UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class STEVEN D. JENNINGS
United States Air Force

ACM 36890

19 March 2008

Sentence adjudged 18 July 2006 by GCM convened at Eielson Air Force Base, Alaska. Military Judge: James B. Roan (sitting alone).

Approved sentence: Bad-conduct 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 Griffin S. Dunham.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Donna S. Rueppell, and Captain Jason M. Kellhofer.

Before

JACOBSON, PETROW, and ZANOTTI
Appellate Military Judges

OPINION OF THE COURT

PETROW, Judge:

In a mixed plea case, the appellant was found guilty of assault with a dangerous weapon, kidnapping, negligent discharge of a firearm, and communicating a threat, in violation of Articles 128 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 928 and 934. Appellant raises the following issues:

I.

WHETHER, IN LIGHT OF THIS COURT'S DECISION IN *UNITED STATES V. CORRALEZ*, THE APPELLANT IMPROVIDENTLY PLED TO KIDNAPPING WHEN HIS SEIZURE OF NDW "LASTED PROBABLY UNDER FOUR MINUTES" AND WAS INCIDENT TO THE ASSAULT SPECIFICATION.

II.

WHETHER THE APPELLANT'S SENTENCE TO THREE YEARS CONFINEMENT IS INAPPROPRIATELY SEVERE CONSIDERING THE APPELLANT'S (1) SPONTANEOUS DECISION TO COMMIT THE OFFENSES, (2) OVERALL STATE OF MIND DURING THE COMMISSION OF THE OFFENSES, AND (3) REHABILITATIVE POTENTIAL.

III.

WHETHER THE STAFF JUDGE ADVOCATE'S FAILURE TO ADVISE THE CONVENING AUTHORITY THAT THE APPELLANT SERVED 123 DAYS OF PRETRIAL CONFINEMENT PREJUDICED THE APPELLANT'S OPPORTUNITY TO RECEIVE CLEMENCY WHEN HE REQUESTED REDUCING THE TERM OF CONFINEMENT IN PART BECAUSE OF THE AMOUNT OF TIME THE APPELLANT ALREADY SERVED IN PRETRIAL CONFINEMENT.

For the reasons stated below, we find the appellant's contentions to be without merit.

Background

As detailed in the stipulation of fact, and disclosed in the course of the *Care* inquiry,[1] on 16 March 2006 the appellant purchased a .300 caliber rifle and 20 cartridges at the Eielson AFB Base Exchange. He took the rifle and ammunition to his billet quarters at the Goldrush Inn on Eielson AFB. While he was handling the rifle after an aborted suicide attempt, it discharged in his room. He loaded another round in the rifle, gathered the remaining ammunition and left the inn still with the intent of committing suicide, but he had decided to do it in the woods on the way to Fairbanks, Alaska.

At approximately 0400 hours on 17 March 2006, a van owned by the Fairbanks Resource Agency and occupied by its employees, who had been engaged in janitorial services at Eielson AFB, was traveling through the base. NDW was the van driver and supervisor of the crew, all of whom were considered developmentally disabled for various reasons. The temperature at the time was -5 degrees Fahrenheit. The appellant

[1] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969)

approached the van as it stopped at an intersection near the Goldrush Inn. He pointed the loaded rifle at the front windshield of the van. The occupants all took notice.

The appellant then positioned himself at the passenger door and, while pointing the rifle at NDW, ordered everyone out of the van. As the passengers began to exit, the appellant directed NDW to remain in the driver's seat. After the passengers had departed the van, the appellant entered the van and directed NDW to drive the van off base. While in the van, the appellant kept his loaded rifle aimed at NDW. The appellant relieved NDW of his cell phone and its earpiece. The appellant informed NDW that they would be driving to Fairbanks.

As they were proceeding to the base's main gate, NDW contemplated exiting the vehicle and disconnected his seatbelt. The appellant was alerted when the seatbelt alarm activated and he then instructed NDW to keep his seatbelt on. The distance from where the appellant had entered the vehicle and the main gate was approximately 1.6 miles.

Having been alerted by the van's passengers, Security Forces and civilian security personnel (security personnel) at the main gate were prepared to stop the van. As the van approached the gate, the appellant told NDW, "if you stop I will shoot you," or words to that effect. As they approached the gate, NDW grabbed the rifle barrel, forcing it to aim towards the floor of the van while stomping on the van's brake pedal. The rifle discharged, the bullet passing through the floor board and severing a cable to the van's transmission. NDW and the appellant struggled for control of the rifle. NDW screamed that the appellant was not getting the rifle back. The appellant released his grip on the rifle, departed the van and ran towards the highway.

