UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ADAM G. JOHNSEN
United States Air Force

ACM S32057

19 November 2013

Sentence adjudged 30 January 2012 by SPCM convened at Nellis Air Force Base, Nevada. Military Judge: William C. Muldoon.

Approved Sentence: Bad-conduct discharge, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Captain Christopher D. James.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Captain Thomas J. Alford; Major Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

ROAN, SARAGOSA, and MARKSTEINER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

SARAGOSA, Judge:

The appellant was tried by a special court-martial composed of officer members. In accordance with his pleas, he was found guilty of one specification of being absent without leave; one specification of wrongful use of cocaine; and one specification of wrongful use of oxycodone, in violation of Articles 86 and 112a, UCMJ, 10 U.S.C. §§ 886, 912a. The adjudged sentence consisted of a bad-conduct discharge, restriction to the limits of Spring Mountain Treatment Center for a period of one month,

reduction to E-1, and a reprimand. The convening authority approved the sentence except for the restriction.[*]

On appeal, the appellant asserts: 1) The record of trial is incomplete because it does not include the amended charge sheet, Defense Exhibit X, and Appellate Exhibits III and VI; 2) The staff judge advocate (SJA) violated Article 25, UCMJ, 10 U.S.C. § 825, by usurping the convening authority's power and exerting undue command influence in the form of "court stacking" when he negated the convening authority's selection of Colonel (Col) HR; and 3) The SJA was disqualified from giving post-trial advice to the convening authority under Rule for Court-Martial (R.C.M.) 1106(b).

Record of Trial

A complete record of the proceedings must be prepared for any special court-martial resulting in a bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months. Article 54(c)(1)(B), UCMJ, 10 U.S.C. § 854(c)(1)(B). This Court must review a complete record in order to perform its review of the findings and sentence. Article 66(c), UCMJ, 10 U.S.C. § 866(c). A complete record of trial must include the exhibits that were received in evidence and any appellate exhibits. R.C.M. 1103(b)(2)(D). When a substantial omission occurs, the record of trial is incomplete which raises a presumption of prejudice that the Government is required to rebut. *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000) (citations omitted). We review the issue of whether a record of trial is complete de novo. *Id.* at 110.

In the instant case, the appellant asserts four items are missing from the record of trial rendering it incomplete. These items include an amended charge sheet and the following three exhibits: the written unsworn statement of the appellant, the sentencing worksheet, and the military judge's written ruling on a pre-trial motion for appropriate relief. After a full review of the record of trial and supplementary documents provided to this Court, we conclude any omissions are insubstantial and do not interfere with our ability to conduct a thorough Article 66, UCMJ, review.

The record of trial includes a duplicate of the charge sheet that fails to include the pre-arraignment pen and ink changes made to Specification 2 and Charge II. This amendment struck the word "oxymorphone" and substituted the word "oxycodone" in its place. The record of trial includes a full discussion on the amendment where the military judge identified what the amendment was and queried the appellant on his understanding of the amendment. The military judge further advised the appellant of his right to object to the amendment made after referral and require a new preferral and referral. The

[*] The promulgating Court-Martial Order (CMO) incorrectly states the appellant's rank in the first paragraph and the military judge listed in the distribution section of the CMO is also incorrect. As such, we order a corrected CMO and that it be distributed accordingly. Rule for Courts-Martial 1114; Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 10.10-10.11 (6 June 2013).

appellant acknowledged his understanding, discussed the issue with his trial defense counsel, asserted his voluntary decision to waive his right to object, and affirmatively chose to proceed with trial. The plea canvass corresponds with this amendment and makes it clear that all parties proceeded through the court-martial based upon this amendment. Moreover, a duplicate of the amended charge sheet has been provided to this Court and has been reviewed in conjunction with the record of trial. As such, we find this omission to be insubstantial.

The record of trial also omits the appellant's written unsworn statement. The appellant gave a very lengthy oral unsworn statement that is transcribed verbatim in the record of trial. Additionally, the Government submitted an affidavit from the assistant trial counsel that the appellant's missing written unsworn statement was substantially the same as the oral unsworn statement presented by the appellant at trial.

