UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant GARRON MERRITT
United States Air Force

ACM 37133

30 June 2009

Sentence adjudged 12 July 2006 by GCM convened at Kunsan Air Base, Republic of Korea. Military Judge: Steven A. Hatfield.

Approved sentence: Dishonorable discharge, confinement for 6 years, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Captain Phillip T. Korman, and Mary T. Hall, Esquire (civilian counsel).

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, Major Roberto Ramirez, and Captain Ryan N. Hoback.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

Contrary to the appellant's pleas, a panel of officers and enlisted members sitting as a general court-martial convicted him of one specification of rape, one specification of unlawful entry, and one specification of adultery, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934. The adjudged sentence consists of a dishonorable discharge, six years confinement, forfeiture of all pay and allowances, and a reduction to E-1. The convening authority approved all of the adjudged sentence except for the

forfeitures. On appeal the appellant asks this Court to set aside the findings and the sentence.

The basis for the appellant's request is that he opines: (1) the military judge erred in denying the trial defense counsel's motion for a new Article 32, UCMJ, 10 U.S.C. § 832, hearing; (2) the evidence is legally and factually insufficient to support his unlawful entry and rape convictions; (3) the military judge erred by failing to recuse himself from the appellant's post-trial session, by failing to conduct a formal Article 39(a), UCMJ, 10 U.S.C. § 839(a), session on the record in the appellant's presence, and by improperly ordering the defense to surrender copies of its exhibits, the originals of which had been lost by the government; (4) he was deprived of his right to speedy post-trial review when over 500 days elapsed between the date of sentencing and the date the convening authority took action; (5) in light of his long history of distinguished and honorable service, his sentence, which includes a dishonorable discharge and six years confinement, is inappropriately severe; (6) he was deprived of effective assistance of counsel when his trial defense counsel, whom the appellant had advised of his intent to release from further representation, surrendered copies of the missing defense exhibits to the military judge; and (7) the government unduly restricted the number of out-of-country witnesses it would fund to testify as to the appellant's truthfulness.* Finding no prejudicial error, we affirm.

Background

On the evening of 29 October 2005, the appellant, then a master sergeant assigned to Kunsan Air Base, Republic of Korea, danced with Senior Airman (SrA) TD, a subordinate. After the dance, SrA TD returned to her room and went to sleep. She was awakened in her darkened room by the appellant having sexual intercourse with her. Believing the appellant was SrA SH, her then-boyfriend, SrA TD did not resist. Only after the appellant began wiping her vagina with a tissue did SrA TD realize it was the appellant who had engaged in sexual intercourse with her. Realizing SrA TD was awake, the appellant crawled out of the room and left.

Shortly thereafter, SrA TD reported the rape and an investigation ensued. A blood sample was collected from the appellant and vaginal swabs were collected from SrA TD. The sample and swabs were sent to the United States Army Criminal Investigations Laboratory (USACIL) for analysis and the swabs subsequently tested positive for the presence of the appellant's semen. At trial, the appellant moved for a new Article 32, UCMJ, hearing. The basis for his motion was that having an investigating officer who was the chief of military justice and a prosecutor at another base (Osan Air Base, Republic of Korea) within the same command created an appearance of partiality. The military judge, finding no actual or implied bias, denied the appellant's motion.

* Assignments of error 5, 6, and 7 are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

At trial, SrA TD testified that the appellant entered her room uninvited and raped her. The appellant testified SrA TD invited him into her room and that the sexual intercourse was consensual. The appellant also called two witnesses, one of whom was from overseas, to testify about his character for truthfulness. The appellant did not move to admit any affidavits as to his character for truthfulness.

Military Judge's Ruling on New Article 32, UCMJ, Hearing

We review a military judge's decision on whether to grant a motion for a new Article 32, UCMJ, hearing for an abuse of discretion. *United States v. Diaz*, 61 M.J. 594, 610 (N.M. Ct. Crim. App. 2005), *aff'd*, 64 M.J. 176 (C.A.A.F. 2006). Under an abuse of discretion review, we examine a military judge's findings of fact using a clearly-erroneous standard, and conclusions of law de novo. *United States v. Larson*, 66 M.J. 212, 215 (C.A.A.F. 2008); *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). "An accused has a right to a 'thorough and impartial investigation' of all charges referred to a general court-martial." *United States v. Castleman*, 11 M.J. 562, 564 (A.F.C.M.R. 1981) (quoting Article 32, UCMJ).

