony. Lastly, in exercising our broad discretion to determine the credibility of this evidence, and without deciding whether or not SH's affidavit is true, we find that the affidavit is not "sufficiently believable to make a more favorable result probable." *Brooks*, 49 M.J. at 69.

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).
Accordingly, the approved findings and sentence are

AFFIRMED.

Further, the appellant's petition for a new trial is

DENIED.

JACKSON, Senior Judge participated in this decision prior to his reassignment on 15 July 2010.

OFFICIAL

STEVEN LUCAS
Clerk of the Court