UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JOHN V. NICHOLS
United States Air Force

ACM 37010

16 October 2008

Sentence adjudged 16 February 2007 by GCM convened at Ramstein Air Base, Germany and Spangdahlem Air Base, Germany. Military Judge: Gordon R. Hammock.

Approved sentence: Bad-conduct discharge, confinement for 22 months, forfeiture of all pay and allowances for 22 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Lance J. Wood.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Coretta E. Gray.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

HEIMANN, Senior Judge:

Contrary to his pleas, the appellant was convicted of six specifications of assault, one specification of housebreaking, and one specification of resisting arrest by civilian police, in violation of Articles 128, 130, and 134, UCMJ, 10 U.S.C. §§ 928, 930, 934, respectively. The adjudged sentence consists of a bad-conduct discharge, reduction to E-1, confinement for 28 months, and forfeiture of all pay and allowances. The approved

sentence consists of a bad-conduct discharge, reduction to E-1, confinement for 22 months, and forfeiture of all pay and allowances for 22 months.*

The appellant raises one issue on appeal. He claims he met his burden of establishing the defense of lack of mental capacity by clear and convincing evidence. In addition, we address some irregularities in the announcement of the sentence that require discussion.

Background

The appellant was a solid noncommissioned officer with no prior disciplinary record and no evidence to suggest that he was having difficulties performing his required duties. He had been on active duty for nearly five years at the time of the offenses and had respectable performance reports from his service as an Emergency Action Controller in the Command Post. He had been awarded both the Air Force Achievement Medal and a Good Conduct Medal. He had never been disciplined or counseled for any alcohol-related incidents prior to the charged offenses. He had no prior documented history of mental health problems.

On the occasion of New Years, the appellant and a co-worker decided to go to Trier, Germany, to celebrate. While he originally indicated that he would be the designated driver, the appellant and the co-worker agreed that they would celebrate by drinking and then sleep in the car after the evening of celebration. And celebrate they did. The co-worker testified that he drank approximately eight to twelve drinks. While he could not testify as to how much the appellant drank, it is undisputed that when the appellant's blood was drawn at 0540 the next morning, it contained .198 milligrams of alcohol per 100 milliliters of blood.

Having stopped drinking at about 0300 or 0400, the appellant left the bar in search of his car. Unable to find his car and abandoned by his co-worker, who was convinced the car was the other way, the appellant began to get himself into trouble. In sum, he assaulted two separate German couples who were also returning from local bars to their homes after the evening festivities. In the first case, the appellant assaulted the male half

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* We note that Lieutenant General RB referred this case to trial on 14 November 2006, in his capacity as Commander, Air Command Europe (AFEUR). He then amended the convening order by changing members on 25 January 2007, in his capacity as Commander, Third Air Forces (3rd AF). Both commands were authorized to convene General Courts-Martial. *See* Headquarters Air Force Special Order G-06-003, dated 8 November 2006. At the time of referral, Lieutenant General RB, as Commander, AFEUR was the GCMCA for the appellant's unit. On 1 December 2006, AFEUR was inactivated and Headquarters 3rd Air Force became the successor General Court-Martial Convening Authority for the appellant and his entire unit. The appellant raised no objection to the jurisdiction of the court at trial or on appeal. We too are satisfied that this court was properly constituted and had jurisdiction over both the offenses and the offender. *See United States v. Jette*, 25 M.J. 16 (C.M.A. 1987); *United States v. Allgood*, 41 M.J. 492 (C.A.A.F. 1995).

of the couple and in the second case, he assaulted both the male and the female. In each case the appellant assaulted the German civilians by striking or grabbing them.

In short order, the German Polezi were notified of the assaults and responded to the neighborhood. Pending their arrival, the appellant attempted to gain entry into a small off-street apartment by begging the occupant to "please open the door." Ultimately, the appellant forced his way into the apartment, causing the elderly owner to be thrown to the ground and shattering her shoulder. While the appellant was gaining entry to the apartment, the Polezi were in immediate pursuit, and ultimately arrested him, despite his efforts to resist.

In support of his claim of lack of mental responsibility, the appellant relies on both the victims of his crimes and the testimony of a forensic psychologist. The victims testified that prior to the confrontation with the Polezi, the appellant had "wide open eyes like a machine," and that he had a peculiar laugh. After struggling with the appellant, the Polezi subdued him with a blow to the head with a MAG light flashlight. At that point, the appellant's behavior became more erratic. He groaned like an animal, foamed at the mouth, and yelled at the Polezi to kill him. He also lashed out, not only at the Polezi, but also at the hospital personnel when he was brought there to check on his head injury.

Ultimately, blood and urine tests indicated that the appellant was simply drunk, with no evidence of drug use. Upon sobering up, the appellant was completely rational and indicated that he had no recollection of the evening events. In addition to the facts described above, the appellant's case at trial included a forensic psychologist, who diagnosed the appellant with bi-polar disorder and concluded that the appellant suffered a manic episode on the night in question.

The prosecution's response to the claim of mental disease or defect was to attack the diagnosis with an expert of its own, who concluded that the appellant simply has an adjustment disorder, casting doubt on the bi-polar diagnosis and the conclusion by the defense expert that the appellant experienced a manic episode. As for the appellant's unusual conduct, the prosecution pointed to the high alcohol content and claimed the appellant was simply in a drunken rage.

Discussion

In his assignment of error, the appellant asserts that he met his burden of establishing the defense of lack of mental capacity by clear and convincing evidence. We disagree.

An accused is presumed to be mentally responsible at the time of any alleged offense. It is, however, an affirmative defense if "at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect,

was unable to appreciate the nature and quality or the wrongfulness of his or her act." Article 50a(a), UCMJ, 10 U.S.C. § 850a(a); Rule for Courts-Martial (R.C.M.) 916(k)(1). To prevail on this affirmative defense, the accused must establish by clear and convincing evidence that he had a severe mental disease or defect, and as a result of that disease or defect, was unable to appreciate the nature and quality or wrongfulness of his or her acts. Article 50a(b), UCMJ, 10 U.S.C. § 50a(b); R.C.M. 916(k)(3). "Clear and convincing evidence is that weight of proof which produces in the mind of the factfinder a firm belief or conviction that the allegations in question are true." *United States v. Martin*, 56 M.J. 97, 103 (C.A.A.F. 2001) (quoting Clifford S. Fishman, *Jones on Evidence: Civil and Criminal* § 3:10 at 239 (7th ed. 1992)) (internal quotations omitted).

Our superior court has articulated the following tests for appellate courts to apply in cases involving claims of a lack of mental responsibility:

> In determining whether the members' finding [that the appellant did not lack mental responsibility at the time of the alleged offenses] was correct in fact, the court must weigh the evidence and determine for itself whether the appellant proved the defense of lack of mental responsibility *by clear and convincing evidence*. In determining whether the finding was correct in law, the court must view the evidence and all reasonable inferences in the light most favorable to the Government and determine whether a court-martial composed of reasonable members could have found that appellant failed to prove lack of mental responsibility *by clear and convincing evidence*.

Id. at 104 (quoting *United States v. Martin*, 53 M.J. 221, 222 (C.A.A.F. 2000) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))).

Our superior court adopted the test of "reasonableness" in applying these standards of review to the members verdict on the question of mental responsibility. *Id.* at 107. "[A]n appellate court 'should reject the jury verdict [on insanity] . . . only if no reasonable trier of fact could have failed to find that the defendant's criminal insanity at the time of the offense was established by clear and convincing evidence.'" *Id.* (quoting *United States v. Barton*, 992 F.2d 66, 68-69 (5th Cir. 1993)). The court further noted, "[s]uch an appellate determination, in turn, depends on whether there is substantial evidence in the record supporting the jury's finding of fact." *Id.*

In our review of the record, we found substantial evidence from which the members could find that the appellant did not prove by clear and convincing evidence that he suffered from a severe mental disease or defect at the time of the offenses. The defense's own expert admitted that the appellant's conduct could have been caused solely by alcohol vice a mental disease or defect. In addition, the prosecution's expert indicated that she diagnosed the appellant with only an "adjustment disorder" and did not find any

other mental disease or defect at the time of the misconduct. The prosecution's expert expressly disagreed with the appellant's expert that the appellant suffered a "manic episode" at the time of the incidents. She particularly highlighted the fact that such a diagnosis was undermined, in her opinion, by the fact that the "episode" occurred neatly during the period of intoxication.

We also conclude that the appellant failed to carry his burden of proving by clear and convincing evidence that he lacked the ability to appreciate the nature and quality or wrongfulness of the acts constituting any of his offenses. The appellant's diligent efforts to gain entry into the home of an elderly civilian to evade capture by the Polezi clearly illustrates his appreciation for the wrongfulness of his actions. While we admit that the appellant's conduct was unusual, when you consider a blood alcohol level that was calculated to be above .20 milligrams of alcohol per 100 milliliters of blood at the time of the offense, it reasonably explains all of the appellant's conduct.

Finally, when we consider the evidence and all reasonable inferences in the light most favorable to the government, we also conclude that a reasonable trier of fact could have found that the appellant failed to meet his burden of proving by clear and convincing evidence that he was unable to appreciate either the nature and quality or the wrongfulness of his acts. The members' finding on mental responsibility was legally and factually correct.

Sentence

We also note that the sentence announced by the panel and the sentence worksheet conflict with one another regarding the adjudged forfeitures. Specifically, the worksheet indicates that the members agreed on a sentence that included "To Forfeit All Pay and Allowance (Per month for 28 Months)." The members announced a sentence of purely "to forfeit all pay and allowances." At trial the military judge, noting the conflict, advised the parties that the announced sentence controlled. While we believe the proper practice would have been to have the panel correct the erroneous announcement, pursuant to authority in R.C.M. 1007(b), we do not find any prejudice to the appellant in this case. The convening authority ultimately approved only forfeiture of pay for 22 months, and the appellant's term of service expired approximately 18 months after trial.

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 approved findings and sentence are

AFFIRMED.

OFFICIAL

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