We agree with the appellant that on its face, a missing defense exhibit, particularly the appellant's unsworn statement, renders the record of trial incomplete. However, in order to raise the presumption of prejudice that the Government must rebut, the omission must be substantial. *Henry*, 53 M.J. at 111. In *United States v. Stoffer*, 53 M.J. 26 (C.A.A.F. 2000), the Court concluded the absence of three defense exhibits was a substantial omission from the appellant's sentencing case and did not approve the bad-conduct discharge. In reaching this conclusion, the Court outlined the brief sentencing proceedings. "The [G]overnment introduced no evidence." *Id.* at 27. Trial defense counsel introduced three defense exhibits that were admitted without any further identification as to what the exhibits were or what was contained within them. *Id.* at 27. "These exhibits were never referred to again after their introduction or otherwise identified in the record of trial." *Id.* at 27. Holding that they could not "presume" what information was contained in the exhibits and finding the Government had failed to overcome the presumption of prejudice for the exhibits' absence in the record of trial or show their omission to be harmless error, the Court did not approve the bad-conduct discharge. *Id* at 27. However, this case is distinguishable from *Stoffer* because the facts of the case at hand are substantially different.

Here, the Government's case consisted of introducing the appellant's personal data sheet, enlisted performance reports, a letter of reprimand for being absent without leave maintained in the appellant's unfavorable information file, and a playback of the appellant's *Care* inquiry. The trial defense counsel presented testimony from the appellant's brother and the medical director of Spring Mountain Treatment Center, a private psychiatric hospital. They also presented 9 character letters, 12 certificates and awards, 5 pages of photographs of the appellant, the curriculum vitae of the medical director, and a 4-page written unsworn statement. Each of the documentary exhibits was published to the members. Finally, the appellant's oral unsworn statement was transcribed verbatim and constituted over 11 pages of the record of trial.

Our superior court has held an accused's right to make an unsworn statement is "considered an important right at military law, whose curtailment is not to be lightly countenanced." *United States v. Martinsmith*, 41 M.J. 343, 349 (C.A.A.F. 1995), and further declared, "[s]o long as this valuable right is granted by the Manual for Courts-Martial, we shall not allow it to be undercut or eroded." *United States v. Grill*, 48 M.J. 131, 133 (C.A.A.F. 1998) (quoting *United States v. Partyka*, 30 M.J. 242, 246 (C.M.A. 1990)). Given the import of an accused's right to make a statement, both oral and written, in allocution, we must conclude the absence of the written unsworn statement from the record of trial is a substantial omission rendering the record of trial in this case as incomplete. As such, this raises the presumption of prejudice that the Government must rebut. *See United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981) (establishing that any presumption of prejudice to the appellant is rebuttable).

In an effort to rebut this presumption of prejudice, the Government has introduced an affidavit of the assistant trial counsel present during the sentencing proceedings to assert that the written unsworn statement was substantially the same as the missing written unsworn statement. After a review of the entire record of trial; the verbatim transcript of the oral unsworn statement, including its length, organization, content, and clarity; and the affidavit of the assistant trial counsel, we are confident that we are able to fully perform our appellate review function pursuant to Article 66, UCMJ, and that the Government has indeed overcome the presumption of prejudice. Accordingly, we find any error in the omission of the written unsworn statement in this case to be harmless.

The next missing document is the military judge's written ruling on a defense pretrial motion to disqualify the Government's expert consultant. This motion was ruled upon orally, including findings of fact and conclusions of law, by the military judge prior to the appellant's pleas. After the sentence was announced, the military judge announced that he reduced his ruling on the defense motion to writing. He had it marked as Appellate Exhibit VI and provided it to the court reporter. While this exhibit did not make it into the record of trial, in a post-trial submission the Government provided the military judge's findings of fact along with a declaration from the military judge attesting to the accuracy of the document. Our review of both the document and the record of trial leave us firmly convinced that this omission is insubstantial.

Finally, the record of trial is missing the sentencing worksheet. The trial counsel included a memorandum for record dated 23 May 2012, that the legal office was unable to locate the sentencing worksheet. The appellant argues the absence of this worksheet precludes this Court from conducting an appropriate appellate review required by Article 66, UCMJ, because we would be unable to assess for ourselves whether the Spring Mountain Treatment Center, the place designated for restriction, was ambiguous. We disagree. Article 66(c), UCMJ states:

> In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

The restriction to Spring Mountain Treatment Center was not approved by the convening authority. Therefore, the restriction portion of the adjudged sentence is not within our purview for appellate review. As such, whether or not the location is ambiguous becomes irrelevant to this Court's ability to review this case under Article 66, UCMJ. Additionally, the sentencing worksheet was examined by the military judge, found to be in proper form, and returned to the president for announcement of the sentence which is transcribed verbatim in the record of trial. No issues have been raised with respect to the sentencing instructions. For these reasons, we do not find the lost sentencing worksheet to be a substantial omission.

