UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class MICHAEL P. JENKINS
United States Air Force

ACM 35699

16 August 2005

Sentence adjudged 23 July 2003 by GCM convened at Charleston Air Force Base, South Carolina. Military Judge: Daryl E. Trawick (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 18 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Andrew S. Williams, and Major Antony B. Kolenc.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Samantha M. Brock (legal intern).

Before

MOODY, SMITH, and PETROW
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

PETROW, Judge:

We have examined the record of trial, the assignment of error, and the government's reply thereto. The appellant was convicted, pursuant to his pleas, of divers uses of cocaine and marijuana, assault, disorderly conduct, and communication of a threat, in violation of Articles 112a, 128, and 134, UCMJ, 10 U.S.C. §§ 912a, 928, 934. The appellant argues that the military judge improperly applied the exceptions to the psychotherapist-patient communications privilege in Mil. R. Evid. 513(d)(4) and (6), and thus, erred in permitting trial counsel to introduce the appellant's confidential

communications to his psychotherapist, Lieutenant Colonel (Lt Col) Frank Budd. He bases this argument primarily on the observation that Lt Col Budd could only "speculate" on the danger that the appellant may have posed, and did not state that the appellant was a danger to any specific person.

According to the stipulation of fact submitted in the case, as well as the appellant's statements during the providency inquiry, on 7 May 2003, the appellant and others confronted and harassed Airman First Class (A1C) Brandon Times. One person in the appeallant's group called A1C Times a "n*****." A1C Times left the area, but soon returned with two others with the intent of confronting his harassers. A1C Times encountered the appellant outside the base dormitory area. After exchanging words, the appellant chased A1C Times and his two companions with a 14-inch knife with a 9-inch blade. While chasing after them, the appellant threatened to kill them stating, "Y'all n****** are f****** with a crazy white boy tonight. I am going to kill y'all n****** tonight." The latter ran for safety, and soon after, reported the appellant's actions to the Security Forces. The appellant had consumed several beers and multiple shots of the liquor "Jagermeister" before the incident.

On 8 May 2003, the appellant stated to another airman, "If that guy from last night came around again, I would f****** kill him." Later in the day, the appellant stated to Staff Sergeant Avriel DuVerney, "[I]f I had a knife when she [referring to his First Sergeant] told me to walk home I would have cut that b*****'* throat." The appellant was angry that his First Sergeant made him walk home from the Security Forces Squadron building following the assault incident on 7 May 2003.

A military judge's decision on admission of evidence is reviewed on appeal for a clear abuse of discretion. *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997). To reverse for an abuse of discretion, the military judge's decision must be "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous." *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987). Mil. R. Evid. 513(a) provides:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

The rule also provides eight exceptions that the privilege does not extend to. The exceptions pertinent to this case are:

> (4) when a psychotherapist . . . believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;
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> . . . .
>
> (6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission.

The Military Rules of Evidence have never specifically recognized a patient-doctor privilege. In fact, Mil. R. Evid. 501(d) declares the privilege inapplicable to courts-martial. However, in *Jaffee v. Redmond*, 518 U.S. 1 (1996), the Supreme Court recognized a psychotherapist-patient privilege under Fed. R. Evid. 501. As suggested in the Drafter's Analysis, *Manual for Courts-Martial, United States (MCM)*, A22-38 (2002 ed.), this spurred the military to incorporate a psychotherapist-patient privilege that was compatible with "the specialized society of the military and separate concerns that must be met to ensure military readiness and national security." *MCM*, A22-44. Accordingly, the Military Rules of Evidence were amended in 1999 to include Mil. R. Evid. 513, creating a psychotherapist-patient communication privilege, along with the eight exceptions contained in Mil. R. Evid. 513(d). As clearly stated by our superior court, "In the absence of a constitutional or statutory requirement to the contrary, the decision as to whether, when, and to what degree *Jaffee* should apply in the military rests with the President, not this Court." *United States v. Rodriguez*, 54 M.J. 156, 161 (C.A.A.F. 2000).

The appellant, notwithstanding the President's acknowledged sovereignty in this realm, seeks to create exceptions to the exception. The first of these would require a finding under Mil. R. Evid. 513(d)(4) that the government has established a requisite that the danger be to a *specific* person, rather than to *any* person as required. The major flaw in this argument is that the President elected to do otherwise, and faced with our superior court's cited observation in *Rodriguez*, it would be inappropriate for a military appellate tribunal to adopt the appellant's suggestion.

The appellant's remaining argument is that Lt Col Budd's belief that the appellant presented a danger to the community was merely "speculation." The government is permitted to present opinion evidence of rehabilitative potential to the court to aid in the determination of an appropriate sentence. Rule for Courts-Martial (R.C.M.) 1001(b)(5)(A). The opinion witness must "possess sufficient information and knowledge about the accused to offer a rationally-based opinion that is helpful to the sentencing authority." R.C.M. 1001(b)(5)(B). And, the opinion must "be based upon relevant information and knowledge possessed by the witness" and "relate to the accused's personal circumstances." R.C.M. 1001(b)(5)(C).

Lt Col Budd, a clinical psychologist with 17 years experience in the field, had conducted a commander-directed mental health evaluation of the appellant for use in determining the appropriateness of pretrial confinement of the appellant. Over defense objection, Lt Col Budd testified during the sentencing portion of the trial that the likelihood that the appellant would commit further violence was relatively high. He concluded that extensive, prolonged psychiatric treatment would be necessary to address the appellant's personality issues. Lt Col Budd believed that the appellant's chances of rehabilitation were very poor.

Lt Col Budd's written evaluation of the appellant was also admitted into evidence over defense objection. In that evaluation, Lt Col Budd describes the results of two standardized mood scale tests administered by him to the appellant, one for general distress and the other specific for anger. He found that the appellant "endorsed significant distress." On the anger scale, "seven of the eight subscales were elevated to near or at the highest levels possible." The appellant scored extremely low on the scale measuring anger control. Lt Col Budd also observed, "Personality testing confirms member's intense anger and likelihood to act out his impulses." He concluded that the appellant be ordered into pretrial confinement "due to his dangerousness to others." In addition, he believed that the appellant's "condition is not amenable to treatment in the military setting."

In *United States v. Williams*, 41 M.J. 134, 139 (C.M.A. 1994), our superior court upheld the admission of such expert opinion testimony for the purpose of assisting the sentencing authority in evaluating an accused's rehabilitative potential, providing there was a rational basis for the opinion. From the record in the instant case, it is clear that Lt Col Budd's opinion was based on the appellant's personal circumstances, and on relevant information and knowledge which he acquired from his testing of the appellant. Accordingly, his opinion was rationally based and helpful to the military judge in evaluating the appellant's rehabilitative potential. The admission of his testimony and written evaluation was thus proper under the requisites of R.C.M. 1001(b)(5) and *Williams*. His conclusion that the appellant posed a threat to others from a condition that would require extensive treatment not available in a military setting suggested the potential for the threat to be long-term rather than limited to the period of pretrial confinement. Accordingly, Lt Col Budd's testimony was an adequate basis for the military judge to conclude that the psychotherapist-patient privilege was vitiated due to the exceptions in Mil. R. Evid. 513(d)(4) and (6).

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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator