UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JAMES L. MACKIE
United States Air Force

ACM S31090 (f rev)

24 October 2012

Sentence adjudged 02 February 2006 by SPCM convened at Barksdale Air Force Base, Louisiana. Military Judge: James L. Flanary (sitting alone) and Amy M. Bechtold (*DuBay*[1] hearing).

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Eric N. Eklund; Colonel Nikki A. Hall; Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; Lieutenant Colonel Mark R. Strickland; Major John N. Page III; Major Reggie D. Yager; and Captain Luke D. Wilson.

Appellate Counsel for the United States: Colonel Don M. Christensen; Colonel Douglas P. Cordova; Lieutenant Colonel Christopher T. Smith; Lieutenant Colonel Matthew S. Ward; Lieutenant Colonel Jeremy S. Weber; Major Joseph Kubler; Major Donna S. Rueppell; Captain Tyson D. Kindness; Captain Brian C. Mason; and Gerald R. Bruce, Esquire.

Before

STONE, GREGORY, and HARNEY
Appellate Military Judges

UPON FURTHER REVIEW

GREGORY, Senior Judge:

A special court-martial composed of a military judge sitting alone convicted the appellant, consistent with his pleas, of one specification each of absence without leave,

[1] *See United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

operating a motor vehicle while impaired, larceny, and burglary, in violation of Articles 86, 111, 121, and 129, UCMJ, 10 U.S.C. §§ 886, 911, 921, 929. The court sentenced him to a bad-conduct discharge, confinement for 7 months, and reduction to E-1. In accordance with a pretrial agreement, the convening authority approved only so much of the sentence as provided for a bad-conduct discharge, confinement for 6 months, and reduction to E-1.

In his initial brief before this Court, the appellant assigned as error the denial by the military judge of his motion for a sanity board under Rule for Courts-Martial (R.C.M.) 706. On 24 September 2007, we agreed that the military judge improperly denied the appellant's pretrial request for a sanity board and returned the record to the convening authority to order a sanity board. *United States v. Mackie*, 65 M.J. 762 (A.F. Ct. Crim. App. 2007), *aff'd*, 66 M.J. 198 (C.A.A.F. 2008). Depending on the results of the board, we authorized the convening authority to either order a rehearing or return the record for further review.

The convening authority ordered the sanity board in full compliance with our order, and the board was conducted on 17-18 December 2007. The board determined that the appellant did not have a severe mental disease or defect at the time of the offenses and that he was competent to stand trial. The convening authority's staff judge advocate received the board results in January 2008, but inexplicably took no action on the case until prompted by a higher headquarters inquiry over two years later in March 2010. Ultimately, the convening authority returned the record to the Court after reviewing the sanity board report in September 2010.[2]

In response to questions raised by the appellant concerning the sanity board and subsequent actions, we ordered a post-trial hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), to determine whether the sanity board reliably reached its conclusions in compliance with R.C.M. 706. The detailed military judge heard testimony from defense and Government experts, including the psychologist who conducted the board, and reviewed a variety of documents submitted by the parties. In thorough findings of fact and conclusions of law, the judge found that the sanity board substantially complied with R.C.M. 706 and reliably determined that the appellant did not have a severe mental disease or defect at the time of the offenses and that he was competent to stand trial.

Pursuant to our order directing the hearing, the convening authority returned the record to this Court for further review. The appellant now argues that the military judge abused her discretion in finding the sanity board reliable. He also asserts that he is entitled to a hearing to determine mental responsibility and competency to stand trial, that R.C.M. 706 is facially unconstitutional, and that post-trial delay denied him due process.

[2] Errors in the release of information from the sanity board resulted in several intervening orders, pleadings, and affidavits. *See United States v. Mackie*, ACM S31090 (rem) (A.F. Ct. Crim. App. 24 August 2010) (Order granting motion to submit documents and motion to remand for convening authority's consideration of correct record).

The Sanity Board

We review the military judge's conclusions that the sanity board rendered a reliable result in substantial compliance with R.C.M. 706 as a mixed question of law and fact: matters of law will be reviewed de novo and findings of fact will be accepted unless clearly erroneous. *United States v. Best*, 61 M.J. 376 (C.A.A.F. 2005). Reviewing as a question of fact the evidentiary findings used by the military judge to evaluate compliance with R.C.M. 706, we find those facts amply supported by the record and certainly not erroneous. Reviewing de novo the military judge's conclusions regarding compliance with the requirements of R.C.M. 706, we conclude, as did the military judge, that the sanity board reliably reached its conclusions in substantial compliance with the requirements of R.C.M. 706.