In determining impartiality, "Article 32[, UCMJ,] investigating officers, whose functions are judicial and quasi-judicial, are held to the same standards as military judges." *Id.* (citing *United States v. Collins*, 6 M.J. 256 (C.M.A. 1979); *United States v. Cunningham*, 30 C.M.R. 402, 404 (C.M.A. 1961)). Except where the parties have waived disqualification of the military judge after full disclosure of the basis for disqualification, a military judge must recuse himself "in any proceeding in which that military judge's impartiality might reasonably be questioned." Rule for Courts-Martial (R.C.M.) 902(a). Moreover, when a military judge's impartiality is challenged on appeal, the test is whether the military judge's actions would cause a reasonable person observing the trial to question the court-martial's legality, fairness, and impartiality. *United States v. Foster*, 64 M.J. 331, 333 (C.A.A.F. 2007).

Applying that same standard to Article 32, UCMJ, investigating officers, such investigating officers must recuse themselves in any proceeding in which their impartiality might reasonably be questioned. The appellant avers the investigating officer's duties as the chief of military justice and a prosecutor at Osan Air Base, Republic of Korea, disqualified her from serving as the investigating officer in his case because such duties, albeit performed at a base other than the appellant's base, would cause a reasonable person observing the Article 32, UCMJ, hearing to question the hearing's legality, fairness, and impartiality. We disagree.

Long ago this Court determined that while an Article 32, UCMJ, investigation must be conducted by an impartial officer, there is no requirement that the officer be appointed from a command different from that of the convening authority investigating the charges. *United States v. Modlin*, ACM 24373 (A.F.C.M.R. 7 Nov 1984) (unpub

op.). With respect to the investigating officer's impartiality, the military judge found no actual or implied bias. We agree and find the military judge did not abuse his discretion in denying the appellant's motion for a new Article 32, UCMJ, hearing.

Sufficiency of the Appellant's Unlawful Entry and Rape Convictions

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (additional citations omitted)).

In resolving questions of legal sufficiency, we are "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). We have considered the evidence produced at trial in the light most favorable to the government and find a reasonable fact finder could have found, beyond a reasonable doubt, all of the essential elements of the specifications of which the appellant was convicted. Specifically, we note that SrA TD's testimony and the evidence analyzed by USACIL are legally sufficient to support the appellant's unlawful entry and rape convictions.

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973). We have carefully considered the evidence under this standard and are convinced beyond a reasonable doubt that the accused is guilty of the charges and specifications of which he was convicted.

Military Judge's Alleged Errors

We find the military judge did not err by failing to recuse himself from the appellant's post-trial session, by failing to conduct a formal Article 39(a), UCMJ, session on the record in the appellant's presence, and by ordering the defense to surrender copies of exhibits. We review a military judge's refusal to recuse himself for an abuse of discretion. *United States v. Butcher*, 56 M.J. 87, 90 (C.A.A.F. 2001); *United States v. Wright*, 52 M.J. 136, 141 (C.A.A.F. 1999). "An accused has a constitutional right to an

impartial judge." *Wright*, 52 M.J. at 140 (citing *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927)). There is a strong presumption of a military judge's impartiality in the conduct of judicial proceedings. *Foster*, 64 M.J. at 333; *United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001).

Except where the parties have waived disqualification of the military judge after full disclosure of the basis for disqualification, a military judge must recuse himself "in any proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M. 902(a). Lastly, when a military judge's impartiality is challenged on appeal, the test is whether the military judge's actions would cause a reasonable person observing the trial to question the court-martial's legality, fairness, and impartiality. *Foster*, 64 M.J. at 333.

The appellant avers the military judge should have recused himself because his authentication of an incomplete record and his potential role as a witness at the post-trial Article 39(a), UCMJ, hearing would have caused a reasonable person observing the trial to question the court-martial's legality, fairness, and impartiality. We disagree. The military judge's action in authenticating an incomplete record does not reasonably call into question his impartiality. Moreover, there is no evidence that the military judge would have been a witness at any post-trial Article 39(a), UCMJ, hearing and, in any event, the post-trial Article 39(a), UCMJ, hearing was never held; thus, there was no reason for the military judge to recuse himself.

Concerning the military judge's failure to call a formal Article 39(a), UCMJ, session, we find the error to be harmless. The purpose of the post-trial Article 39(a), UCMJ, hearing was to provide the convening authority with the materials necessary to complete the record of trial. The receipt of the missing exhibits completed the record of trial and obviated the need to have a formal post-trial Article 39(a), UCMJ, session. In short, the appellant, in raising this issue, is advocating form over substance and such issue is wholly without merit.

Moreover, it was within the military judge's authority to issue a certificate of correction on an incomplete authenticated record of trial and, in doing so, he had the authority to order trial defense counsel to produce copies of the missing exhibits to complete the record. R.C.M. 1104(d)(2); *United States v. Chisholm*, 58 M.J. 733, 736-37 (Army Ct. Crim. App. 2003), *aff'd*, 59 M.J. 151 (C.A.A.F. 2003). Lastly, proceedings to accomplish the certificate of correction need not take place in a formal Article 39(a), UCMJ, hearing. R.C.M. 1104(d)(2), Discussion.