NDW then exited the van shouting for the gate guards to take the rifle. The security personnel ordered him to lay on the ground, placed him in handcuffs, and took him to the gate shack. The expended shell casing was removed from the rifle. After being informed as to what had transpired, the security personnel intercepted the appellant, who had reached the highway. The appellant informed them he had ammunition in his pocket. The security personnel retrieved the 18 remaining cartridges from the appellant.

The appellant was interviewed by AFOSI and consented to a search of his room at the Goldrush Inn. They discovered where the bullet had penetrated the wall of the room and found its shell casing. Fairbanks Resource Agency paid $475.59 for the repairs to the damaged van.

I.

WHETHER, IN LIGHT OF THIS COURT'S DECISION IN *UNITED STATES V. CORRALEZ*, THE APPELLANT IMPROVIDENTLY PLED TO KIDNAPPING WHEN HIS SEIZURE OF NDW "LASTED

PROBABLY UNDER FOUR MINUTES" AND WAS INCIDENT TO THE ASSAULT SPECIFICATION.

Discussion

The appellant asserts that because the acts underlying the kidnapping offense were so intrinsically entwined with the assault and were of such a short duration (approximately four minutes according to the appellant's testimony) that the appellant's plea of guilty to the kidnapping specification was improvident, and should be set aside.

If an accused, after entering a guilty plea, sets up matter inconsistent with the plea the court shall proceed as though he had pleaded not guilty. Article 45(a), UCMJ, 10 U.S.C. § 845(a). On appeal, we review the military judge's acceptance of the plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). "However, even if the military judge did not abuse his discretion in accepting the plea, we still may set aside the plea if we find a substantial conflict between the plea and the accused's statements or other evidence in the record." *United States v. Rothenberg*, 53 M.J. 661, 662 (A.F. Ct. Crim. App. 2000) (citing *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996)). A providence inquiry into a guilty plea must establish "not only that the accused himself believes he is guilty, but also that the factual circumstances as revealed by the accused himself objectively support that plea." *United States v. Higgins*, 40 M.J. 67, 68 (C.M.A. 1994) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)); *Rothenberg*, 53 M.J. at 662. Mere conclusions of law recited by an accused are insufficient to provide a factual basis for a guilty plea. *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996) (citing *United States v. Terry*, 45 C.M.R. 216 (C.M.A. 1972)).

In determining whether the evidence is legally sufficient, we "view[] the evidence in the light most favorable to the prosecution' and determine whether '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Brown*, 55 M.J. 375, 385 (C.A.A.F. 2001) (quoting *Jackson v. Virginia*, 443 U.S. 307 (1979)) (emphasis in original). The assessment of the legal sufficiency of the evidence is limited to the evidence presented at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

The appellant invokes our decision in *United States v. Corralez*, 61 M.J. 737 (A.F. Ct. Crim. App. 2005) to support his premise that the seizure of NDW was so incidental to the assault that it lacked sufficient vitality to be sustained as an offense separate and apart from the assault. In that case, the accused had, *inter alia*, been charged with two specifications of kidnapping under Article 134, UCMJ, 10 U.S.C. § 934, to which he had pleaded guilty. In one instance, the accused and MR, a woman with whom he was in a relationship, entered into an argument while in a vehicle when they became lost. The argument continued after the appellant parked the vehicle at his relative's house – their

destination. While sitting in the vehicle, the accused struck MR in the face, pulled her hair, hit her on the leg, bit her hand, and choked her. When she attempted to exit the vehicle, he prevented her from doing so for about five minutes by holding her seatbelt in the locked position. According to MR's testimony, she wanted to go into the house but the appellant "didn't want to take an argument into the home in front of all the family." *Corralez*, 61 M.J. at 749.

In the second incident, less than a month later, the couple were in their apartment when an argument ensued. During the course of the argument, MR and the accused were wrestling with each other and she hit him on the head with a table. The accused pushed MR from room to room and prevented her from leaving the apartment for about five minutes. After the fight subsided, MR changed her mind about leaving the apartment and went to bed.