Unlawful Command Influence

Trial defense counsel raised a motion for appropriate relief to disqualify Col HR from acting as a Government consultant on the case because he had previously been selected as a court member by the convening authority and subsequently relieved by the SJA by way of his delegated authority to relieve members. *See* R.C.M. 505(c)(1)(B). With no case law to support his position, trial defense counsel argued the Government could have selected ". . . any single person in the Medical Group to operate as their expert . . ." and to "cherry-pick" Col HR from the panel "cries foul" and is "unfair."

The military judge heard testimony on the issue from Col HR and argument from counsel. Ultimately, he made the following findings of fact and conclusions of law:

> [Col JB], the Staff Judge Advocate for the United States Air Warfare Center, has been delegated the authority to relieve court members appointed by the 57th Wing Commander pursuant to [R.C.M.] 505(c)(1)(B).
>
> On [14 December] 2011, the 57th Wing Commander selected [Col HR] as a member of this court-martial.
>
> Prior to that selection, Trial Counsel had contacted [Col HR] about serving as an expert consultant or witness in courts-martial.

In the week to ten days following [Col HR]'s selection to this court-martial, Trial Counsel contacted [Col HR] by e-mail to see if he was available as an expect [sic] consultant for this case.

[Col HR] informed Trial Counsel by e-mail that he was already a court-member.

There has been no evidence presented that any facts of the case had been discussed between [Col HR] and Trial Counsel at that time, or any time before [Col HR] was relieved of court-martial duty.

The next communication [Col HR] got regarding this issue was a notice that he had been relieved as a court member. He was relieved on [12 January] 2012 by the action of [Col JB] pursuant to the authority he had been delegated from the 57th Wing Commander.

And after that Trial Counsel contacted [Col HR] has acted as a [G]overnment expert consultant since last Friday. [sic]

Regarding the law in this case, [R.C.M.] 505(c)(1) authorizes a convening authority to change members of a court-martial without showing cause before assembling.

Based on that rule, the [c]ourt makes the following conclusions.

At [the] time [of the military judge's ruling], the [c]ourt has not yet assembled.

[Col JB] exercised his delegated power to relieve [Col HR] prior to assembly as no cause is required.

Trial Counsel did not improperly communicate with the court member before assembly.

The [c]ourt is aware of no rules prohibiting a relieved member from then serving as an expert consultant for either party.

Therefore, the defense motion to prohibit [Col HR] from acting as an expert consultant to Trial Counsel is denied.

Although the issues of unlawful command influence and Article 25, UCMJ, violation were not specifically raised within the pretrial motion, on appeal the appellant contends the military judge erred "by not finding the SJA had violated Article 25, UCMJ,

by usurping the convening authority's power and exerting unlawful command influence." We disagree.

We review allegations of unlawful command influence de novo. *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994) (citation omitted). Article 37(a), UCMJ, 10 U.S.C. § 837(a), states in part, "[n]o person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case." The appellant has the initial burden of raising unlawful command influence. *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A. 1994). Once the issue of unlawful command influence is properly placed at issue, "no reviewing court may properly affirm findings and sentence unless [the court] is persuaded beyond a reasonable doubt that the findings and sentence have not been affected by the command influence." *United States v. Thomas*, 22 M.J. 388, 394 (C.M.A. 1986). At the appellate level, we evaluate unlawful command influence in the context of a completed trial using the following factors: "[T]he [appellate] defense must (1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that unlawful command influence was the cause of the unfairness." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999) (citing *Stombaugh*, 40 M.J. at 213); *See also United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003); *United States v. Reynolds*, 40 M.J. 198, 202 (C.M.A. 1994).

Court stacking is a form of unlawful command influence. *United States v. Upshaw*, 49 M.J. 111, 113 (C.A.A.F. 1998). Court stacking occurs when a convening authority selects court members to achieve a desired result and acts with an improper motive. *United States v. Brocks*, 55 M.J. 614, 616 (A.F. Ct. Crim. App. 2001), *aff'd*, 58 M.J. 11 (C.A.A.F. 2002). Court stacking may also occur if the convening authority's delegate excuses members with an improper motive. Where the motive is benign, systematic inclusion or exclusion may not be improper. *Upshaw*, 49 M.J. at 113. In raising the issue of court stacking, "more than mere allegation or speculation is required." *Brocks*, 55 M.J. at 616 (citing *Biagase*, 50 M.J. at 150).

Article 25(d)(2), UCMJ, provides that "[w]hen convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." *See also* R.C.M. 502(a)(1). Prior to assembly of the court for trial of a case, "the convening authority may excuse a member of the court from participating in the case," and "may delegate his authority . . . to his staff judge advocate . . ." who may excuse members without cause shown. Article 25(e), UCMJ; *see also* R.C.M. 505(c)(1)(B).

