UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant JESSE I. RANNEY
United States Air Force

ACM S31046

31 March 2008

Sentence adjudged 26 October 2005 by SPCM convened at Kadena Air Base, Japan. Military Judge: Steven A. Hatfield.

Approved sentence: Bad-conduct discharge, confinement for 90 days, forfeiture of $400.00 pay per month for 3 months, reduction to E-3, and a reprimand.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Major John N. Page III.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Major John P. Taitt.

Before

JACOBSON, PETROW, and ZANOTTI
Appellate Military Judges

OPINION OF THE COURT

PETROW, Judge:

Contrary to his pleas, the appellant was found guilty of willfully disobeying a lawful order of his superior commissioned officer and of willfully disobeying the lawful order of a non-commissioned officer, in violation of Articles 90 and 91, UCMJ, 10 U.S.C. §§ 890 and 891. The appellant raises the following issues:

I.

WHETHER THE EVIDENCE IS FACTUALLY AND LEGALLY SUFFICIENT TO SUPPORT THE FINDING OF GUILTY FOR DISOBEYING A LAWFUL COMMAND WHERE THERE WAS NO EVIDENCE THAT THE COMMAND WAS DIRECTED PERSONALLY TO APPELLANT OR THAT APPELLANT KNEW IT WAS FROM A SUPERIOR COMMISSIONED OFFICER.

II.

WHETHER THE MILITARY JUDGE ERRED IN NOT FOLLOWING *UNITED STATES V. DEISHER*, 61 M.J. 313 (C.A.A.F. 2005) BY REFUSING TO RULE ON THE LAWFULNESS OF THE ORDER IN THE SPECIFICATION OF CHARGE II AND INSTEAD SUBMITTING THE ISSUE OF LAWFULNESS TO THE COURT MEMBERS.

III.

IRRESPECTIVE OF ISSUE II, WHETHER THE ORDER IN THE SPECIFICATION OF CHARGE II WAS A LAWFUL ORDER WHEN THE EVIDENCE INDICATED THE ORDER'S PURPOSE WAS TO ACCOMPLISH SOME PRIVATE END.

IV.

WHETHER APPELLANT'S SENTENCE THAT INCLUDES A PUNITIVE DISCHARGE AND 90 DAYS CONFINEMENT IS INAPPROPRIATELY SEVERE IN LIGHT OF THE EVIDENCE PRESENTED AT TRIAL.

We find in favor of the appellant on Issue II, and adversely to the appellant on the remaining issues.

I. LEGAL AND FACTUAL SUFFICIENCY OF EVIDENCE WITH RESPECT TO THE SPECIFICATION OF CHARGE I

Background

The appellant's driving privileges on base and on Okinawa had been suspended by the order of Lieutenant Colonel (Lt Col) D, Deputy Commander, 18th Mission Support Group, whose duties included that of Base Traffic Reviewing Officer. Lt Col D testified that when he assumed the duty of Base Traffic Reviewing Officer he signed two orders

which were forms established under the Wing's base driving regulation. One letter informs the recipient that his Kadena-issued driving permit is revoked for a certain period of time depending on the nature of the offense - DUI, refusing to submit to a breathalyzer, or driving while one's license is suspended. The letter also provides information concerning the process for challenging the violation. The letter would be completed and issued by Security Forces personnel. Lt Col D did not personally review the revocations issued. Subsequent to the suspension of his driving privileges, on 22 April 2005 the appellant was involved in an off-base traffic accident, in which he was the driver of one of the vehicles.

Earlier, on 25 January 2005, the appellant had prepared and submitted a letter to then, Major O, Commander, 18th Mission Support Squadron, requesting limited driving privileges, "due to the hardship created by not being allowed to operate a vehicle." He explained that he lived off-base, approximately a 15 and 25 minute drive from his two primary duty posts, respectively. His commander, concurring in the request, then forwarded it to Lt Col D for action. Lt Col O testified that the request was generated because the appellant's "license was suspended for the first alcohol incident for a year."

On 13 April 2005, Lt Col D issued a letter denying the appellant's request for limited driving privileges. The first paragraph of the letter states, "On 4 September 2004, you were found to be operating a motor vehicle while under the influence of alcohol . . . your driving privileges on Okinawa and all Air Force related properties are hereby limited." The following paragraph provided a list of "To and From" denoting various specific locations. All of them are lined out by a single slash. In the remarks section, Lt Col D hand-wrote the following: "No priv[ilege] re-instated based on SF [security forces] & legal recommendations." Lt Col D testified that, before acting on a request for limited driving privileges, he would review the background file and the recommendations of Security Forces and the Judge Advocate.

