UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant MARVIN L. LINDER
United States Air Force

ACM 35401

20 December 2004

Sentence adjudged 4 March 2002 by GCM convened at Spangdahlem Air Base, Germany. Military Judge: Linda S. Murnane.

Approved sentence: Dishonorable discharge, confinement for 4 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher and Lieutenant Colonel Stephen J. Maher.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the assignment of errors, and the government's reply thereto. Considering the evidence in the light most favorable to the prosecution, we find that a reasonable factfinder could have found all essential elements of the offense of desertion beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). *See also United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003). Furthermore, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *Walters*, 58 M.J. at 395. *See United States v. Haliburton*, 26 C.M.R. 474 (C.M.A. 1958) (essential elements of desertion).

The military judge excluded three memoranda purporting to establish the appellant's good military character. Her reason for doing so was that the writings did not establish good military character during the charged time period. We hold that this was not an abuse of discretion. *See United States v. Breeding*, 44 M.J. 345, 351 (C.A.A.F. 1996) (no abuse of discretion in refusing to admit opinion evidence of good character when the witness's contact with the accused was too attenuated by time to be relevant). In any event, even if error, we conclude that the judge's ruling did not materially prejudice the substantial rights of the appellant. He was permitted to introduce good military character through other evidence including enlisted performance reports, citations for decorations, a record of performance feedback, a memorandum from his wife, herself a Master Sergeant, and live testimony. Therefore, we hold that this ruling excluding the three memoranda, even if error, was harmless. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

The military judge did not permit an Air Force Office of Special Investigations agent to testify that he had learned of the appellant's whereabouts in the Philippines by speaking with the appellant's wife. The defense wished to elicit this information in order to refute the idea that the appellant intended to remain away from his organization permanently. The theory was that, had the appellant truly intended to desert, he would have kept his whereabouts a secret. We find that the wife's apparent knowledge of the appellant's location did not render less probable the conclusion that, at some point during the absence, he formed the intent to remain away permanently. Evidence is relevant if it has "any tendency to make the existence of a fact . . . more probable or less probable than it would be without the evidence." Mil. R. Evid. 401. "The intent to remain away permanently required in desertion must exist at or *after* the inception of the absence charged as desertion." *United States v. Hall*, 27 C.M.R. 210, 211 (C.M.A. 1959) (emphasis added). Therefore, we hold that the proffered evidence was not logically relevant. Even if the military judge's ruling was error, however, we conclude that it did not materially prejudice the substantial rights of the appellant. Article 59(a), UCMJ.

After the trial, the convening authority waived mandatory forfeitures for a period of six months and directed that the money be paid to the appellant's dependents. However, the convening authority did not first disapprove or suspend the adjudged forfeitures, as required by *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002). In light of our superior court's holding in *United States v. Lajaunie*, 60 M.J. 280 (C.A.A.F. 2004), we conclude that this is error, requiring a new action.

The action of the convening authority is set aside. The record of trial is returned to The Judge Advocate General for remand to the convening authority for post-trial processing consistent with this opinion. Thereafter, Article 66(b), UCMJ, 10 U.S.C. § 866(b), will apply.

OFFICIAL

ANGELA M. BRICE
Clerk of Court