Here, the basic facts appear uncontroverted. The convening authority selected Col HR as a court member. The SJA excused Col HR prior to the court-martial assembly

using his properly delegated authority. Subsequently, Col HR acted as an expert consultant for the Government. In order to meet the first of the *Biagase* factors, these facts must constitute unlawful command influence. To be deemed unlawful command influence, the SJA's motive in excusing Col HR must be found to be nefarious and in an effort to achieve a desired result from the court-martial proceeding. The appellant points to the fact that Col HR was the "commander of the medical operations squadron and had a Ph.D. in counseling." He argues, "The legal office knew Col HR had a background in psychology and that is why they chose to dismiss him from the panel and retain him as their expert." In response to this Court's order, Col JB provided an affidavit outlining his purpose and motives for excusing Col HR as a court member. His affidavit makes it clear that his excusal was based upon his understanding that Col HR had prior conversations with the trial counsel concerning the appellant's medical situation. His affidavit does not support a finding that he intended to influence or affect the result of the court-martial by Col HR's excusal. As such, we find the facts do not meet the first criterion set forth in *Biagase* in that no unlawful command influence occurred.

Even if one assumes arguendo that unlawful command influence occurred, the record of trial provides no basis for concluding the proceedings were unfair. The appellant's sole argument on that issue is, "Col HR would have been an extremely good member for the defense." Of course, this presupposes that had Col HR remained on the panel that he would not have been the subject of a challenge for cause or peremptory challenge by either side based upon his stated background and area of expertise and answers to voir dire questions. Relying upon the record before us, we find no evidence to indicate that the appellant was not afforded a fair and impartial trial. We will not speculate that Col HR would necessarily have been a "good member" for the trial defense. Therefore, we conclude the second and third *Biagase* criteria are also not fulfilled. We are satisfied beyond a reasonable doubt that there was no unlawful command influence and hold that the SJA committed no error in this regard. Likewise, we hold the military judge did not err in his ruling of the pre-trial motion.

Staff Judge Advocate Recommendation (SJAR)

The SJA may be disqualified from providing recommendation or legal review to the convening authority if the SJA must "review that officer's own pretrial action . . . when the sufficiency or correctness of the earlier action has been placed in issue." R.C.M. 1106(b), discussion. In the instant case, the pretrial action of the SJA in excusing Col HR was placed in issue when the trial defense counsel made a motion for appropriate relief directly based on the alleged impropriety of the SJA's actions. As noted above, that same issue has now been raised on appeal in the form of alleged unlawful command influence. To prepare the SJAR in this case would require Col JB to conduct a legal review of his own actions in excusing Col HR that had been brought into question, thereby disqualifying him from serving as the reviewing SJA. *See United States v. Lynch*, 39 M.J. 223, 228 (C.M.A. 1994) ("[W]here a legitimate factual controversy exists

between the [SJA] and the defense counsel, the [SJA] must disqualify himself from participating in the post-trial recommendation.").

Although we find error, we do not find that the appellant was prejudiced as a result. Our superior court "has not held that 'recommendations prepared by a disqualified officer [are] void.'" *United States v. Stefan*, 69 M.J. 256, 258 (C.A.A.F. 2010) (quoting *United States v. Edwards*, 45 M.J. 114, 115 (C.A.A.F. 1996), *pet. granted*, 51 M.J. 472 (C.A.A.F. 1999) (No. 95-0775/NA). Rather, the test to be applied is one for prejudice under Article 59(a), UCMJ, 10 U.S.C. § 859(a), which requires material prejudice to the substantial rights of the accused. *Id.* To find reversible error, the appellant must, inter alia, "make[ ] 'some colorable showing of possible prejudice.'" *United States v. Taylor*, 60 M.J. 190, 195 (C.A.A.F. 2004) (quoting *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998)).

At the outset, we note that the appellant did not raise this issue in response to the SJAR or the addendum to the SJAR. Considering that in conjunction with several other factors, we find no prejudice. First, as noted above, while the SJA's actions may have been called into question by way of trial defense counsel's motion, the military judge found no error. Likewise, on appeal we have found no unlawful command influence. Second, the facts of this case do not rise to the level that traditionally has been found to cause prejudice. There is nothing in this case which indicates that Col JB somehow took a firm stance on sentencing or did anything by way of his recommendation to prejudice the appellant. To the contrary, in this case, the addendum to the SJAR advises clemency in the form of disapproval of the portion of the sentence calling for restriction to Spring Mountain Treatment Center. There is simply nothing in the record that would suggest that a different SJA would have made a different recommendation on the appellant's clemency request. We conclude that the appellant was not prejudiced.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

LEAH M. CALAHAN
Deputy Clerk of the Court