UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JONATHAN K. ROWELL
United States Air Force

ACM S31991

15 April 2013

Sentence adjudged 24 August 2011 by SPCM convened at Ramstein Air Base, Germany. Military Judge: Dawn R. Eflein.

Approved sentence: Bad-conduct discharge, reduction to E-3, and a reprimand.

Appellate Counsel for the Appellant: Lieutenant Colonel Patrick E. Neighbors and Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Charles G. Warren; Captain Brian C. Mason; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and SOYBEL
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

SOYBEL, Judge:

Contrary to his pleas, the appellant was convicted by a special court-martial comprised of officer members of two specifications of absence without leave (AWOL), one specification of using disrespectful language towards a superior noncommissioned officer (NCO), and two specifications of dereliction of duty, in violation of Articles 86, 91, and 92, UCMJ, 10 U.S.C. §§ 886, 891, 892. He was sentenced to a bad-conduct discharge, two months of hard labor without confinement, two months of restriction to the base, reduction to E-3, and a reprimand. The convening authority approved only so

much of the sentence that provided for a bad-conduct discharge, reduction to E-3, and a reprimand.

The appellant raises three issues on appeal: 1) Whether the military judge abused her discretion when she denied the appellant's motion to suppress involuntary statements, 2) Whether the military judge abused her discretion in admitting evidence as a business record exception under Mil. R. Evid. 803(6), and 3) Whether the sentence was inappropriately severe.

Background

The appellant went on leave to the United States from his station at Ramstein Air Base, Germany, in December 2009 and in May 2011. Both times, he was unable to secure timely space-available flights back to his station and returned several days late. For the first incident he received a letter of reprimand; however, after the other charged incidents occurred, this first AWOL was included as one of the specifications in his court-martial.

After the appellant failed to properly return from his May 2011 leave, he and Master Sergeant (MSgt) MT had a phone conversation about his AWOL status and his need to return to the base as soon as possible. She did not inform him of his rights under Article 31, UCMJ, 10 U.S.C. § 831. The appellant made disrespectful comments to MSgt MT, claiming that she had taken excessive leave. He also said that he had information on everyone and would take them all down if he was going down, and that she had an extramarital affair, as well as other inappropriate statements.

During the Government's presentation of evidence to prove the dereliction of duty charge, the trial counsel called Ms. AG, the contracting squadron's Government travel card (GTC) account coordinator. The dereliction offense at issue was the appellant's use of his GTC for personal rather than authorized expenditures. Through Ms. AG and over defense objection, the Government introduced, under the business record exception to the hearsay rule, the appellant's GTC card holder bank statement showing unauthorized uses.

Standard of Review

We review a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010); *United States v. Alameda*, 57 M.J. 190 (C.A.A.F. 2002); *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995). An abuse of discretion occurs when the findings of fact are clearly erroneous or the conclusions of law are based on an erroneous view of the law. *United States v. Hollis*, 57 M.J. 74, 79 (C.A.A.F. 2002). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (citations omitted). *See also White*,

69 M.J. at 239. We review conclusions of law de novo. *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000).

Statements to Superior NCO

The appellant's objection to the disrespectful statements being admitted stems from MSgt MT's failure to warn him of his rights under Article 31, UCMJ, during their conversation about him being in AWOL status. The appellant argues that had MSgt MT warned him of his rights regarding his AWOL status, he would have asserted his rights and made no statements, including the disrespectful statements. [1] The issue boils down to whether statements made in violation of an accused's rights under Article 31, UCMJ, yet unrelated to the suspected offense should be suppressed. [2] We are mindful that the statements in this case are not *about* another offense but actually *constitute* a new offense. Thus, the issue here is whether Article 31, UCMJ, serves to immunize a service member from committing an offense in addition to warning him that he or she has the right not to make a statement about suspected offenses already committed. It does not.