DWS, the manager of the Security Forces Squadron Reports and Analysis Section, testified that, after the Base Traffic Reviewing Officer issues his decision, his office contacts the requester and has him sign the acknowledgement at the bottom of the decision letter. DWS testified that the appellant signed the acknowledgement and that he witnessed the signing as indicated by his signature being alongside that of the appellant.

Discussion

Pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866(c), we are required to determine the factual and legal sufficiency of the evidence *de novo*. The basis for our determination of factual sufficiency is whether after weighing the evidence we are convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). The test for determining the legal sufficiency of evidence in support of a finding of guilty is whether, when the evidence is viewed in the light most favorable to

the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001); *Turner*, 25 M.J. at 325.

In *United States v. Byers*, 40 M.J. 321 (C.M.A. 1994), our superior court found the facts insufficient to sustain a violation of Article 90, UCMJ, 10 U.S.C. § 890 under circumstances in which the order was a routine administrative sanction for a traffic offense, the order was issued by a staff officer on behalf of the issuing officer, and there was "no evidence that [the issuing officer] personally issued the order or that he knew that the order had been violated until disciplinary action was initiated." *Byers*, 40 M.J. at 323. Under these facts, the Court found that the evidence failed to establish a direct and personal order which, when disobeyed, was a "'personal affront to his dignity.'" *Id.* at 323-24 (quoting *United States v. Keith*, 13 C.M.R. 135, 139 (C.M.A. 1953).

Had no other action been taken with regard to the original order suspending appellant's driving privileges, *Byers* would have required our finding in favor of the appellant. However, the evidence clearly established that Lt Col D personally considered and acted upon the appellant's request for limited driving privileges, which was, in essence, a determination to retain the original order revoking the appellant's driving privileges in force and effect. The appellant acknowledged receipt of that determination. The "personal affront" requirement in *Byers* was met when the appellant decided to drive a motor vehicle in violation of the original order *and* the denial of his request for limited driving privileges.

Conclusion

Accordingly, we find that the evidence adduced at trial was factually and legally sufficient to support an offense under Article 90, UCMJ.

II. MILITARY JUDGE'S REFUSAL TO RULE ON THE LAWFULNESS OF THE ORDER IN THE SPECIFICATION OF CHARGE II

Background

Gunnery Sergeant (GySgt) F, a member of the United States Marine Corps, testified that he was the Detachment Chief at Armed Forces Network (AFN) Okinawa. The appellant worked under GySgt F at AFN as a maintenance technician. GySgt F identified Prosecution Exhibit 5, an "Order to Cease Unprofessional Relationship," dated 9 Mar 05, which he had completed and served on the appellant. It directed the appellant to cease his relationship with Lance Corporal (LCpl) M, a female Marine who worked at the detachment.

Approximately 16 to 18 military members worked at AFN along with a number of civilians. AFN is split into two sections, Maintenance and Operations. The appellant was in the former and LCpl M in the latter. There was no supervisory relationship between the two. The appellant was not in the chain of command over anyone in Operations.

GySgt F testified that he discussed with the appellant the latter's relationship with LCpl M, that the appellant admitted the existence of the relationship, and that he (GySgt F) perceived the relationship as unprofessional and issued the order directing the appellant to cease the "offensive" aspect of their relationship. The order elucidated as follows: "'Offensive,' as outlined in [Air Force Instruction] 36-2909, includes shared living accommodations, vacations, transportation, or off-duty interests on a frequent or recurring basis in the absence of any purpose or organizational benefit. Your relationship with LCpl M will be strictly on a professional level." The order stipulated that it would remain in effect for the duration of the appellant's tour at the AFN Detachment.

GySgt F also testified that there was no general prohibition at AFN prohibiting the members from dating each other. He stated that one of the reasons for the order was that the appellant was a Non-Commissioned Officer (NCO). He explained that Marine E-3s (LCpl M's grade) have certain restrictions placed upon them – they have to be in by midnight and they can't drink at age 20 although it was otherwise permitted at Kadena. He explained that his NCOs are expected to enforce these restrictions. By allowing the relationship to continue, he asserted that these expectations are compromised – not only for LCpl M but for other E-3s. Nothing was apparent at the time the order was issued but he feared it would fester and over time become a problem. On cross-examination GySgt F testified that a Marine Corporal (E-4) had dated an Airman First Class (E-3), both while being assigned to AFN, and that a Marine Corporal was considered an NCO in the Marine Corp.

At trial, the appellant moved to dismiss both charges and their specifications pursuant to a motion for a finding of not guilty under R.C.M. 917. With regard to Charge II, the appellant argued that it was fatally flawed in that the order was unlawful. The appellant contends that the military judge erred by not issuing a finding as to the legality of the order. In response to the appellant's contentions to the order's lawfulness, the military judge asked, "[b]ut how are these not questions of fact that the members should determine?" He followed with the following observation:

> MJ: Well, I think it is intertwined with the facts . . . to the extent that I do not intend to instruct the members that this order was lawful as a matter of law. But based on the standard of 917, I'm not about to make that determination for the members and say as a matter of law that it is unlawful. So with regard to Specification of Charge II, I will leave to the members to make that determination. But I'm going to deny your motion.

