UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DAMIEN G. KAWAI
United States Air Force

ACM 35366 (reh)

2 October 2007

Sentence adjudged 03 October 2006 by GCM convened at Whiteman Air Force Base, Missouri. Military Judge: Steven A. Hatfield (sitting alone).

Approved sentence: Dishonorable discharge, confinement for life with eligibility for parole, total forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Major Karen L. Kecker (argued), Colonel Beverly B. Knott, Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Terry L. McElyea, Major Andrew S. Williams, Major Sandra K. Whittington, Major James M. Winner, Major Maria A. Fried, and Captain Timothy M. Cox.

Appellate Counsel for the United States: Major Jin-Hwa L. Frazier (argued), Colonel LeEllen Coacher, Colonel Gary F. Spencer, Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, Major Matthew S. Ward, Major Shannon J. Kennedy, and Major Donna S. Rueppell.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

SOYBEL, Judge:

This is a further review case. We are reviewing it after a rehearing on one charge and specification, and a new sentence. In his first trial, the appellant was charged with premeditated murder, larceny, and obstruction of justice under Articles 118, 121, and 134 UCMJ, 10 U.S.C. §§ 918, 921, 934. He pled guilty to unpremeditated murder, and to the larceny and obstruction of justice charges. The government was successful in proving the

greater offense of premeditated murder. The appellant was sentenced to a dishonorable discharge, confinement for life with the possibility of parole, forfeiture of all pay and allowances, and reduction to E-1. This Court set aside the finding of guilty as to the charge and specification alleging obstruction of justice because we found the possible defense of duress was raised by the appellant during his discussions with the military judge, but was not sufficiently vetted during the *Care* inquiry.[1]

We returned the case to the convening authority with the option of dismissing the charge and specification or retrying the appellant for obstruction of justice. A rehearing on sentence or sentence reassessment was required depending on which option was chosen. The convening authority decided to retry the appellant on the obstruction of justice charge and specification and, in a litigated trial, the appellant was found guilty. In the sentencing rehearing that followed, the appellant was sentenced to a dishonorable discharge, confinement for life with the possibility of parole, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged.

The appellant now raises three issues regarding his rehearing.[2]

I. WHETHER THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUSTAIN A GUILTY FINDING OF OBSTRUCTION OF JUSTICE, SINCE THE EVIDENCE SHOWS APPELLANT CUT THE VICTIM'S WRIST AFTER THE HOMICIDE TO CONCEAL HIS CRIMES AS OPPOSED TO INTENDING TO INTERFERE OR IMPEDE THE DUE ADMINISTRATION OF JUSTICE.

II. WHETHER THE MILITARY JUDGE COMMITTED PLAIN ERROR DURING PRESENTENCING PROCEEDINGS IN ADMITTING IRRELEVANT AND UNDULY PREJUDICIAL EVIDENCE IN THE FORM OF 12 PHOTOGRAPHS OF THE VICTIM AS A CHILD, TWO PHOTOGRAPHS OF THE VICTIM'S GRAVE SITE, AS WELL AS LENGTHY AND EMOTIONAL AND INFLAMMATORY TESTIMONY FROM THE VICTIM'S FAMILY MEMBERS.

III. WHETHER THE APPELLANT WAS PUNISHED IN VIOLATION OF ARTICLE 13, UCMJ, 10 U.S.C. § 813, AND RULE FOR COURTS-MARTIAL (R.C.M.) 305(k), AND THEREBY ENTITLED TO MORE THAN 8 DAYS CONFINEMENT CREDIT.[3]

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

[2] All three issues are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[3] For purposes of this case we will consider the appellant a pretrial confinee rather than a post-trial confinee and apply the standards of Article 13, UCMJ, although his status as such is not clear-cut.

We find no merit in any of these issues.

Factual Background

A detailed statement of the facts is recited in *United States v. Kawai*, 63 M.J. 591 (A.F. Ct. Crim. App. 2006). The appellant did not like the victim in this case, Airman First Class (A1C) Charles Eskew, Jr. They had some contact at work and they both lived in the same dormitory on Kadena Air Base, Japan. One night, the appellant and A1C Eskew went drinking and at some point, toward the end of the evening, were alone in A1C Eskew's room drinking and watching television. A1C Eskew soon passed out. Another Airman stopped by to see the victim but, because of his condition, ended up leaving fairly quickly. The appellant then smothered A1C Eskew with a pillow and strangled him to death. The appellant then went to his room, retrieved a knife, and slit both of his dead victim's wrists. According to his confession to the OSI, he did this because he was "trying to cover it up by making it look like a suicide." He then hid the knife in a dayroom in the dorm. He also stole some video equipment, games, and a television out of A1C Eskew's room.

