UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CHARLES R. PHILLIPS
United States Air Force

ACM 36412

19 March 2008

Sentence adjudged 6 December 2004 by GCM convened at Bolling Air Force Base, District of Columbia. Military Judge: Jeri K. Somers (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 28 years, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Robert V. Combs, Major Matthew S. Ward, and Major Donna S. Rueppell.

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges

OPINION OF THE COURT

BRAND, Judge:

The appellant was convicted, in accordance with his pleas, of one specification of failure to obey an order, one specification of carnal knowledge, and two specifications of making and uttering bad checks in violation of Articles 92, 120, and 134, UCMJ, 10 U.S.C. §§ 892, 920, 934. Contrary to his pleas, he was convicted of one specification of carnal knowledge, two specifications of violating 18 U.S.C. § 2252A, and one specification of violating 18 U.S.C. § 2251 in violation of Articles 120 and 134, UCMJ,

10 U.S.C. §§ 920, 934. His approved sentence consists of a dishonorable discharge, confinement for 28 years, and reduction to E-1.

Background

During the appellant's brief time on active duty, he was involved with several young girls, ranging in age from 14 to 16. Two of the individuals were victims named in the allegations – JO and MD. The appellant pled guilty to carnal knowledge with JO when she was 14,[1] and to violating a no contact order involving MD, who was 16 at the time. Contrary to his pleas, he was convicted of having sexually explicit photographs of these two on his web site, and of using materials to create the pictures that had been mailed, shipped or transported in interstate commerce as those pictures involved JO. Further, he was convicted of carnal knowledge with JO.[2]

On appeal, appellant alleges numerous assignments of error[3] and requests a new trial. We find these assignments of error, including the request for a new trial and with the exception of sentence appropriateness, to be without merit.

Request for a New Trial

A new trial may be requested "[a]t any time within 2 years after approval by the convening authority of a court-martial sentence." Rules for Courts-Martial (R.C.M.) 1210(a). The appellant, through counsel, petitioned this Court on the last day of the time period. The petition shall include "[a] full statement of the newly discovered evidence or fraud on the court-martial which is relied upon for the remedy sought[.]" R.C.M. 1210(c)(7). The response to this requirement was simply "new evidence" and "fraud". The body of the brief did shed a bit more light. Specifically, the appellant references information his counsel had, but he was unaware of, as the new evidence[4] and thus this caused the appellant to enter into a pretrial agreement and a fraud was committed. Further, in the submission, the request for a new trial includes the offenses for which the appellant pled guilty. R.C.M. 1210(a) specifically states that "a petition for a new trial may not be submitted on the basis of newly discovered evidence when the petitioner was found guilty of the relevant offense pursuant to a guilty plea."

The determination whether sufficient grounds exists for ordering a new trial rests with the authority considering the petition. *United States v. Sztuka*, 43 M.J. 261, 268

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[1] Although, he believed she was 15 years old.
[2] This incident predated the incident to which the appellant pled guilty.
[3] Including two (Assignments VII and X) involving specification 1 of Additional Charge I for which the findings were not guilty, contrary to the appellant's brief(s).
[4] Evidence which could have been used for impeachment purposes but was not. Specifically, the victim, JO, may have made another rape accusation (although it appears this was made by her mother) and thought she may have been drugged prior to the incident (carnal knowledge) to which the appellant pled guilty.

(C.A.A.F. 1995). Requests for a new trial are generally disfavored, and relief should only be granted if a manifest injustice would result absent a new trial. *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993). A new trial based upon the discovery of new evidence may only be granted if: 1) the evidence was discovered after the trial; 2) the evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and 3) the newly discovered evidence, if considered by a court-martial in light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused. R.C.M. 1210(f)(2). A new trial "may rest upon newly discovered evidence that would 'substantially impeach[ ]' critical prosecution evidence 'on a material matter.'" *Sztuka*, 43 M.J. at 268 (quoting *Williams*, 37 M.J. at 354).

In this case, the appellant fails to meet all three prongs required before a new trial is granted. The evidence, which was not newly discovered, was merely additional potential impeachment matters for cross examination. The trial defense counsel thoroughly cross-examined the complaining witness and brought out inconsistencies throughout the trial. Even had the trial defense counsel asked a few more questions, with the evidence in question, it is not probable that a more favorable result for the appellant would have occurred.

