UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant RODNEY E. WELLS
United States Air Force

ACM 36245

12 January 2007

Sentence adjudged 1 October 2004 by GCM convened at Lackland Air Force Base, Texas. Military Judge: James L. Flanary.

Approved sentence: Dishonorable discharge, confinement for 8 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Frank J. Spinner (argued), Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major John N. Page III.

Appellate Counsel for the United States: Captain Jamie L. Mendelson (argued), Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Michelle M. McCluer, and Major Nurit Anderson,

Before

ORR, FRANCIS, and SOYBEL
Appellate Military Judges

OPINION OF THE COURT

ORR, Senior Judge:

The appellant was tried at Lackland Air Force Base Texas, by a general court-martial consisting of officer members. Contrary to his pleas, the appellant was found guilty of one specification of attempted conspiracy to commit murder, and one specification of conspiracy to commit murder in violation of Articles 80 and 81 UCMJ, 10 U.S.C. §§ 880, 881. The panel sentenced the appellant to a dishonorable discharge, confinement for 10 years, forfeiture of all pay and

allowances, and reduction to E-1. The convening authority reduced the confinement portion of the sentence to 8 years and approved the remainder of the sentence as adjudged. Additionally, the convening authority granted the appellant's request for a waiver of the mandatory forfeitures for six months for the benefit of the appellant's spouse and children.

The case is before this Court for review under Article 66, UCMJ, 10 U.S.C. § 866. The appellant asserts four errors for our consideration: (1) Whether the evidence is legally and factually sufficient to support the findings of guilt where the record does not support a finding that the appellant formed an intent to kill; (2) Whether the convictions should be set aside because the government allowed potentially exculpatory evidence to be destroyed; (3) Whether the military judge erred by failing to review the government's surveillance tapes, which were admitted into evidence, for accuracy, and failing to instruct the members that the tapes, rather than the transcripts, are evidence; and (4) Whether this Court should take appropriate action to ensure the intent of the convening authority is satisfied while fulfilling the requirements of *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002). On 10 October 2006, we heard oral argument in this case.

Background

On several occasions, the appellant met with CS and JA to plan the murder of CS's husband, Staff Sergeant (SSgt) DS, also one of appellant's co-workers. At trial, the prosecution presented testimony of both co-conspirators, CS and JA, an audio surveillance recording of the appellant and JA discussing the plot to kill SSgt DS, and testimony of the intended victim, SSgt DS, as evidence to support the charges. Witness testimony outlined a plot in which the appellant and CS agreed to bring about the death of CS' estranged husband, SSgt DS, for his life insurance proceeds, of which a certain percentage was to be used to establish appellant's loan business. To accomplish their goal, the appellant procured the services of JA, whom he commissioned to kill SSgt DS. In return for his role in the plan, JA was promised an amount that ranged from $25,000-$50,000, which was also to be paid from SSgt DS' life insurance proceeds upon his death.

Legal and Factual Sufficiency

In his first assignment of error, the appellant argues that the evidence presented at trial was legally and factually insufficient to support his convictions for conspiracy and attempted conspiracy to commit murder, because he never possessed the requisite intent to kill SSgt DS. We disagree.

The test for legal sufficiency is whether, when the evidence is viewed in the light most favorable to the government, any rational factfinder could have found

the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

The crux of the appellant's argument is that he is not guilty because he never intended for SSgt DS' death to actually occur. In support of this contention, he points out certain actions and inaction on his part that he believes support his assertion he never believed or intended for JA to kill SSgt DS. Specifically, the appellant directs the Court's attention to his conversations with SSgt DS during the relevant time frame. First, the appellant told SSgt DS that his wife wished to have him killed. Additionally, on one occasion the appellant allowed SSgt DS to hide in a closet and listen to a conversation the appellant had with CS regarding the murder plot.