Obstruction of Justice

The appellant argues the evidence is factually and legally insufficient to sustain his conviction of obstruction of justice. "The test for legal sufficiency requires courts to review the evidence in the light most favorable to the government. If any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient." *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)).

In addition, this court must be independently convinced the appellant is guilty. *United States v. Boland*, 1 M.J. 241, 242 (C.M.A. 1975). The test for factual sufficiency is, "whether weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [this Court] are themselves convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J.at 325.

To sustain a finding of guilty of obstruction of justice under Article 134, UCMJ, the government must prove:

> 1) That the appellant wrongfully committed a certain act; 2) That he did so in the case of a certain person against whom the accused had reason to believe there were or would be criminal proceedings pending; 3) That the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice; and 4) That the conduct was to the prejudice

of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

In his brief, the appellant focuses on the second and third elements. He claims there was no evidence in the record to show any subjective belief on his part that proceedings against him were imminent at the time he cut A1C's Eskew's wrists. He also argues that he was merely trying to avoid detection by cutting his victim's wrists, rather than trying to obstruct justice. *See United States v. Finsel*, 36 M.J. 441 (C.M.A. 1993). He contends this mindset is insufficient to sustain a finding of guilt for obstruction of justice.

When reviewing these types of cases, we are mindful that every case must be examined on a case-by-case basis "considering the facts and circumstances surrounding the alleged obstruction and the time of its occurrence with respect to the administration of justice." *Id.*; *United States v. Lennette*, 41 M.J. 488, 490 (C.A.A.F. 1995).

One who has no reason to believe that a criminal proceeding might take place cannot intend to obstruct it. However, there is no need for an investigation to be underway at the time an accused commits his wrongful act. *United States v. Athey*, 34 M.J. 44 (C.A.A.F. 1992). To have "reason to believe" an accused need only have "surmised that there was a possibility that, at some time, a criminal proceeding might take place and he wished to prevent such a proceeding." *Id.* at 49.

Here, the appellant knew he had just killed a fellow Airman in their common dormitory. He was also aware that just before the murder, another Airman had stopped by the victim's room and saw the appellant in there while the victim was incapacitated by alcohol and completely defenseless. As a result, the appellant had to have known it was likely he would be identified as one of the last people to have been seen with the victim before he was murdered. Leaving his victim's body in the dorm room as he did, appellant would also have known the killing would be discovered quickly and that a criminal investigation would ensue. This is enough for triers of fact to find the appellant "surmised that there was a possibility that, at some time, a criminal proceeding might take place." *Id.*

To "cover it up" he tried to make it "look like a suicide." These very words in the appellant's confession demonstrate his intent; that the act was done "to influence, impede, or otherwise obstruct the due administration of justice" Article 134, UCMJ. He was doing more than trying to avoid detection. He was trying to divert the course of the expected and inevitable investigation from a murder investigation to a suicide investigation, or perhaps even create a situation where no investigation would be conducted. He knew the cuts would be seen by the investigators and he was altering evidence to sidetrack them. Cutting his victim's wrists is enough for the fact finders to decide "he wished to prevent such a proceeding." *Athey*, 34 M.J. at 49. It is true that if

he were successful, the appellant would have also avoided detection; but that result would have been derived from his efforts to obstruct justice.

Viewing the evidence in the light most favorable to the government, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt and that the evidence is legally sufficient. This court is also convinced of the appellant's guilt under the standards enunciated in *Boland*, 1 M.J. at 242.

Sentencing Evidence

We have reviewed the appellant's assertion that the military judge committed plain error during presentencing proceedings in admitting irrelevant and unduly prejudicial evidence. We find no merit to this argument. *United States v. Johnson*, 46 M.J. 8 (C.A.A.F. 1997) (stating the standard of review is whether the military judge abused his broad discretion); *United States v. Prevatte*, 40 M.J. 396 (C.M.A. 1994) (holding judges are presumed to know the law and act according to it). Additionally, there was no prejudice to the appellant since he was sentenced to the mandatory minimum sentence. Article 118, UCMJ, 10 U.S.C. § 918.