In our *Corralez* analysis, this Court expressed concern about charging the offense of kidnapping in these scenarios. We determined that the brief holdings of MR in the couple's automobile and in their apartment were merely incidental to the five charged assault specifications stemming from these disputes and could not support the far more serious offenses of kidnapping. *Corralez*, 61 M.J. at 748.

In the course of our analysis, we cited the six-part test created by our superior court in *United States v. Seay*, 60 M.J. 73 (C.A.A.F. 2004):

1. The occurrence of an unlawful seizure, confinement, inveigling, decoying, kidnapping, abduction or carrying away and a holding for a period. Both elements must be present.

2. The duration thereof. Is it appreciable or *de minimus*? This determination is relative and turns on the established facts.

3. Whether these actions occurred during the commission of a separate offense.

4. The character of the separate offense in terms of whether the detention/asportation is inherent in the commission of that kind of offense, at the place where the victim is first encountered, without regard to the particular plan devised by the criminal to commit it[.]

5. Whether the asportation/detention exceeded that inherent in the separate offense and, in the circumstances, evinced a voluntary and distinct intention to move/detain the victim beyond that necessary to commit the separate offense at the place where the victim was first encountered[.]

6. The existence of any significant additional risk to the victim beyond that inherent in the commission of the separate offense at the place where the victim is first encountered. It is immaterial that the additional harm is not planned by the criminal or that it does not involve the commission of another offense.

Seay, 60 M.J. at 80-81 (quoting *United States v. Santistevan*, 22 M.J. 538 (N.M.C.M.R. 1986).

To accept the appellant's argument that the scenario in the present case is comparable in effect to those in *Corralez*, would be to turn the respective facts on their head. In the instant case, it is clear from the start that what motivated the appellant was his desire to leave the base and proceed towards Fairbanks. He lacked both the knowledge and means of accomplishing that goal. When the van was spotted, he perceived it as providing a viable solution to curing both of those inadequacies. His dilemma at that point is how to suborn that conveyance to his use. As he explained, it would be necessary to retain the van's driver to meet his objective since he had no knowledge of the local area. Therefore, the assault, consummated by the threat posed by his rifle, becomes the catalyst to achieving the greater end by ensuring the retention of NDW and his cooperation, rather than an end in itself. This is quite the opposite of the situation in *Corralez* where the continuation of the assault was the objective, and the retention of the victim the means of accomplishing that end. Furthermore, we find the short duration of the kidnapping to be unconvincing because it resulted from an unexpected intervening event – NDW's successful effort to wrestle the gun from the appellant's grasp.

Conclusion

We find that no substantial conflict existed between the appellant's plea of guilty to the kidnapping charge and the facts adduced at trial. *Eberle*, 44 M.J. at 374. Further, viewing the evidence in the light most favorable to the prosecution, we find that a rational trier of fact could have found the essential elements of the kidnapping charge beyond a reasonable doubt. *Brown*, 55 M.J. at 375. Accordingly, the military judge's acceptance of the guilty plea to the kidnapping charge did not constitute an abuse of discretion.

II.

WHETHER THE APPELLANT'S SENTENCE TO THREE YEARS CONFINEMENT IS INAPPROPRIATELY SEVERE CONSIDERING THE APPELLANT'S (1) SPONTANEOUS DECISION TO COMMIT THE OFFENSES, (2) OVERALL STATE OF MIND DURING THE COMMISSION OF THE OFFENSES, AND (3) REHABILITATIVE POTENTIAL.

In support of his assertion that the punishment adjudged by the military judge was inappropriately severe, the appellant cites, among other matters, his struggle to complete basic and technical training, his difficulties with his job performance once assigned to his unit, his desire to commit suicide and purchase of a rifle to effect that desire, his having the van passengers depart to avoid their being hurt, the short duration of the kidnapping, the opinion of his friends, family, and church as to his rehabilitative potential, and his willingness to take responsibility and regret for his actions.

"Sentence appropriateness is determined by the sentencing authority at the trial level, the convening authority or supervisory authority, and the Court of Military Review." *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982). Accordingly, such determination by this court is *de novo*. "[S]entence appropriateness should be judged by 'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *Id.* (quoting *United States v. Mamaluy*, 27 C.M.R. 176 (C.M.A. 1959)).

