UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant TIMOTHY G. RIDGLEY
United States Air Force

ACM 36058 (f rev)

12 March 2009

Sentence adjudged 05 October 2007 by GCM convened at Schriever Air Force Base, Colorado. Military Judges: Kurt Schuman and Bryan D. Watson.

Approved sentence: Hard labor without confinement for 30 days and reduction to E-5.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Major John N. Page III, Major Sandra K. Whittington, and Captain Tiffany M. Wagner.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Jeremy S. Weber, Major Jefferson E. McBride, and Major Donna S. Rueppell.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

UPON FURTHER REVIEW

HEIMANN, Senior Judge:

In 2004 the appellant was tried and convicted of four specifications of maltreatment of different subordinates and two specifications of having an unprofessional sexual relationship with subordinates, in violation of Articles 93 and 134, UCMJ, 10 U.S.C. §§ 893, 934. The adjudged and approved sentence consisted of a bad-conduct discharge and reduction to E-1. On 12 December 2006, this Court, after reviewing six

assignments of error raised by the appellant, affirmed the findings but set aside the sentence because of an instructional error during sentencing. *United States v. Ridgley*, ACM 36058 (A.F. Ct. Crim. App. 12 Dec 2006) (unpub. op.). A rehearing on the sentence was authorized.

A sentence rehearing was initially held from 19-21 April 2007. That rehearing ended in a mistrial when the panel was unable to reach the required votes on a sentence. From 3-5 October 2007, a second rehearing on sentence was conducted. A panel of officers sentenced the appellant to a reduction in grade to E-5 and hard labor without confinement for 30 days. On 20 November 2007, the convening authority approved the new sentence as adjudged.[1]

The appellant now raises two new issues before the Court. First, he challenges the validity of the guilty finding for Specification 1 of Charge I. Second, he alleges that he is denied effective assistance of appellate counsel because of the lack of a verbatim transcript of the final sentencing rehearing. Having considered both issues, we find no merit and affirm the appellant's sentence.

Vague Findings

In the appellant's first allegation of error, he contends that, because of exceptions and substitutions made by the initial court-martial panel, the finding of guilty to Specification 1 of Charge I is fatally defective. He argues that as a result of the verdict rendered by the initial panel, it is "unclear of what specific conduct the members found Appellant guilty and, more specifically, of what conduct they found him not guilty." In support of this argument, the appellant cites *United States v. Walters*, 58 M.J. 391, 396-97 (C.A.A.F. 2003). We find the appellant's argument to be misplaced.

The specification at issue alleged:

> [T]hat Master Sergeant Timothy Ridgley . . . did . . . on divers occasions, between on or about 21 May 2002 and on or about 11 Aug 2003, maltreat SrA [NR], a person subject to his orders, by inappropriately touching her and deliberately and repeatedly making offensive comments of a sexual nature to her.

Contrary to his plea, the court-martial panel found the appellant guilty except for the words "inappropriately touching her and" and "repeatedly." The appellant's argument centers on the fact that he was found not guilty of the excepted language.

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[1] The approved sentence does not meet the threshold trigger requirements established by Article 66(b), UCMJ, 10 U.S.C. § 866(b), for review by this Court. However, our review authority attached at the time of the appellant's original approved sentence, which did meet those requirements, and continues throughout the appellate process, to include review of any rehearing. *See United States v. Davis*, 63 M.J. 171, 176-77 (C.A.A.F. 2006).

Our superior court has recently addressed this very issue, stating "When members find an accused guilty of an 'on divers occasions' specification, they need only determine that the accused committed two acts that satisfied the elements of the crime as charged -- without specifying the acts, or how many acts, upon which the conviction was based." *United States v. Rodriguez*, 66 M.J. 201, 203 (C.A.A.F. 2008) (citations omitted).

Having concluded, by a *de novo* review, that the specification and the conviction are both factually and legally sound, we then move to the real basis for the appellant's assertion of error. Specifically, the appellant contends that he was prejudiced in the sentencing rehearing because the "vague" findings created a dilemma for the defense in the presentation of sentencing matters before the newly constituted sentencing panel. He contends that because the original panel did not specify the basis of their verdict, he was left with explaining all six claims of offensive comments forming the basis of the specification when it is *possible* the original panel did not find him guilty of all six comments.