Pretrial Confinement Credit Pursuant to Article 13, UCMJ, and R.C.M. 305(k)

The appellant claims that while awaiting his retrial on the obstruction of justice charge, he was subjected to illegal pretrial confinement in violation of Article 13, UCMJ, and R.C.M. 305(k). He seeks 3-for-1 credit from 18 July 2006 through 7 September 2006 and 2-for-1 credit for the period that runs from 7 September 2006 through the remainder of the time he spent at the Whiteman Air Force Base (AFB) confinement facility, which was essentially through the completion of his rehearing.[4]

Article 13, UCMJ, prevents any person being held for trial from being punished or penalized while being held in pretrial confinement, or from being held under conditions any more rigorous than the circumstances required to ensure his presence. *See United States v. Crawford*, 62 M.J. 411 (C.A.A.F. 2006). The appellant has the burden of showing a violation of Article 13, UCMJ. *United States v. Inong*, 58 M.J. 460 (C.A.A.F. 2003). Finding intent to punish is important for establishing a violation of the first clause of Article 13, UCMJ. *United States v. McCarthy*, 47 M.J. 162 (C.A.A.F. 1997).

At trial, the military judge made a number of findings: He found from 18 July 2006 – 7 September 2006, the appellant was kept in the Whiteman AFB confinement facility under more restrictive conditions than the rest of his stay. When he first arrived he was kept in an 80 square-foot, solitary confinement cell until he learned the rules of the facility. He was moved to a larger cell within 42 hours.

[4] The appellant never complained to confinement facility officials about the conditions of his confinement.

In another cell, but segregated from the appellant, was a female, post-trial inmate. During this time period, the female was permitted, subject to the guard's permission, access to the common area of the jail to eat, read, or exercise. During this same period, the appellant was essentially confined to his cell and was only allowed out to exercise 3 times a week, which according to the non-commissioned officer in charge of corrections for Whiteman AFB, was the minimum required under the applicable Air Force Instruction.[5] He missed eight exercise sessions to which he was entitled.

After 7 September 2006, the appellant had much greater access to the common area, presumably because the female prisoner was either released or moved to another location. At that point, the appellant had regular access to the common area (over 800 square feet). He received at least one hour each day to exercise and another hour to watch television. He was also allowed to eat his meals in the common area. Even with the improved conditions, the appellant's confinement was more restrictive than what he was used to at Ft. Leavenworth, Kansas, where he was incarcerated after his first trial. Nonetheless, taking all of the facts into consideration, the only fault the military judge found with the appellant's pretrial confinement was that he missed eight exercise periods for no good reason. Implicit in his ruling was the finding that the Whiteman AFB confinement facility did not impose confinement upon the appellant "any more rigorous than the circumstances required to ensure his presence." Article 13, UCMJ. He specifically found there was no intent to punish the appellant during any part of his confinement at Whiteman AFB. Despite this finding, he awarded the appellant eight days of pretrial confinement credit because he missed eight days of exercise.

We review the military judge's findings of fact and will not overturn them unless they are clearly erroneous. *United States v. Mosby*, 56 M.J. 309 (C.A.A.F. 2002). Without question, the judge's findings were not "clearly erroneous" in this case and we will not overturn them.

The Whiteman AFB confinement facility was not dealing with the average pretrial confinement prisoner. Although his conviction for obstruction of justice was overturned, the confinement officials were still dealing with someone convicted of premeditated murder and larceny. This fact is part of the circumstances, along with the physical layout of the facility itself and the proximity of other prisoners, that had to be factored in when determining the "circumstances required to ensure his presence." Article 13, UCMJ. The military judge also recognized the confinement facility's responsibility to "ensure the health and safety of all concerned." Given the above factors, as shown by the witness testimony, and the fact that there was no intent to punish the appellant, we find no error in the military judge's findings of fact and conclusions of law.

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[5] AFI 31-205, *The Air Force Corrections System* (7 April 2004).

Based on the above, the appellant has not established that his rights under Article 13, UCMJ, were violated. Accordingly he is not entitled to any additional credit under R.C.M. 305(k).

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 findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of Court