Discussion

Appellate courts employ a *de novo* standard of review when assessing the rulings of the military judge concerning the lawfulness of an order. *United States v. Deisher*, 61 M.J. 313, 317 (C.A.A.F. 2005).

Conclusion

The government concedes that the military judge erred when he charged the members with deciding the lawfulness of the order underlying the specification of Charge II. We concur. If the military judge erroneously submits the issue of legality to the members, we consider on appeal whether a record has been established that permits us to resolve the question of legality without further proceedings. *United States v. Mack*, 65 M.J. 108, 112 (C.A.A.F. 2007) (citing *Deisher*, 61 M.J. at 319).

III. LAWFULNESS OF THE ORDER IN THE SPECIFICATION OF CHARGE II.

Discussion

This brings us to the third error raised by the appellant, whether the order in the specification of Charge II was lawful. Appellate courts employ a *de novo* standard in assessing the rulings of the military judge concerning the lawfulness of a charged order. *Deisher*, 61 M.J. at 317.

The essential attributes of a lawful order include: (1) issuance by competent authority; (2) communication of words that express a specific mandate to do or not do a specific act; and (3) relationship of the order to a military duty. *Mack*, 65 M.J. at 112 (citing *Deisher*, 61 M.J. at 317). An order is presumed lawful, and the accused bears the burden of rebutting the presumption. *Id.* In the present case, the first two attributes are not at issue. What remains to be determined is whether the nature of the order was related to a military duty.

As previously discussed, the evidence in the record establishes that GySgt F's reason for issuing the order was his concern regarding the conflict between the duties imposed upon an NCO with regard to reporting non-compliance of junior Marine enlisted members with various restrictions placed upon their social activities and the existence of a relationship between an NCO and a junior enlisted member which tended to engender such non-compliance. He expressed concern about the impact such a situation would have on other junior enlisted members within the unit – in essence its impact on the discipline and moral of the unit, clearly a traditional concern of those in supervisory positions within the military.

Conclusion

Had there been a supervisory relationship between the appellant and LCpl M within the unit, the basis for GySgt F's concerns would have had more gravitas. Yet, we are charged with discerning whether there existed a rational nexus between military duty and the order in question, not to parse where that military duty sits on a continuum from greatest to least. Based on the evidence in the record, we conclude that such a nexus existed in this case, and consequently the order was lawful. Therefore, we conclude that the military judge's error in submitting the question of lawfulness of that order to the panel members was harmless. *See Mack*, 65 M.J. at 112.

IV. SENTENCE APPROPRIATENESS

Discussion

We review the appropriateness of an adjudged sentence *de novo*. *United States v. Lane*, 64 M.J. 1 (C.A.A.F. 2007) (citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). This Court may affirm only such findings and sentence as we find correct in law and in fact, and determine, on the basis of the entire record, should be approved. Article 66(c), UCMJ. When considering sentence appropriateness, we should give "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176 (C.M.A. 1959)).

In conducting our review we must keep in mind that Article 66(c), UCMJ, has a sentence appropriateness provision that "is a sweeping Congressional mandate to ensure a fair and just punishment for every accused." *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (quoting *United States v. Bauerbach*, 55 M.J. 501 (Army Ct. Crim. App. 2001)). Article 66(c), UCMJ, "requires that [we] independently determine, in every case within [our] limited Article 66, UCMJ, jurisdiction, the sentence appropriateness of each case [we] affirm." *Id.* at 384-85.

Our duty to assess the appropriateness of a sentence is "highly discretionary," but does not authorize us to engage in an exercise of clemency. *United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

This was the appellant's second special court-martial. In December 2004, he was convicted by a special court-martial of driving while intoxicated and sentenced to, among other things, confinement for 90 days. In the case sub judice, the appellant was convicted of violating an order to not drive. The offense occurred in April 2005 – not long after his first court-martial conviction. Evidence offered during the sentencing phase of trial

indicated that the appellant was once again driving while intoxicated. Furthermore, the appellant got into a car accident which resulted in the injury of a Japanese national. All of this occurred while the appellant was engaged in an unprofessional relationship, in violation of another order. When viewed in light of the appellant's crimes and the aggravated circumstances surrounding those crimes, the sentence adjudged was not inappropriately severe.

Conclusion

Having reviewed this particular appellant's record of service, all matters contained in the record of trial, and the nature and seriousness of the offense, we conclude that the sentence adjudged was appropriate.

V. CONCLUSION

The 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 findings and sentence are

AFFIRMED.

Judge ZANOTTI did not participate.

OFFICIAL

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