We find the appellant's arguments unpersuasive. Prior to sharing the above information with SSgt DS, the appellant had a conversation with SSgt DS regarding SSgt DS' life insurance policies and whether SSgt DS thought his wife would kill him for the money. SSgt DS testified that he thought the appellant was joking at the time of the conversation. The appellant did not approach CS about the idea of having her husband killed for a portion of the life insurance proceeds until after this conversation. At different times in the charged time period, the appellant communicated with both CS and JA regarding different aspects of the plot to kill SSgt DS. The plot began with appellant broaching the idea with CS and at a later point he involved JA in the plan. JA's involvement in the plot to kill SSgt DS arose from appellant contacting JA's brother, SSgt AA, to procure JA's services in carrying out the killing. Unbeknownst to the appellant, SSgt AA was working with the Air Force Office of Special Investigations (OSI) as an undercover informant. Soon thereafter, JA became an OSI undercover informant as well.

The appellant met with CS and JA both individually and together several times over the course of the charged time period. On one occasion, the appellant, CS, and JA met at a local restaurant to discuss the plan to kill SSgt DS. At that meeting the appellant actively moderated a discussion concerning the different ways to kill SSgt DS, but no final plan regarding how the killing would take place was made. The appellant also had a discussion with CS regarding the importance of spending time with SSgt DS before his death to deflect suspicion afterwards. He also discussed with JA the manner and method in which he thought JA should kill SSgt DS, and told JA to return the murder weapon to him for disposal after JA killed SSgt DS. Throughout the course of the charged time period, the appellant

was the lynchpin of the contact amongst JA, CS, and himself. Even though the appellant relayed some information to SSgt DS at certain times as he highlights in his submission, he did not tell SSgt DS all of the relevant facts concerning the murder plot. Additionally, at no time did the appellant tell either CS or JA of SSgt DS' knowledge of any aspect of the plan, or that the plan was just a hoax.

This evidence, viewed in a light most favorable to the prosecution, provides a sufficient basis from which a rationale trier of fact could have found all of the elements of conspiracy and attempted conspiracy to murder SSgt DS beyond a reasonable doubt. Further, after considering all of the evidence in the record of trial and making allowances for not having personally observed the witnesses, we ourselves are convinced beyond a reasonable doubt that the appellant committed these offenses. Therefore, his conviction is legally and factually sufficient. *See Turner*, 25 M.J. at 324-25.

Potentially Exculpatory Evidence

In his second assignment of error, the appellant contends this Court should set aside his conviction because the government allowed potentially exculpatory evidence to be destroyed. Specifically, he asserts that despite his timely request, voice messages on his government provided cellular phone were not available for him to use at trial.

The appellant was issued a government cellular phone to perform his duties as a recruiter. In a post-trial affidavit, the appellant claims SSgt DS and CS left exculpatory messages on the voicemail of his cellular phone. The appellant contends these messages would show that SSgt DS was fully informed of the plan to kill him and that the appellant never intended to carry out the plan. Additionally, he claims CS left a voicemail message stating she no longer wanted the appellant to have her husband killed.

The appellant's trial defense counsel made one oral and three written discovery requests. In his first request, he asked the government to preserve the "current state of any electronic memory device" on the appellant's cellular phone because it may have an exculpatory message. In his 11 August 2004 request, he specifically asked for a transcript of any voicemail available on the appellant's government cellular phone. However, when the OSI agents attempted to comply with the request, they learned that some of the requested messages may have been destroyed because they were stored on a server maintained by a private phone company. The private phone company's policy was to delete messages 30 days after they are recorded. Even though the appellant's cellular phone was maintained in the same condition as it was when the OSI agent's took it into evidence in February of 2004, the appellant asserts the government did not comply

with his discovery request because they failed to ask the private phone company to preserve the voicemail messages. As a result, he avers that the government violated his constitutional right to due process.

The appellant did not raise this issue at trial, therefore we review his claim for plain error. *United States v. Avery,* 52 M.J. 496, 498 (C.A.A.F. 2000). Rule for Courts-Martial (R.C.M.) 703 (f)(1) provides: "Each party is entitled to the production of evidence which is relevant and necessary." R.C.M. 703(f)(2) governs unavailable evidence, stating:

> Notwithstanding subsection (f)(1) of this rule, a party is not entitled to the production of evidence which is destroyed, lost, or otherwise not subject to compulsory process. However, if such evidence is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such evidence, the military judge shall grant a continuance or other relief in order to attempt to produce the evidence or shall abate the proceedings, unless the unavailability of the evidence is the fault of or could have been prevented by the requesting party.