The Supreme Court reviewed the question of whether testimonial immunity protects one from being charged with perjury for false statements made during immunized testimony. In *Glickstein v. United States*, 222 U.S. 139, 142 (1911), the Court reasoned that "the immunity afforded by the constitutional guaranty relates to the past, and does not endow the person who testifies with a license to commit perjury." *Id.* at 142. Thus, more than 100 years ago, the Supreme Court recognized that one's constitutional right against self-incrimination does not protect him or her from prosecution of new offenses committed while giving statements protected by constitutional guarantees.

In *United States v. Mandujano*, 425 U.S. 564 (1976), the Supreme Court ruled on a situation more closely related to the instant case. There, the Court ruled that an accused can be prosecuted for committing perjury even though the statement was given in violation of his rights under the Fifth Amendment[3] and *United States v. Miranda*, 384 U.S. 436 (1966). In doing so, the Court also pointed to other instances where a violation of an accused's rights will not serve to prevent admission of statements received in violation of those rights when the statements themselves constitute new offenses. "[T]his Court has refused to permit a witness to protect perjured testimony by proving a *Miranda* violation. . . . [N]otwithstanding a *Miranda* violation: '(The Fifth Amendment) privilege cannot be construed to include the right to commit perjury.'" *Mandujano*, 425 U.S. at 583 (emphasis added) (quoting *Harris v. New York*, 401 U.S. 222 (1971) (alterations in text)).

[1] Because of the lack of a rights advisement pursuant to Article 31, UCMJ, 10 U.S.C. 831, the Government did not introduce any statements from that conversation to prove the offense of absence without leave.
[2] We will decide this question assuming, but not ruling, that an Article 31, UCMJ, violation actually occurred, since the result would be the same.
[3] U.S. CONST. amend. V.

Drawing upon this rational, our sister court ruled that an accused can be prosecuted for giving a false statement during an interview which violated his rights under Article 31, UCMJ. *United States v. Caritativo*, 33 M.J. 865 (C.G.C.M.R. 1991), *aff'd*, 37 M.J. 175 (C.M.A. 1993). Implicitly, *Caritativo* held that Article 31, UCMJ, like the Fifth Amendment to the United States Constitution, does not allow someone to commit perjury without fear of prosecution just because their rights under that provision were violated. *Id.*

The same logic holds true for disrespectful language even if uttered during a conversation where Article 31, UCMJ, rights may be required. A violation of Article 31, UCMJ, does not provide a sanctuary to commit additional offenses. Service members Article 31, UCMJ, rights are meant to protect them from "mak[ing] any statement regarding the offense of which he is accused or suspected," not other offenses. Article 31(b), UCMJ. Moreover, like the perjury committed in the cases cited above and below, the disrespectful statements were not offenses even contemplated by authorities when the accused was questioned. They were newly committed offenses perpetrated during the questioning or, in this case, conversation. This has been the long standing rule. *See for example United States v. Lewis*, 12 M.J. 205, 208 (C.M.A. 1982); *United States v. Rollins*, 23 M.J. 729, 733 (A.F.C.M.R. 1986). To say statements of this nature should be covered under Article 31, UCMJ, stretches its protection far beyond its intended goal of deterring prosecutorial misconduct.

Business Record Exception

Under Mil. R. Evid. 803(6), a business record is admissible as an exception to the hearsay rule, even if the declarant is available to testify, if it is a record of regularly conducted activity. To qualify under this exception, the record must meet certain requirements, including being "made at or near the time . . . [and] kept in the course of regularly conducted business activity . . . as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Mil. R. Evid. 902(11) or any other statute permitting certification."

The military judge admitted the appellant's Citibank credit card statement (GTC statement) over the defense's hearsay objection; yet, it was not properly certified, and Ms. AG was not the proper person to lay the foundation. There is no dispute that these records were not certified.