Speedy Post-Trial Review

A review of the post-trial processing of the appellant's case is helpful in addressing this issue. On 12 July 2006, the appellant's court-martial adjourned. On 9

November 2006, the appellant submitted his clemency request. In his request, he advised the convening authority that Defense Exhibits O-BC were missing from the authenticated record of trial. On 4 January 2007, trial counsel requested trial defense counsel provide original or copies of the missing exhibits for inclusion into the record of trial. On 23 January 2007, trial defense counsel advised trial counsel that the defense would not be providing copies of the missing exhibits for inclusion into the record of trial because it was not in the appellant's best interest.

On 12 February 2007, the convening authority directed a post-trial Article 39(a), UCMJ, session to inquire into the missing exhibits and to give the military judge the opportunity to order trial defense counsel to produce copies of the missing exhibits for inclusion into the record of trial. On 23 February 2007, the military judge, at trial defense counsel's request, established 25 April 2007 as the date for the post-trial Article 39(a), UCMJ, session. On 13 March 2007, the government moved the military judge to compel trial defense counsel to produce a copy of the missing exhibits for inclusion into the record of trial.

On 15 March 2007, trial defense counsel filed a response opposing the motion to compel. On 31 March 2007, the military judge ordered trial defense counsel to provide copies of the missing exhibits for inclusion into the record of trial. On 6 April 2007, trial defense counsel informed the military judge that they were seeking guidance from their respective state bar associations and would not anticipate compliance before the scheduled post-trial Article 39(a), UCMJ, session. As a result, the military judge continued the post-trial Article 39(a), UCMJ, session for an indefinite time.

On 30 May 2007, Mr. CG, one of the appellant's trial defense counsel, informed the military judge that based on guidance from his state bar association, he was barred from providing the missing exhibits. On that same day, Captain (Capt) CC, the appellant's other trial defense counsel, sought to terminate his representation of the appellant. Capt CC also acknowledged his state bar association advised him of his obligation to comply with the order. On 1 June 2007, the military judge denied Capt CC's request to terminate his representation of the appellant and ordered the appellant's trial defense counsel to produce copies of the missing exhibits for inclusion into the record of trial.

On that same day, Capt CC provided the military judge copies of the missing exhibits for inclusion into the record of trial. On 27 August 2007, the military judge ordered a certificate of correction. On 28 November 2007, the convening authority took action in the appellant's case.

"We review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal." *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citing *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004);

United States v. Cooper, 58 M.J. 54, 58 (C.A.A.F. 2003)). In conducting this review we follow our superior court's guidance in using the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice" to the appellant. *Moreno*, 63 M.J. at 135 (citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *United States v. Toohey*, 60 M.J. 100, 102 (C.A.A.F. 2004)).

For courts-martial completed after 11 June 2006, we apply a presumption of unreasonable delay where the action of the convening authority is not taken within 120 days of the completion of trial. *Id.* at 142. Once this due process analysis is triggered by a facially unreasonable delay, "we analyze each factor and make a determination as to whether that factor favors the [g]overnment or the appellant." *Id.* at 136 (citing *Rheuark v. Shaw*, 628 F.2d 297, 303 (5th Cir. 1980)). We then balance our analysis of the factors to determine whether there has been a due process violation. *Id.* No one single factor is required to find that a post-trial delay constitutes a due process violation, nor will the absence of a given factor prevent such a finding. *Id.*

In determining prejudice, this Court looks to three interests for prompt appeals: "(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired." *Id.* at 138-39 (quoting *Rheuark*, 628 F.2d at 303 n.8).

Having enunciated the "post-trial delay" test, we now apply the test to the case sub judice. While a 504-day delay is sufficient to trigger the rebuttable presumption of an unreasonable delay, the facts make clear that the appellant, in opposing the request and orders to produce copies of the missing exhibits for inclusion into the record of trial, exacerbated the delay and bears responsibility for the majority of the delay. An appellant cannot create or exacerbate an error and then take advantage of a situation of his own making. Invited error, as in the case here, "does not provide a basis for relief." *United States v. Raya*, 45 M.J. 251, 254 (C.A.A.F. 1996) (citing *United States v. Johnson*, 26 F3d. 669, 677 (7th Cir. 1994)).

Lastly, assuming the invited error doctrine is inapplicable, the appellant is still not entitled to relief. We note that: (1) a sufficient basis for the delay exists; (2) the appellant has not, prior to this appeal, asserted his right to timely review and appeal; and (3) there has been no sufficient showing of prejudice. Put simply, all the *Barker* factors weigh in favor of the government and the appellant is not entitled to relief.