Dr. BL, a credentialed clinical psychologist practicing in an Air Force clinic under the supervision of a licensed psychiatrist, Dr. LP, conducted the sanity board as directed by the convening authority. She reviewed information from multiple sources, including medical notes from the clinical psychologist who treated the appellant before trial. These notes describe many of the behaviors that gave rise to the initial motion for a sanity board. Dr. BL also administered a battery of psychological tests and conducted an interview of the appellant. Based on her examination, she diagnosed the appellant as having an adjustment disorder but not suffering from a severe mental disease or defect at either the time of the examination or at the time of the offenses. She further concluded that he had sufficient mental capacity to understand the nature of judicial proceedings against him and to intelligently cooperate in his defense.

In addition to the testimony of Dr. BL, the military judge heard testimony from two other expert witnesses: the Government called Colonel (Dr.) DF, an Air Force psychiatrist, and the appellant called Dr. NS, a retired Air Force clinical psychologist. Addressing the appellant's concern that the necessarily retrospective nature of the sanity board in this case could not reliably address competence at trial, Dr. DF testified that a retrospective competency determination is "very possible." Based on all the information he reviewed in the present case, he rendered his expert opinion: "Quite honestly, in my opinion, I think an acceptable sanity board was done in 2007 . . . I believe . . . that [the appellant] was competent to stand trial at the time of trial and he was sane." The defense expert, Dr. NS, agreed with Dr. DF that a sanity board could accomplish a retrospective competency evaluation.

Both experts agreed with Dr. BL's diagnosis that the appellant had an adjustment disorder. The defense expert testified that she would have done more testing to rule out depression, but she nonetheless acknowledged that even a diagnosis of depression in this case would not have been sufficiently severe to render him incompetent to stand trial or not mentally responsible. Although both experts identified areas for improvement in Dr. BL's evaluation, both testified that the evaluation met the requirements of R.C.M. 706. Dr. NS acknowledged that her concerns with the sanity board stemmed more from her

general dissatisfaction with the Rule itself rather than the conduct of the board by noting, "I think the fault lies in 706."

Dr. BL incorrectly advised the appellant concerning the confidentiality of his responses. Dr. DF testified that a patient might provide more limited or guarded responses when advised that the responses would be disclosed but that, in this case, the results show that the appellant was very forthcoming during the board. Dr. NS, the defense expert, agreed that no specific evidence showed that the incorrect advice had a chilling effect on the appellant's responses and further acknowledged that the malingering diagnosis indicated that the appellant provided more rather than less information. The evidence shows, as the military judge found, that the incorrect advice did not impact the reliability of the sanity board results in this case.

After much discussion by both experts on the relative quality of the sanity board in this case, during which each attempted to assign letter grades to the report, the military judge distilled the issue to a single question to Dr. DF:

> MJ: Just to make it very, very concise, on a pass/fail standard, did the 2007 sanity board pass or fail?
>
> WIT: Pass.

We agree. Having applied the standards of review set forth in *Best* to the findings and conclusions in this case, we find that Dr. BL reliably determined that the appellant did not suffer from a severe mental disease or defect at the time of the charged offenses and that he had the requisite capacity to stand trial. Although she provided incorrect advice concerning confidentiality, the evidence shows that the error had no impact on the reliability of the sanity board results and did not otherwise prejudice the appellant.

The Requirement for a Competency Hearing

Citing R.C.M. 909, the appellant argues that he is entitled to a competency hearing. The rule provides:

> After referral, the military judge *may* conduct a hearing to determine the mental capacity of the accused, either sua sponte or upon request of either party. If an inquiry pursuant to R.C.M. 706 conducted before or after referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the military judge *shall* conduct a hearing to determine the mental capacity of the accused.

R.C.M. 909(d) (emphasis added). Had the sanity board found the appellant incompetent, the appellant would be correct because, in that circumstance, the Rule requires that the military judge conduct a competency hearing. However, as we found above, the sanity

board reliably determined that the appellant was competent to stand trial – a finding that does not require a competency hearing.

In *United States v. Breese*, 47 M.J. 5 (C.A.A.F. 1997), a post-trial sanity board was unable to determine whether that appellant was mentally responsible, but rather concluded that the offenses related to the appellant's use of alcohol and that he could possibly be alcohol dependent. The board also concluded that he was competent to participate in appellate proceedings. Breese argued that he was entitled to a new trial based on the board's inability to reach a conclusion concerning mental responsibility at the time of his offenses. The Court held that he was not, finding beyond a reasonable doubt that the sanity board evidence would not have caused a different result.

