UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic CHRISTOPHER J. MARTIN
United States Air Force

ACM 38222

30 September 2013

Sentence adjudged 22 August 2012 by GCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: Christopher A. Santoro.

Approved Sentence: Dishonorable discharge and confinement for 15 months.

Appellate Counsel for the Appellant: Dwight H. Sullivan, Esquire, and Captain Travis K. Ausland.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Gerald R. Bruce, Esquire; and Major Tyson D. Kindness.

Before

ROAN, MARKSTEINER, and WIEDIE
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

WIEDIE, Judge:

At a general court-martial the appellant was convicted, consistent with his pleas, of attempted forcible sodomy, willful disobedience of a superior commissioned officer, wrongful use of oxycodone, and assault consummated by a battery, in violation of Articles 80, 90, 112a and 128, UCMJ, 10 U.S.C. §§ 880, 890, 912a, 928. A panel of officer and enlisted members adjudged a sentence of a dishonorable discharge,

confinement for 24 months, and forfeiture of all pay and allowances.[1] The convening authority approved only so much of the sentence that called for 15 months of confinement and a dishonorable discharge. The convening authority also waived automatic forfeitures for six months for the benefit of the appellant's daughter.

On appeal, the appellant asserts that the military judge abused his discretion by refusing to give a defense-requested instruction in sentencing on sex offender registration. We have reviewed the record of trial, the assignment of error, and the government's answer thereto. Finding no error that prejudiced a substantial right of the appellant, we affirm.

Background

Prior to the sentencing proceedings, the appellant requested that the military judge provide a tailored sentencing instruction. The subject of the requested instruction was sex offender registration as a result of the appellant's conviction of attempted forcible sodomy. The military judge refused to provide the requested instruction, explaining that sex offender registration was a collateral matter and not the proper subject of a sentencing instruction. The military judge also stated that the proposed instruction provided by the appellant failed to cite any legal authority upon which it was based.

Sex Offender Registration Instruction

Counsel is entitled to request specific instructions from the military judge, but the judge has substantial discretionary power in deciding which instructions are ultimately provided to the members. *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993) (citing *United States v. Smith*, 34 M.J. 200 (C.M.A. 1992)); Rules for Courts-Martial 920(c) Discussion. Thus, the military judge's denial of a requested instruction is reviewed for abuse of discretion. *Damatta-Olivera*, 37 M.J. at 478 (citing *United States v. Dennis*, 625 F.2d 782 (8th Cir. 1980)); *United States v. Rasnick*, 58 M.J. 9, 10 (C.A.A.F. 2003). To determine whether error exists when a military judge fails to give a requested instruction, we apply a three-pronged test and determine whether: "(1) the requested instruction is correct; (2) 'it is not substantially covered in the main [instruction]'; and (3) 'it is on such a vital point in the case that the failure to give it deprived [the accused] of a defense or seriously impaired its effective presentation.'" *United States v. Miller*, 58 M.J. 266, 270 (C.A.A.F. 2003) (citing *United States v. Zamberlan*, 45 M.J. 491, 492-93 (C.A.A.F. 1997) (quoting *United States v. Eby*, 44 M.J. 425, 428 (C.A.A.F. 1996))); *See also Damatta-Olivera*, 37 M.J. at 478. For error to exist, all three prongs of the *Miller* test must be satisfied. *United States v. Barnett*, 71 M.J. 248, 253 (C.A.A.F. 2012).

[1] We note that the Court-Martial Order (CMO) incorrectly states that the appellant's sentence was adjudged by a military judge. Promulgation of a corrected CMO, properly reflecting that the sentence was imposed by officer and enlisted members, is hereby ordered.

"The general rule concerning collateral consequences of a sentence is that 'courts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration.'" *United States v. Griffin*, 25 M.J. 423, 424 (C.M.A. 1988) (quoting *United States v. Quesinberry*, 31 C.M.R. 195, 198 (C.M.A 1962)) (alteration in original). Ordinarily, instructions on collateral consequences should be avoided. *United States v. Hall*, 46 M.J. 145, 146 (C.A.A.F. 1997) (citing *Griffin*, 25 M.J 423; *United States v. McElroy*, 40 M.J. 368, 371–72 (C.M.A. 1994)).

The appellant argues that sex offender registration is a proper matter in mitigation and therefore the military judge abused his discretion by refusing to provide the members with the instruction on sex offender registration, in light of our superior court's decision in *United States v. Riley*, 72 M.J. 115 (C.A.A.F. 2013). In *Riley*, the accused was not advised by her trial defense counsel that pleading guilty to kidnapping of a child subjected her to registration as a "sex offender" pursuant to federal law. Our superior court held that "in the context of a guilty plea inquiry, sex offender registration consequences can no longer be deemed a collateral consequence of the plea." *Id.* at 121. That language, however, is used in the context of whether the accused understood the "meaning and effect" of her guilty plea, as required by Article 45(a), UCMJ, 10 U.S.C. § 845(a), which includes the consequence of sex offender registration. With that context, we do not find this language transforms sex offender registration into a matter in extenuation that would bring it outside of the parameters set forth in *United States v. McNutt*, 62 M.J. 16, 19 (C.A.A.F. 2005) (Error by the military judge when considering the Army's "good-time" credit policy when he assessed the accused's sentence, as sentence determinations should be based on the evidence before the factfinder) and *United States v. Duncan*, 53 M.J. 494 (C.A.A.F. 2000) (Military judge properly instructed on requirement of accused to participate in a rehabilitation program as a collateral consequence when information was requested by members and reasonably related to the consideration of the nature of the appellant's offenses).

Given that, we find the military judge did not abuse his discretion in refusing to provide the defense-requested sex offender registration instruction because sex offender registration is not a matter in mitigation for purposes of sentencing proceedings. *See United States v. Lindsey*, ACM 37894 (A.F. Ct. Crim. App. 18 June 2013) (unpub. op.) (Military judge did not abuse her discretion in instructing members that they could not consider sex offender registration consequences when deciding what sentence was appropriate for the appellant and by prohibiting trial defense counsel from referencing sex offender registration in his argument); *United States v. Datavs*, 70 M.J. 595, 604 (A.F. Ct. Crim. App. 2011) (No abuse of discretion where a military judge precluded the trial defense counsel from discussing sex offender registration during his sentencing argument).

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court