Inappropriately Severe Sentence

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

In this case, the appellant, by his actions, seriously compromised his standing as a member of society and a military member. His otherwise outstanding record does not minimize the seriousness of his crimes. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offenses of which the appellant was found guilty, we do not find the appellant's sentence inappropriately severe.

Ineffective Assistance of Counsel Claim

Service members, without question, have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005). Claims of ineffective assistance of counsel are reviewed under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). Where there is a lapse in judgment or performance alleged, we ask: (1) whether trial defense counsel's conduct was in fact deficient, and, if so (2) whether counsel's deficient conduct prejudiced the appellant. *Strickland*, 466 U.S. at 687; *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991).

The appellant bears the heavy burden of establishing that his trial defense counsel was ineffective. *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001). Counsel are presumed to be competent and we will not second guess trial defense counsel's strategic or tactical decisions. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993). "To make out a claim of ineffective assistance of counsel, the accused must rebut this presumption by pointing out specific errors made by his defense counsel which were unreasonable under prevailing professional norms." *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987).

> The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. In making [the competence] determination, the court should keep in mind that counsel's function, as elaborated in prevailing

> professional norms, is to make the adversarial testing process work in the particular case.

Id. (quoting *United States v. Cronic*, 466 U.S. 648, 690 (1984)). "Acts or omissions that fall within a broad range of reasonable approaches do not constitute a deficiency." *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001).

We find Capt CC's actions in complying with the military judge's order, namely to provide copies of the missing exhibits to complete the record of trial, were not deficient. While counsel has an obligation to provide effective assistance of counsel, that obligation does not require him to subject himself to possible sanctions from his licensing authority. The record is clear that Capt CC would have subjected himself to possible sanctions from his state bar association if he had refused to comply with the military judge's order.

Moreover, even if the appellant's counsel was deficient, the appellant has failed to show how he was prejudiced by the alleged deficiency. In order to constitute prejudicial error, trial defense counsel's deficient performance must render the result of the proceeding "unreliable" or "fundamentally unfair." *United States v. Ingham*, 42 M.J. 218, 223 (C.A.A.F. 1995) (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993)). In this regard the appellant has fallen woefully short.

Alleged Denial of Defense Witnesses

It is a denial of due process to deprive a defendant of the benefit of the favorable testimony of a relevant witness simply because the defendant could not pay the expenses of obtaining that testimony. *United States v. Joyner*, 494 F.2d 501, 506-07 (5th Cir. 1974), *cert. denied*, 419 U.S. 995 (1974). Failure to object at trial to such a denial shall constitute waiver absent plain error. R.C.M. 905(e); Mil. R. Evid. 103(d). "To prevail under a plain error analysis, [the appellant bears the burden of showing] that: '(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right.'" *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005) (quoting *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)). While the threshold for establishing prejudice is low, the appellant must nevertheless make a "colorable showing of possible prejudice." *Id.* at 436-37 (quoting *Kho*, 54 M.J. at 65).

In the case at hand, the appellant has failed to show that he complained at trial about the denial of his right to witnesses at government expense. Moreover he has failed to show the government denied him access, at government expense, to favorable overseas witnesses. We note that the government provided the appellant at least one overseas witness to testify as to the appellant's character for truthfulness and the record is devoid of any further requests by the appellant for additional witnesses. We also note that there is no evidence in the record that the appellant moved to admit any affidavits as to his

character for truthfulness to which he was entitled under Mil. R. Evid. 405(c). Thus, there is a lack of evidence that the appellant sought and was denied additional witnesses at the government's expense. In short, we find no error.

Moreover, since at least two witnesses testified as to the appellant's character for truthfulness, the testimony of additional witnesses on the appellant's character for truthfulness would arguably have been cumulative. An appellant has no constitutional right, under a claim of due process, to a witness whose testimony would be merely cumulative to the testimony of other witnesses. *Wagner v. United States*, 416 F.2d 558, 564 (9th Cir. 1969), *cert. denied*, 397 U.S. 1015 (1970). Thus, even if the government had denied the appellant additional character witnesses at the government's expense, such a denial would not had been error and certainly not plain error. Lastly, the appellant has not shown prejudice.

Erroneous Promulgating Order

Finally we note that the promulgating order erroneously fails to highlight the sentence was adjudged by officer and enlisted members. Preparation of a corrected court-martial order, properly reflecting that the sentence was adjudged by officer and enlisted members is hereby directed. *See United States v. Smith*, 30 M.J. 1022, 1028 (A.F.C.M.R. 1990).

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; *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court