We reject the appellant's claim of error for several reasons. First, when this Court originally reviewed the appellant's case, we affirmed the findings at that time, and the appellant did not seek further review of this holding by motion for reconsideration or appeal to our superior court. Thus, these findings became the law of the case, making it inappropriate to readdress the validity of the original verdict. *See United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986) (unchallenged ruling "constitutes the law of the case and binds the parties" absent plain error). Second, the members' verdict was clear: they found the appellant guilty of maltreating SrA NR by deliberately making offensive comments of a sexual nature to her *on divers occasions*. Nothing in this verdict is contrary to the holding in *Walters*. Third, the appellant's argument is itself inconsistent with Article 63, UCMJ, 10 U.S.C. § 863. Article 63, UCMJ, entitled the appellant to a new sentencing hearing composed of members who were not members of the court-martial which first heard the case. While this statutory mandate may present dilemmas for all parties in determining how to present evidence in a new sentencing hearing, it nonetheless is the law. Finally, even if we accept that somehow the appellant was hampered by the perceived dilemma, when we look to the new sentencing hearing itself, we find no "material prejudice" to the appellant. Article 59a, UCMJ, 10 U.S.C. § 859a. The appellant stipulated to all of the testimony of SrA NR. This stipulated testimony consisted of reading to the new panel substantial portions of her original testimony from the first trial and from the first sentencing rehearing. The substance of this testimony was essentially a repeat of the information provided to the first panel, to include significant suggestions that SrA NR had credibility problems and that "based on the victim impact of [her alone] that the most Sergeant Ridgley deserves would be [a Letter of Reprimand or Counseling]."

Considering all of the above, we remain convinced that the guilty finding for Specification 1 of Charge I is valid and the appellant suffered no prejudice during the sentencing phase as it relates to the charge and specification.

Verbatim Record

Upon completion of the appellant's second sentencing rehearing, a *summarized* record of the trial was prepared.[2] This action was consistent with Article 54(c)(2), UCMJ, 10 U.S.C. § 854(c)(2) and Rule for Courts-Martial (R.C.M.) 1103(b)(2)(C), which authorize a summarized record of trial in cases where, as here, the sentence includes only a reduction in rank and hard labor without confinement. The appellant now complains that this action denies him effective assistance of appellate counsel under Article 70, UCMJ, 10 U.S.C. § 870. We disagree.

Prior to filing his assignment of errors, the appellant's counsel asked this Court to compel the convening authority to complete a verbatim record of the sentencing rehearing. In support of this request, he submitted an affidavit from his trial defense counsel. The affidavit highlights the fact that the trial defense counsel made a motion to dismiss the sentencing rehearing, or at least Specification 1 of Charge I, because of unfairness to the appellant for all the reasons outlined in the first issue, discussed above. While the military judge denied this motion, his findings of fact and conclusions of law are not transcribed in the summarized record now before the Court. The appellant argues that this shortcoming is significant. In addition to a lack of verbatim findings on the vagueness issue, the appellant also contends that he is denied effective assistance of appellate counsel, because the record does not contain a verbatim transcript of the sentencing arguments of trial counsel. This second argument is not supported by comments contained in the trial defense counsel's affidavit.

We denied the appellant's motion for a verbatim record, highlighting R.C.M. 1103 and finding that the appellant had not met his burden of proving that a verbatim record of the trial is necessary. We relied then, as we do now, upon the very detailed nature of the summarized record of the sentencing rehearing in this case, which included 31 appellate exhibits, some of which constitute verbatim stipulations of expected testimony from the two prior verbatim records prepared for this case. In addition to the deleted record, we also rely on both U.S. Supreme Court and Court of Appeals for the Armed Forces past guidance in this area.

Specifically, the U.S. Supreme Court has held that:

> [I]n all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds . . . . In

[2] A complete verbatim record of the first sentencing rehearing is included in the record of trial.

> terms of a trial record, this means that the State must afford the indigent a record of sufficient completeness to permit proper consideration of [his] claims.
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> A record of sufficient completeness does not translate automatically into a complete verbatim transcript.

Mayer v. City of Chicago, 404 U.S. 189, 193-94 (1971) (alterations in original) (citations and quotations omitted).

The Court of Appeals for the Armed Forces has said:

> [A] summarized account is also approved for the record for review in certain general court-martial cases [provided it] is not contended that the summarized records are inadequate to permit informed review, and scrutiny of them convincingly indicates that aside from the provisions of Article 54(b) they are of 'sufficient completeness' to meet the general standard for review.

United States v. Thompson, 47 C.M.R. 489, 494 (C.M.A. 1973) (quoting *Coppedge v. United States*, 369 U.S. 438, 446 (1962)).

When considering the above two principals, we are left with two conclusions that control this case. First, the appellant has failed to make any colorable showing of the need for a verbatim record of trial. On the vagueness issue, our *de novo* review removes any doubt as to the need for the military judge's findings. On the arguments issue, the appellant himself does not assert that an error even occurred in the argument. *See Karabin v. Petsock*, 758 F.2d 966, 969-70 (3d Cir. 1985) (finding no due process violation where appellant made no showing of "colorable need" for opening and closing statements).

Second, as we consider the extensive nature of the summarized record, particularly the fact that virtually all of the testimony is provided verbatim in the appellate exhibits and, notwithstanding the appellant's first assignment of error, the fact that we are only considering the validity of the sentence under Article 66(c), 10 U.S.C. § 866(c), we are ourselves satisfied that we can complete the necessary standard of review required with this record. Therefore, we reject the appellant's broad claim that he is denied effective representation of counsel because there is no verbatim record.

Conclusion

Upon further review, 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.

Judge THOMPSON did not participate.

OFFICIAL

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