UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class BRADLEY D. ROBERTS
United States Air Force

ACM S30264

18 February 2005

Sentence adjudged 14 November 2002 by SPCM convened at Elmendorf Air Force Base, Alaska. Military Judge: Jack L. Anderson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 8 months, forfeiture of $600.00 pay per month for 8 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Harold M. Vaught, and Captain Diane M. Paskey.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Lieutenant Colonel William B. Smith.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

PRATT, Chief Judge:

In accordance with his pleas of guilty, the appellant was convicted by a special court-martial of a series of offenses: failure to go on divers occasions, misuse of a government credit card, improper issuance of vehicle entry passes, making a false official statement, shoplifting 4 video games, writing a bad check for $1000, and failing to pay a just debt of over $2900, in violation of Articles 86, 92, 107, 121, and 134, UCMJ, 10 U.S.C. §§ 886, 892, 907, 921, 934. A military judge sentenced him to a bad-conduct discharge, confinement for 8 months, forfeiture of $600.00 pay per month for 8 months,

and reduction to E-1. The convening authority ultimately approved the sentence as adjudged.[1]

On appeal, the appellant raises a single issue—that his sentence is "excessively severe"—and, in support thereof, moves to submit a post-trial psychological evaluation indicating that he suffers from mood and personality disorders.[2] Proper analysis of this issue requires a brief look at the true nature of the claim being made by the appellant. There are essentially three possibilities here and the appellant, perhaps cleverly, blends all three in his appellate pleadings.

1. *Assigned Error*. The appellant's brief is formatted and presented as an assignment of error asserting that his sentence is "excessively severe." Issues of sentence severity seek to have this Court exercise its responsibility under Article 66(c), UCMJ, to approve only that sentence, or such part or amount of the sentence, as it finds correct in law and fact and determines should be approved. 10 U.S.C. § 866(c). In fulfilling that responsibility, we must consider the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained *in the record of trial*. *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982); *United States v. Alis*, 47 M.J. 817, 828 (A.F. Ct. Crim. App. 1998) (emphasis added). Generally, after the convening authority has taken action, an appellant is not entitled to submit matters from outside the record for our consideration, even on the issue of sentence appropriateness. *United States v. Bethea*, 46 C.M.R. 223 (C.M.A. 1973). Thus, if we treat this appellant's pleading as an assignment of error, we should deny the appellant's motion to submit the post-trial document (as the government urges us to do). *United States v. Parker*, 36 M.J. 269 (C.M.A. 1993). Although we would still fulfill our responsibility to assess the appropriateness of the sentence, we would do so without the use of the proffered document.

2. *Direct Appeal On Issue of Mental Responsibility*. As the appellant points out in his brief, military courts have historically given "preferential treatment" to the question of mental responsibility and, even though the matter was not raised at trial, permit appellants to raise such issues on direct appeal. *United States v. Young*, 43 M.J. 196, 197 (C.A.A.F. 1995); *United States v. Norton*, 46 C.M.R. 213, 218 (C.M.A. 1973); *United States v. Burns*, 9 C.M.R. 30, 35 (C.M.A. 1953). However, such direct appeals are permitted as a means of attacking the viability of a conviction on sanity grounds, i.e., asserting a lack of mental responsibility at the time of the offense(s) and/or a lack of mental capacity to stand trial.[3] Rules for Courts-Martial (R.C.M.) 706, 909, 916(k); *United States v. Massey*, 27 M.J. 371 (C.M.A. 1989); *United States v. Triplett*, 45 C.M.R.

[1] A pretrial agreement, capping confinement at 9 months, did not impede the convening authority's discretion.
[2] Bipolar Disorder, Most Recent Episode Manic, moderate (Axis I) and Personality Disorder Not Otherwise Specified, with Anti-Social and Borderline Traits (Axis II).
[3] Of course, an appellant can also challenge his or her mental capacity to understand and cooperate intelligently in appellate proceedings. R.C.M. 1203(c)(5).

271 (C.M.A. 1972). In this case, however, the appellant concedes that the diagnosed disorders do not amount to a lack of either mental responsibility or mental capacity. He argues, instead, simply that they are sufficiently mitigating to warrant a new hearing on sentence. We have neither found nor perceive any basis, in statute, regulation, or caselaw, for extending the privilege of direct appeal to situations in which the evidence—although of a mental health nature—may simply serve as mitigation evidence in sentencing proceedings.

3. *Newly Discovered Evidence*. Of course, the ready alternative to direct appeal is to petition for a new trial on the grounds of newly discovered evidence. R.C.M. 1210(f)(2). Although the appellant did not formally undertake this route, instead presenting his pleading as an assignment of error, the appellant's brief cites and argues "newly discovered evidence" principles and asserts (if somewhat obliquely) an entitlement to a new sentencing proceeding. Ultimately, the appellant requests that this Court instead exercise its authority under *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986), to reassess the adjudged sentence to one not including a punitive discharge.[4] But his point is not lost—he believes that the psychological diagnosis constitutes "newly discovered evidence" and that he is entitled to a new trial (on sentencing).[5]

As noted earlier, given the "blended" nature of the appellant's pleading, we would be acting well within our discretionary authority under Article 66(c), UCMJ, to simply deny the appellant's motion to submit the post-trial document. *Parker*, 36 M.J. at 271. But we choose, instead, to exercise our discretion to evaluate the appellant's evidence.[6] *Id.* We will accept the document in the only viable way we can—as proffered "newly discovered evidence"—and evaluate it using the appropriate measuring stick provided by R.C.M. 1210(f).

Newly Discovered Evidence

Article 73, UCMJ, 10 U.S.C. § 873, which provides the right to petition for a new trial on the grounds of newly discovered evidence, does not address whether a distinction is to be drawn between findings and sentencing. Typically, such petitions seek to correct an injustice relating to findings of guilt. When the "newly discovered evidence" consists of a mental health diagnosis, it usually seeks to question the appellant's mental responsibility for the offenses or perhaps his mental capacity to cooperate intelligently in

[4] Here again, the appellant blends concepts. *Sales* addresses the circumstances in which a Court of Criminal Appeals may reassess a sentence as a means of eradicating the effect of prejudicial error found to have occurred at trial. In the case sub judice, no such error is alleged. In fact, what the appellant asserts is entitlement to a new sentencing proceeding, but offers to forego said proceeding if this Court will exercise its Article 66(c), UCMJ, discretion in determining sentence appropriateness so as to set aside the approved bad-conduct discharge.

[5] For an interesting discussion of the important distinction between "rehearing" and "new trial," see *United States v. Parker*, 36 M.J. 269, 271 (C.M.A. 1993). As our superior court says in *Parker*, "[t]he two proceedings may be indistinguishable once you get there, but it's how you get there that matters."

[6] The appellant's Motion To Submit Document is granted.

his defense. However, our reading of the *Manual For Courts-Martial*, both current and former editions, convinces us that a request such as the one before us now—seeking a new "trial" on sentence only—is equally viable. For instance, the 1969 *Manual* explicitly recognized that a new trial would be appropriate when newly discovered evidence affirmatively establishes "that an injustice has resulted from the findings *or the sentence*." *Manual for Courts-Martial, United States, 1969* (Revised ed.) (emphasis added). The current *Manual* is not as explicit, but included in the list of required contents of a petition for new trial is "[a] brief description of any finding *or sentence* believed to be unjust." R.C.M. 1210(c)(6) (emphasis added).

The standard of review applicable to situations in which an appellant's mental responsibility is being challenged is somewhat particularized. Combining the "beyond a reasonable doubt" requirement for findings of guilt, with the "clear and convincing" burden imposed upon an accused by Article 50a, UCMJ,[7] the standard is whether the appellate court is convinced beyond a reasonable doubt "that reasonable factfinders, viewing the totality of the evidence, would not be convinced by clear and convincing evidence that [the] appellant lacked mental responsibility for his crimes." *United States v. Cosner*, 35 M.J. 278, 281 (C.M.A. 1992). If it is not so convinced, the accused is entitled to present his evidence before a court-martial. *Cosner*, 35 M.J. at 280; *United States v. Dock*, 28 M.J. 117, 120 (C.M.A. 1989).

In the case sub judice, however, where although the "new evidence" relates to mental health, it neither challenges a finding of guilty nor otherwise puts the appellant's sanity in issue, the standard described above does not apply. As the appellant acknowledges, the psychological diagnosis in this case is simply being proffered as evidence in mitigation. Thus, we will apply the same treatment and evaluation standard applicable to any other, non-sanity-related, newly discovered evidence. The evaluation criteria are contained in R.C.M. 1210(f)(2), which provides:

> Newly discovered evidence. A new trial shall not be granted on the grounds of newly discovered evidence unless the petition shows that:
>
> (A) The evidence was discovered after the trial;
>
> (B) 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
>
> (C) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

[7] 10 U.S.C. § 850a. In 1987, Congress amended the UCMJ by adding Article 50a, making lack of mental responsibility an affirmative defense that must be raised and proven by the accused by clear and convincing evidence.