We reach a similar conclusion here. Competency is an interlocutory question of fact and is presumed, absent a preponderance of the evidence to the contrary. R.C.M. 909(b) and (e). The military judge heard argument on the appellant's competency and accepted his pleas of guilty after finding him competent:

> Just for the record, before I go into the script, I will just note that during this inquiry since we began, I have been paying close attention to [the appellant], his responses, to his body language, to ensure that he does, in fact, fully understand what is going on. I have noticed that he has interacted appropriately with his defense counsel, several times he has asked questions or it appears that he has asked questions, and the defense counsel has also responded back to him. It appears that the defense has asked questions, and he has responded back to [the defense counsel]. It appears to the court, and in conscience and in good faith I can say that it appears [the appellant] is fully cognizant of all that is going on, and that it appears that he has ably assisted his defense counsel in the *Care*[3] inquiry and going through this procedure.

Both the appellant and his counsel agreed. The sanity board that convened post-trial reached the same conclusion.

Although the military judge erred in not ordering a sanity board, the conclusions of the post-trial board, as well as the evidence taken at the *DuBay* hearing, show beyond a reasonable doubt that the result of the military judge's discretionary de facto competency hearing would not change. The appellant's own expert testified at the *DuBay* hearing that, to negate competency, a mental disease or defect would "have to be so severe that it would be patently apparent from the face of the transcript." That is clearly not the case here. Having reviewed the record of trial in light of the retrospective sanity board, we find no reason to order an additional hearing on the interlocutory question of competence. *See* R.C.M. 909(b) and 909(e); *United States v. Young*, 43 M.J. 196 (C.A.A.F. 1995)

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

(appellant must provide sufficient evidence to open the door for further inquiry into mental responsibility).

The Constitutionality of R.C.M. 706

The constitutionality of a statute or rule is a question of law we review de novo. *United States v. Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000). The appellant complains that R.C.M. 706 is "so lacking in standards" that it violates the Due Process Clause.[4] Citing *United States v. Drope*, 420 U.S. 162, 171 (1975), he argues that the rule fails to provide "adequate" procedures to prevent trial of an incompetent accused. Contrary to the appellant's broadside attack, our superior court has often recognized "the important protections afforded by R.C.M. 706 and its predecessors to service-members facing the court-martial process" and noted its origins in "long-standing military practice, dating to at least 1917." *Best*, 61 M.J. at 382. While the appellant may continue to dispute the validity of the board's findings, his quarrel with the process implemented by R.C.M. 706 does not equate to a denial of due process such that the rule is unconstitutional. As our superior court implicitly found in *Best*, we find the process provided by R.C.M. 706 more than adequate to protect an incompetent accused from trial and decline the appellant's request to sweep away this proven procedural protection as unconstitutional.

In evaluating the adequacy of a substitute sanity board, our superior court noted the "carefully crafted procedures" of R.C.M. 706. *United States v. English*, 47 M.J. 215, 219 (C.A.A.F. 1997). Those procedures require, among other things, that: (1) each member of the board be either a physician or a clinical psychologist; (2) the board make specific findings concerning mental responsibility and competence, to include a clinical psychiatric diagnosis; and (3) the board issue a report of its findings, with specific safeguards for confidentiality. R.C.M. 706 (c). Because the Rule does not dictate the specific procedures to be followed in conducting, the examination permits a sanity board to apply the ever-evolving medical and scientific norms of mental examinations. Essentially, R.C.M. 706 provides the legal framework for specific medical or psychological findings made in accordance with prevailing professional standards. Dr. NS, the appellant's expert, acknowledged that sanity boards are evaluated under the current standard of care. Thus, as the *DuBay* hearing illustrates, attacks on a sanity board's findings are properly directed toward the medical and psychological bases of the board's findings rather than the constitutionality of the rule which authorizes them.

Post-Trial Processing Delay

Citing primarily the lengthy delay between the sanity board ordered by this court in 2007 and the return of the case to the court for further review, the appellant argues that he has been deprived of his right to speedy post-trial review. The appellant acknowledges that his case predates the applicability of the time standards set forth in

[4] U.S. CONST. amend. V.

United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006), for evaluating when a post-trial delay becomes facially unreasonable, but those standards are nevertheless helpful in evaluating this case. From adjournment of trial to the initial appellate decision, the appellant's case was processed well within the time standards established in Moreno.

In the somewhat unusual posture of the appellant's case, the delays complained of occurred after the initial appellate decision. Our superior court addressed such a situation in *United States v. Roach*, 69 M.J. 17 (C.A.A.F. 2010). In *Roach*, the initial appellate decision was issued within the *Moreno* standard. However, an additional 19 months elapsed after the decision before a final resolution. The Court found that the initial decision contained no "malicious delay" and therefore did not trigger the analysis required by the thresholds established in *Moreno*. Here, the convening authority complied with our previous decision by directing a sanity board which, as discussed above, reliably determined that the appellant was mentally responsible and competent to stand trial. Neither the initial decision nor the convening authority's compliance implicates any malicious delay sufficient to show a denial of speedy post-trial review under *Roach*.

Conclusion

The approved findings and the 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 the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court