Improvident Plea to Carnal Knowledge

In determining whether a guilty plea is provident, the test is whether there is a "substantial basis in law and fact for questioning the guilty plea." *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). "In order to establish an adequate factual [basis] for a guilty plea, the military judge must elicit 'factual circumstances as revealed by the accused himself [that] objectively support that plea[.]'" *Jordan*, 57 M.J. at 238 (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). The providency inquiry must reflect the accused understood the nature of the prohibited conduct. *See United States v. Sapp*, 53 M.J. 90, 92 (C.A.A.F. 2000). "[A] military judge must explain the elements of the offense and ensure that a factual basis for each element exists." *United States v. Barton*, 60 M.J. 62, 64 (C.A.A.F. 2004) (citing *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996)). We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996) (citing *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995)).

A mere possibility that a defense might exist "does not render a plea of guilty improvident. On appeal, a guilty plea should be overturned only if the record fails to objectively support the plea or there is 'evidence in "substantial conflict" with the pleas of guilty.'" *United States v. Bullman*, 56 M.J. 377, 381 (C.A.A.F. 2002) (citations omitted); *see also United States v. Wyatt*, ACM 36435 (A.F. Ct. Crim. App. 31 May 2007) (unpub. op.).

"This Court has held that a military judge has a duty under Article 45, UCMJ, to explain to the accused the defenses *that an accused* raises during a providence inquiry. 'Article 45(a) requires that, in a guilty-plea case, inconsistencies and apparent defenses must be resolved by the military judge or the guilty pleas must be rejected.' Where an accused is misinformed as to possible defenses, a guilty plea must be set aside." *United States v. Zachary*, 63 M.J. 438, 444 (C.A.A.F. 2006) (emphasis added) (citations omitted).

The appellant avers his plea was improvident to the lesser included offense of carnal knowledge in Specification 1 of Charge I when the military judge informed him "it is no defense that the accused was ignorant or misinformed of the victim's true age." This is an incorrect statement of the law, and the military judge misspoke. However, there was no objection by either counsel. The appellant did not raise a defense of mistake of fact. It is clear from the record that the military judge merely misspoke and read part of the instructions in Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook*, ¶ 3-45-2, Note 1(d) (15 Sep 2002) that were neither complete nor applicable. It is also clear that throughout the litigated portion of the trial, mistake of fact was raised extensively as to other charges, including carnal knowledge. The appellant never referenced any inconsistencies or defenses in his providency inquiry. He informed the judge he knew that JO was under the age of 16, and he thought she was 15 at the time of the incident. The appellant's plea was provident.

Prosecutorial Misconduct

We review the appellant's assertion that the prosecutors engaged in misconduct *de novo*. *United States v. Argo*, 46 M.J. 454, 457 (C.A.A.F. 1997). The appellant avers the prosecutors violated the "spirit" of Military Rule of Evidence (Mil. R. Evid.) 615[5] by allowing the alleged victims in the case to talk together, eat together and share a motel room. When the trial defense counsel requested sequestration of the alleged victims, the military judge ordered it and there is no evidence that order was violated.

Prosecutorial misconduct is generally defined as "action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996); *quoted in United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003). "In analyzing allegations of prosecutorial misconduct, 'courts should gauge the overall effect of counsel's conduct on the trial, and not counsel's personal blameworthiness.'" *United States v. Rodriguez-Rivera*, 63 M.J. 372, 378 (C.A.A.F. 2006) (quoting *Thompkins*, 58 M.J. at 47).

There is no evidence of prosecutorial misconduct in this case.

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[5] Exclusion of witnesses.

Incomplete Record

The trial defense counsel made a motion for the mental health records of JO. JO asserted her privilege as it dealt with records prior to the charged offense (specifically the rape allegation[6]). The military judge conducted a hearing under Mil. R. Evid. 513. She informed the parties that there was information in the records which might be material to the defense but that she was not releasing as the defense had failed to meet their burden. The records were never made an exhibit nor attached to the record of trial. The records reviewed by the trial judge should have been made an exhibit and included in the record of trial.

Various rules make clear that once reviewed in camera by the military judge, the evidence must "be sealed and attached to the record" to facilitate appellate review. Mil. R. Evid. 505(g)(4). Generally, when this is not done, the case is remanded to the lower court with an order that the records be produced to the court below, which may include an appropriate protective order to appellate counsel to preserve privacy. *See, e.g., United States v. Avery*, 48 M.J. 408 (C.A.A.F. 1997). In this case, under a separate motion, the appellee provided some, but not all, the records at issue.

"[W]hether the record of trial is incomplete, is one that presents a question of law which this Court will review *de novo*. The requirement that a record of trial be complete and substantially verbatim in order to uphold the validity of a verbatim record sentence is one of jurisdictional proportion that cannot be waived." *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000) (citing *United States v. Gray*, 7 M.J. at 298 (C.M.A. 1979); *United States v. Whitney*, 48 C.M.R. 519 (C.M.A. 1974)).

A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut. *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981); *Gray*, 7 M.J. 298; *United States v. Boxdale*, 47 C.M.R. 351, 352 (C.M.A. 1973). Insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one. *Henry*, 53 M.J. at 111.

Although there appear to be some mental health records of JO missing from the record, this is an insubstantial omission and does not render the record incomplete. The appellant's counsel predominantly wanted the records for countering the rape allegation which no longer exists. Additionally, in the pretrial agreement, signed by the appellant, the appellant agreed to "waive all motions regarding M.R.E. 412 and 513 as they relate to [JO]." The only relevance of the missing records would be to review the military judge's ruling on the 513 motion and the appellant has specifically waived that motion. Although

[6] To which, pursuant to a pretrial agreement, the appellant pled to the lesser included offense of carnal knowledge and the government agreed not to go forward on the greater offense.

the completeness of the record issue cannot be waived, waiving issues dealing with the mental health records can be, and were, thus making those records insubstantial. Even assuming the missing records are substantial, raising a presumption of prejudice, the presumption is rebutted for two reasons. First, the appellant in his pretrial agreement waived any issues concerning JO under Mil. R. Evid. 412 or 513, thereby mooting the necessity for this Court to review the complete mental health records of JO. Second, the appellant's trial defense theory was one of mistake of fact, and therefore the relevant question is what the appellant reasonably believed JO's age to be. JO's mental health records have no conceivable bearing on this issue and the omission of some of her mental health records from the record of trial have not prejudiced the appellant.

Inappropriately Severe Sentence

The appellant avers his sentence to a dishonorable discharge, confinement for 28 years, and reduction to E-1 is inappropriately severe. We agree.

Article 66(c), UCMJ, provides that this Court "may affirm . . . the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Our superior court has concluded that the Courts of Criminal Appeals have the power to, "in the interests of justice, substantially lessen the rigor of a legal sentence." *United States v. Lanford*, 20 C.M.R. 87, 94 (C.M.A. 1955), *quoted in United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002).

We carefully reviewed the facts and circumstances of this case, and all the matters presented in the sentencing phase of the trial. The offenses are serious indeed; the adverse impact upon the victims and the disruption to good order and discipline warrant significant punishment. The sentence is within legal limits and no error prejudicial to the appellant's substantial rights occurred during the sentencing proceedings. Nonetheless, we find that a lesser sentence of a dishonorable discharge, confinement for 15 years, and reduction to E-1 should be affirmed.

Admission of Expert Testimony

When counsel has objected[7] to testimony, we review a military judge's ruling on the admissibility of expert testimony for an abuse of discretion. *United States v. Houser*, 36 M.J. 392, 398 (C.M.A. 1993). If the counsel failed to object, the error will be examined under the plain error doctrine. *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005). The proffered testimony must meet certain criteria for admissibility: (1) that the expert is qualified, (2) that the subject of the testimony is within the realm of the expert's qualification, (3) that the expert has an appropriate basis for the testimony,

[7] The trial defense counsel did object, but only as to the testimony of the expert as it dealt with victims of specifications of which the appellant was acquitted.

(4) that the testimony is relevant, (5) that the testimony is reliable, and (6) that testimony meets the balancing test under Mil. R. Evid. 403. *United States v. Halford*, 50 M.J. 402, 404-05 (C.A.A.F. 1999).