Obviously, the evidence—the appellant's diagnosis—was discovered after the trial. It appears that the evaluation that led to the diagnosis did not occur until after the appellant had served his confinement and was, presumably, on appellate leave pending completion of the appellate review process. The more difficult question is whether the evidence is such that it would have been discovered at or before the time of trial "in the exercise of due diligence." R.C.M. 1210(f)(2)(B). The record of trial contains some evidence that the appellant and his defense counsel were on notice that he may be suffering from some form of mental health disorder. Specifically, among the letters introduced as defense exhibits during the trial were letters from the appellant's parents and his grandparents. His parents' letter, dated nearly six weeks before trial, included the following information:

> Although Brad was never an outstanding student, he did perform at an average or above level through the 8th grade. Around that time, we began to notice a change in his personality. Over the rest of his time at home with us, he became increasingly rebellious to our authority and displayed problems controlling anger. . . . [I]t seemed that he was not capable of caring about [his school performance]. At first, we believed all of this was part of being a teenager.
>
> . . . .
>
> We harbored concern that Brad's problems could be more than just a difficult personality or growing pains. However, we were unable to get him to make a real commitment to seeking counseling and evaluation.
>
> . . . .
>
> However, we believe that whatever behavior has brought this about is not because he is a bad person, but that *there must be underlying psychological or psychiatric problems that need to be evaluated*.
>
> . . . .
>
> In addition to the counseling and support the Air Force has provided *he is seeing a psychologist and counselor in the private sector*.

(Emphasis added.) His grandparents expressed similar opinions about the appellant's possible psychological problems. After establishing that they have shared a close

relationship with the appellant, both during his childhood and during his time in the military, their letter states:

> If Bradley is guilty of these charges, has the court determined "why"? I can think of only one reason: he has a serious psychological problem. . . . His conduct, if guilty, can only be attributed to some personality disorder that certainly must be treatable.

These excerpts suggest that both the appellant and his defense counsel were adequately on notice that he may have a diagnosable mental health problem. In addition to candid opinions by those who knew him best, it appears that the appellant was seeing a private psychologist even at that time. In this setting, we conclude that evidence of the appellant's psychological posture could have been obtained (and, for all we know, may have been obtained) at the time of trial through the exercise of "due diligence." On that basis, we conclude that the appellant's post-trial evaluation does not satisfy the second prong of the test for newly discovered evidence.

Assuming arguendo that it did satisfy the "due diligence" prong, we would nevertheless ultimately conclude that it failed to satisfy the third and final prong. Over a seven-month period of time, starting within days of his arrival at his first duty station, the appellant engaged in a series of varied offenses. Among other things, he wrote a $1000 bad check to a car dealer as a down payment on a vehicle and, by the time of trial eight months later, he had still not honored the check. He returned from a five-week deployment to the Philippines and knowingly misused his government credit card over 40 times during the ensuing two weeks, making unauthorized charges totaling over $1000. Through sheer neglect, he dishonorably failed to pay his government credit card debt of over $2900 and, by the time of trial several months later, he had still not paid anything on the balance. Less than a week after these charges were referred to court-martial, the appellant shoplifted 4 video games from the Base Exchange. A subsequent routine background check revealed that, unbeknownst to base officials, the appellant had been arrested and charged off-base several months earlier for shoplifting two DVD movies from a local Wal-Mart store.[8]

Along with these and other pieces of the appellant's disciplinary history, we note that the military judge, in assessing an appropriate sentence, had before him the statements of the appellant's parents and grandparents (and others), asserting that his behavior evinced psychological problems. The nature and number of the appellant's transgressions suggested no less. While confirmation of this fact through the post-trial psychological diagnosis *might* arguably produce a more favorable result for the accused, we conclude that, when considered "in the light of all other pertinent evidence," it is

[8] The appellant received a Letter of Reprimand for this off-base misconduct.

simply *not probable* that it would produce a *substantially* more favorable result. R.C.M. 1210(f)(2)(C).

In conclusion, then, applying R.C.M. 1210(f)(2), we decline to grant the appellant a new sentencing proceeding. Further, exercising our Article 66(c), UCMJ, discretion, we are convinced that the adjudged and approved sentence is appropriate for this appellant and for the offenses of which he was convicted. *Snelling*, 14 M.J. at 268.

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

ANGELA M. BRICE
Clerk of Court