In conducting our review we must keep in mind that Article 66(c), UCMJ, 10 U.S.C. § 866(c), has a sentence appropriateness provision that "is a sweeping Congressional mandate to ensure a fair and just punishment for every accused." *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (quoting *United States v. Bauerbach*, 55 M.J. 501, 504 (Army Ct. Crim. App. 2001)). Article 66(c), UCMJ, "requires that [we] independently determine, in every case within [our] limited Article 66, UCMJ, jurisdiction, the sentence appropriateness of each case [we] affirm." *Baier*, 60 M.J. at 384-85.

Our duty to assess the appropriateness of a sentence is "highly discretionary," but does not authorize us to engage in an exercise of clemency. *United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

The appellant faced a maximum punishment of a dishonorable discharge, confinement for life, forfeiture of all pay and allowances, and a fine. A pre-trial agreement limited the period of confinement to five years. The adjudged sentence was well below both of these. While one can be sympathetic to the trials and tribulations faced by the appellant, such matters are more the substance of clemency best bestowed by those endowed with the power to exercise it, that is, the convening authority.

We are confronted with a fact situation in which the appellant leveled a loaded weapon without provocation at a number of innocents, most of whom were developmentally handicapped, putting them in fear of being grievously injured. The appellant's demeanor was such as to engender in NDW a viable fear for his life as well as that of security personnel as the van approached the main gate and the appellant voiced his demand that NDW run the gate or be shot. It was at this point that NDW grabbed the

rifle's barrel in an attempt to disarm the appellant. The resulting discharge of the weapon caused a bullet to penetrate the floor of the van mere inches from where NDW was seated. The fact that no one was seriously injured can be attributed more to providence than as the result of providential caution and concern on the part of the appellant.

Conclusion

Having considered the particular circumstances of the appellant, his character, and the nature and seriousness of those offenses for which his punishment was adjudged, we find the sentence to be appropriate.

III.

WHETHER THE STAFF JUDGE ADVOCATE'S FAILURE TO ADVISE THE CONVENING AUTHORITY THAT THE APPELLANT SERVED 123 DAYS OF PRETRIAL CONFINEMENT PREJUDICED THE APPELLANT'S OPPORTUNITY TO RECEIVE CLEMENCY WHEN HE REQUESTED REDUCING THE TERM OF CONFINEMENT IN PART BECAUSE OF THE AMOUNT OF TIME THE APPELLANT ALREADY SERVED IN PRETRIAL CONFINEMENT.

Post trial, the staff judge advocate provided the convening authority a recommendation (SJAR), as well as an addendum to the SJAR, advising him to approve the findings and sentence as adjudged. The appellant asserts that neither document mentioned that the appellant served 123 days in pretrial confinement – the mention being "only" in the Report of Result of Trial attached to the SJAR.

Along with his post-trial recommendation, the post-trial matters contained in the record of trial reflect that the staff judge advocate submitted an AF Form 1359 Report of Result of Trial, as well as the appellant's Personal Data Sheet, as attachments to the SJAR. The former contains a box labeled "PRETRIAL CONFINEMENT" in which are contained the words "123 days." The Personal Data Sheet contains an entry labeled "NATURE OF PRE-TRIAL RESTRAINT" after which the statement "Pretrial Confinement, 17 Mar 06 – Present" appears. These documents are incorporated by reference in the first paragraph of the SJAR.

Discussion

Rule for Courts-Martial (R.C.M.) 1106 sets out the requirements for the post-trial recommendation of the staff judge advocate. The stated purpose of the recommendation "is to assist the convening authority to decide what action to take on the sentence in the exercise of command prerogative." R.C.M. 1106(d)(1). The form of the recommendation is required to be "a *concise* written communication." R.C.M. 1106(d)(2) (emphasis added). Among the required items to be contained in the

recommendation is "[a] statement of the nature and duration of any pretrial restraint." R.C.M. 1106(d)(3)(D).

In *United States v. Miller*, 56 M.J. 764 (A.F. Ct. Crim. App. 2002), this court held that the appearance of the period of pre-trial restraint in the AF Form 1359 and in the Personal Data Sheet satisfied the requirements of R.C.M. 1106 and did not serve to render the staff judge advocate's recommendation fatally flawed. Accordingly, there is no error and we need not engage in a "plain error" analysis as would otherwise be required under *United States v. Scalo*, 60 M.J. 435 (C.A.A.F. 2005) and *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000).

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, 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.

Judge ZANOTTI did not participate.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court