Ms. AG testified that she was responsible for the GTC accounts for all personnel in the appellant's squadron. To do this job, she had to take online and class room training. The training included the capacity to "pull up reports and . . . actually setting up the reports that we use all the time." The evidence established that these records were downloaded from the CitiCorp website, to which the witness was given access. She testified that she normally accesses a number of reports which include a report on "all

accounts," "overseas" accounts, and a report on "any accounts that are due to be suspended in the next couple of weeks." She also pulled delinquency reports twice a month. No one else in the squadron had the authority to access the GTC accounts.

Normally, the reports simply listed the accounts meeting the search criteria. If Ms. AG wanted to pull up a report on a specific individual's account, she could also do that by searching in "members account." When the Government introduced the appellant's statement for the relevant period, the witness identified it as his statement that she "downloaded on-line." She testified that she accesses multiple reports including delinquency listings, suspended listings and individual CTC statements. The appellant's account was on the delinquency report, and she pulled his individualized account statement. She testified that it looked like the reports that she accessed and relied upon in the execution of her duties as the GTC manager for the squadron. She also testified that, in the time period she had been accessing the squadron reports (a little more than a year), she had found no errors.

Here, we have a record of a non-testifying third party incorporated into the business records of a testifying party. *See United States v. Grant*, 56 M.J. 410, 413-14 (C.A.A.F. 2002). These types of records are admissible on the testimony of a qualified witness of the second business if: (1) the second business integrated the document into its records, (2) the second business relied upon the accuracy of it in the ordinary course of business, and (3) there are other circumstances indicating the trustworthiness of the document. *Id*. at 414. *See also United States v. Foerster*, 65 M.J. 120, 125 (C.A.A.F. 2007) (In a prosecution of larceny and forgery, the court properly admitted into evidence the check fraud victim's forgery affidavit maintained by the bank.).

We find that the criteria established for admitting GTC records by the forgoing cases are met. Ms. AG was the individual responsible for the GTC program within her squadron, had special training on the reports, and knew how to access the records in this case; therefore, she was a qualified person within the meaning of the case law. *See generally United States v. Harris*, 55 M.J. 433, 437 (C.A.A.F. 2001). She was specially trained in managing the GTC program and these accounts. She testified that CitiCorp's records were integrated into Air Force records, in that she was trained in pulling up reports and "actually setting up the reports that we use all the time." These reports were used in the ordinary course of the squadron's business, which includes managing service members' GTCs. She also testified that they relied on the accuracy of the records. Finally, there were other circumstances indicating trustworthiness, in that she had worked with these records on a regular basis for over a year and never found an error.

Given the above, we find that the military judge did not abuse her discretion when she admitted the appellant's GTC statement from CitiCorp into evidence as a business record exception to the hearsay rule under Mil. R. Evid. 803(6).

Sentence Appropriateness

The appellant argues that his sentence to a bad-conduct discharge is inappropriately severe. He asserts that his first AWOL, for which he previously received a Letter of Reprimand, would not have been prosecuted had it not been for his second AWOL. He states his first AWOL was due to a sick wife and child and the second one was due to financial hardship. He also argues that the disrespect specification was minor misconduct. Finally he argues the dereliction of duty specification is "likely unsustainable," so, removing that from the equation, the remainder is "an exercise in minor misconduct."

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005). This Court "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). 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 in order to assess sentence appropriateness. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

The appellant's actions demonstrate a clear deviation from the established standards of military conduct. He was convicted of two AWOLs, being disrespectful to a superior noncommissioned officer, and two specifications of dereliction of duty. One was for failing to obtain his Government passport so that he could travel overseas on official travel and another for misusing his GTC. The members had the opportunity to listen to the witnesses and assess their credibility. The appellant also sought clemency from the convening authority, who disapproved the restriction to base and the hard labor without confinement portions of his sentence. Thus, he was left with a bad-conduct discharge, reduction to E-3, and a reprimand. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offenses for which he was found guilty, we do not find the appellant's sentence inappropriately severe. We find that the approved sentence was clearly within the discretion of the convening authority and was appropriate in this case.

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;

United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court