R.C.M. 1001(b)(5)(A) permits presentation of evidence on rehabilitative potential. R.C.M. 1001(b)(5)(B) requires that this evidence be based on a proper foundation - that the witness "possess sufficient information and knowledge about the accused to offer a rationally based opinion that is helpful to the sentencing authority." Although the lack of contact with an accused bears upon the weight to be given to an expert's testimony, not its admissibility, *United States v. Stinson*, 34 M.J. 233, 239 (C.M.A. 1992), there may be additional factors present that demonstrate that it was not appropriate to offer an opinion on appellant's rehabilitative potential. *See United States v. McElhaney*, 54 M.J. 120, 133 (C.A.A.F. 2000).

The military judge is presumed to know the law. *United States v. Rodriguez*, 60 M.J. 87, 90 (C.A.A.F. 2004) (citing *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997). The expert testified in generalities as it pertained to the appellant and made it quite clear, he was in no position to diagnose or label the appellant. The military judge did not abuse her discretion, nor was there plain error.[8]

Ineffective Assistance of Counsel

Service members 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) (citing *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000)). We analyze claims of ineffective assistance of counsel under the framework established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel are presumed to be competent. It is well established, the appellate court will not second guess the strategic or tactical decisions made at the time of trial by the defense counsel. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993). Where there is a lapse in judgment or performance alleged, we ask first whether the conduct of the defense was actually deficient, and, if so, whether that deficiency prejudiced the appellant. *Washington*, 466 at 687; *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991) (citing *United States v. McGillis*, 27 M.J. 462 (C.M.A. 1988)). The appellant bears the 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).

The appellant and both counsel have submitted affidavits on this issue and therefore we will decide this issue under the guidance of *United States v. Ginn*.[9] In his affidavit, the appellant states he was forced into signing the pretrial agreement (PTA), his

[8] Assuming waiver of the abuse of discretion standard and applying the plain error standard in this case.
[9] 47 M.J. 236 (C.A.A.F. 1997)

counsel were unprepared, they unnecessarily limited character evidence, and they failed to keep the appellant informed and various other allegations. The record is replete with evidence to contradict the assertions of the appellant including the fact the appellant actually entered into a much more favorable PTA prior to trial. He withdrew from that PTA on the eve of trial indicating the appellant knew his options when he entered the second PTA. He informed the judge that he had entered into the agreement of his own free will and was not forced. Further, he told the military judge he was satisfied with his counsel. The appellant has failed to meet his burden with regards to ineffective assistance of counsel.

Disqualification of the Staff Judge Advocate from further Participation

If a Staff Judge Advocate (SJA) testifies as a witness at a court-martial concerning a contested matter, he or she may be disqualified from thereafter serving as the SJA for the convening authority in that case. R.C.M. 1106(b) and its Discussion. "Where a legitimate factual controversy exists between the [SJA] and the defense counsel, the [SJA] must disqualify himself from participating in the post-trial recommendation." *United States v. Gutierrez*, 57 M.J. 148, 149 (C.A.A.F. 2002).

In this case, the trial defense counsel made a motion that the pretrial advice was defective. During the motions hearing, the military judge requested that the SJA (Col B) testify regarding whether there was an omission of information in the pretrial advice. Col B testified that he had omitted the information. The military judge then denied the defense's motion. At the end of trial, the trial defense counsel made it known they objected to Col B acting in any further capacity in the case. Col B, as the SJA, signed the Staff Judge Advocate's Recommendation (SJAR), dated 3 Feb 2005. After clemency submissions, an addendum, dated 5 Aug 2005, was signed by Col S, the new SJA.

Col B was not disqualified from acting as the SJA in post-trial processing even though he testified. He testified to an uncontested matter. He was in the same position he would have been in, if he hadn't testified. The motion would have been raised and he would have still addressed whether there were any legal errors. Even if he was disqualified, this issue was mooted when a new SJA took the reins and signed the Addendum to SJAR.[10]

The remaining assignments of error[11] by the appellant and his counsel have been considered and determined to be without merit. *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

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[10] The Addendum to the SJAR was served on the defense counsel.

[11] Although not raised as an issue, contrary to the Court Martial Order, Specification 4 of Charge II was withdrawn. There is no error prejudicial to the substantial rights of the appellant.

Conclusion

The approved findings and sentence, as reassessed, 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 findings, as approved, and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court