The Supreme Court has laid out a two part test when dealing with the loss of potentially exculpatory evidence: 1) did the lost evidence possess exculpatory value that was or should have been known to possess such characteristics by the government; 2) is comparable evidence available through other reasonably available means. *California v. Trombetta*, 467 U.S. 479, 489 (1984). An additional requirement was added stating, "[u]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v. Youngblood,* 488 U.S. 51, 58 (1988).

We are not persuaded by the appellant's arguments. Even if we assume the voicemail messages were destroyed, the fact that the appellant did not raise this issue at trial causes us to question the exculpatory value of this evidence. Additionally, there is no evidence the government acted in bad faith. Although the appellant's trial defense counsel avers that he made a timely discovery request, he made two additional requests for the voicemail messages. The fact that each discovery request was more specific indicates either the appellant's trial defense counsel was looking for additional evidence or that the government did not understand his previous requests. Moreover, SSgt DS, CS, and the appellant all testified at trial and were subject to vigorous cross-examination. Both SSgt DS and CS gave testimony concerning their phone conversations with the appellant. Therefore, even if we assume the voicemail messages existed, we are convinced

beyond a reasonable doubt that they would not have made a difference in the outcome of the trial. *See United States v. Bagley*, 473 U.S. 667, 676 (1985).

Military Judge's Instructions

In his third assignment of error, the appellant argues the military judge erred by failing to properly instruct the members. The prosecution offered into evidence surveillance tapes of conversations between JA and the appellant. Because some portions of the tapes were inaudible and others were spoken in spanish, the prosecution prepared transcripts of the tapes. The appellant's trial defense counsel questioned the accuracy of the transcripts and prepared a different transcript of the conversations. The military judge admitted both versions into evidence. Additionally, the appellant testified regarding the differences between the two versions of the transcripts. The appellant asks this Court to set aside the findings of guilt and the sentence because the military judge did not address the accuracy and the inaudible portions of the recordings or properly instruct the panel members.

We review a military judge's rulings and instructions regarding recordings and transcripts for an abuse of discretion. *See United States v. Craig*, 60 M.J. 156, 162 (C.A.A.F. 2004). After considering both versions of the transcripts, the appellant's testimony, and the military judge's instructions, we find no abuse of discretion. Even if it were later determined that the military judge did not comply with the guidance set forth in *Craig*, we find that such error was harmless because the members decided the contested issue of whether the appellant gave JA $100 to purchase a knife, in the appellant's favor.

Waiver of Mandatory Forfeitures

In his fourth assignment of error, the appellant asserts the convening authority's action is erroneous because it does not reflect the convening authority's intent. The appellant believes the convening authority intended to waive the mandatory forfeitures for a six-month period. However, the convening authority did not adhere to the dictates set forth in *Emminizer* and failed to disapprove, modify, or suspend the adjudged forfeitures. *Emminizer*, 56 M.J. at 445. As a result, the appellant expresses concern that the wording of the action would allow the government to recoup the funds paid to his dependents at a later time. The appellant asks this Court to set aside the action and return the case to convening authority for new post-trial processing.

In response, the government concedes error and agrees that the convening authority should have disapproved, reduced, or suspended the adjudged forfeitures. Nevertheless, the government asserts that the action is not ambiguous.

The government argues that the convening authority's intent is clear and that this Court should view this as an error of form and not substance. The government contends that neither the appellant, nor his dependents face recoupment action in the future. Therefore, no corrective action is required. We disagree.

In *United States v. Johnson,* 62 M.J. 31 (C.A.A.F. 2005), our Superior Court corrected a similar error by disapproving the adjudged forfeitures. *Id*. at 38. Likewise, we are convinced that the convening authority intended to waive the mandatory forfeitures to ensure that money was available to support the appellant's dependents. As a result, we see no need to return the case to the convening authority for corrective action. Therefore, we hereby disapprove the adjudged forfeitures and approve only so much of the sentence as provides for a dishonorable discharge, confinement for 8 years, and reduction to the grade of E-1.

Conclusion

The approved findings and sentence, as modified by this Court, 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 (2000). Accordingly, the approved findings and sentence, as modified, are

AFFIRMED.

Senior Judge ORR participated in this decision prior to his reassignment.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator