UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant RICHARD F. GREENWOOD
United States Air Force

ACM 38147

22 October 2013

Sentence adjudged 16 March 2012 by GCM convened at Moody Air Force Base, Georgia. Military Judge: Matthew D. van Dalen.

Approved Sentence: Dishonorable discharge, confinement for 1 year, and reduction to E-1.

Appellate Counsel for the Appellant: Major Scott W. Medlyn.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Daniel J. Breen; and Gerald R. Bruce, Esquire.

Before

ORR, HARNEY, and MITCHELL
Appellate Military Judges

OPINION OF THE COURT

PER CURIAM:

Contrary to his pleas, a general court-martial composed of officer members convicted the appellant, an Air Force recruiter, of one specification of failing to obey a lawful general regulation by attempting to develop a personal, intimate, or sexual relationship with BP; three specifications of dereliction of duty by willfully exposing himself to AE, BP, and SO in an Air Force recruiting office; three specifications of indecent acts by intentionally exposing his genitalia to AE, BP, and SO; one specification of sexual contact with BP by touching her inner thigh; and one specification of unlawfully touching BP on the leg, in violation of Articles 92, 120 and 128, UCMJ,

10 U.S.C. §§ 892, 920, 928.[1] The adjudged sentence consisted of a dishonorable discharge, confinement for 1 year, forfeiture of all pay and allowances, and reduction to E-1. The convening authority waived the mandatory forfeitures for a period of six months, to be paid to the appellant's dependents, and approved the remainder of the adjudged sentence.

The appellant raises seven issues for our consideration: 1) Whether the dereliction of duty specifications under Article 92, UCMJ, legally state an offense; 2) Whether the convictions are legally and factually insufficient; 3) Whether Specifications 2-4 of Charge I are multiplicious with Specifications 1-4 of Charge III; 4) Whether it was error for the military judge to deny the defense the ability to discuss sex offender registration during sentencing argument; 5) Whether the sentence was overly severe; 6) Whether the military judge committed plain error by admitting the appellant's personal data sheet which omitted his service in a recognized combat zone; and 7) Whether the staff judge advocate's recommendation was in violation of Rule for Courts-Martial (R.C.M.) 1106 or otherwise in error when it included a copy of the appellant's personal data sheet which omitted his service in a recognized combat zone.[2]

Background

The appellant was a recruiter for the United States Air Force in Carrollton, Georgia. His office was co-located with recruiters from other services in a strip mall office. The appellant, who manned the Air Force recruiter office by himself, was responsible for recruiting at approximately 10 local high schools. He was one of the region's top recruiters.

The three victims were females of high school age when they visited the appellant's office as Air Force recruits, on separate occasions. Each made an appointment with the appellant prior to visiting his office. Two of the girls, AE and SO, came alone, entered a seemingly empty office, and waited for the appellant in the office's front room. When AE arrived, the door was slightly ajar and she was informed the appellant was inside. After entering, AE waited for the appellant, who eventually came from the back room completely naked, with an erection. When SO arrived at the office, she found the door unlocked and entered. While SO was waiting in the main area, the appellant came from the back room with just a shirt on, naked from the waist down. In both instances, the appellant acted surprised, clothed himself, then apologized to the girls saying he had lost track of time and had either just finished his workout or that his clothes were in the wash.

[1] The appellant was acquitted of one specification of indecent conduct by masturbating in front of BP in violation of Article 120, UCMJ, 10 U.S.C. § 920.
[2] Issues 1-3 are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (1982).

The third victim, BP, came with her friend and her grandmother, who drove her to the appellant's office. After discussing various aspects of the Air Force, the appellant offered to administer BP an aptitude test. He also offered to drive her to meet her aunt at an agreed upon place after the test was completed. BP testified that after she completed the test she noticed the appellant had accessed her iPod Touch. She realized that he had looked through her pictures until he found one of her in a bathing suit. The appellant told her that was his favorite picture of her. She testified that he then rolled his chair back from the desk at which he was sitting and started masturbating for what seemed like five minutes.[3] BP covered her face at this point and stated she was in shock and just "froze." After those five minutes the appellant went into the back room. BP testified she waited for him in the main part of the office, but from where she was she could tell pornography was playing on a television in the back room. Eventually, the appellant returned to the front room, in uniform, and drove BP to meet her aunt. BP testified that on the way he grabbed her inner thigh and tried to kiss her.

Dereliction of Duty

The appellant's argument that the specifications of Charge I fail to state an offense because they fail to allege a specific duty is without merit. The Government charged the appellant with four violations of Article 92, UCMJ. Three specifications were similar and alleged a dereliction of duty by willfully failing to refrain from exposing the appellant's nude or partially nude body to three high school girls in an Air Force recruiting office. In pretrial motions trial defense counsel filed a motion for a bill of particulars under R.C.M. 906(b)(6), requesting to know the source of the duty not to expose one's nude or partially nude body in a recruiter's office. The Government cited to Air Education and Training Command Instruction 36-2909, *Professional and Unprofessional Relationships*, 2 March 2007, certified current 26 September 2011, which governed the appellant as a recruiter, as well as the "custom of the service" as the sources for the duty. At trial, the Government presented a witness to prove the existence of such a custom.

This Court has previously held that an adequate specification "must (1) notify the accused of the offense charged, (2) contain the elements of the offense either expressly or by fair implication, and (3) together with the record of trial" protect against double jeopardy by barring a later prosecution for the same offense. *United States v. Conway*, 40 M.J. 859, 861 (A.F.C.M.R. 1994) (citing *United States v. Bryant*, 30 M.J. 72 (C.M.A. 1990)).

The purpose of the bill of particulars was to meet the *Conway* requirements and inform the defense of the information they believe the charged specifications were lacking. As noted above, the defense used this mechanism to further refine the

[3] The appellant was acquitted of this specification.

Article 92, UCMJ, specifications and flesh out the exact nature of the source of the duty alleged to have been breached.

The elements of the offenses under Article 92, UCMJ, require the Government to prove (1) "[t]hat the accused had certain duties;" (2) "[t]hat the accused knew or reasonably should have known of those duties;" and (3) the accused was willfully derelict during the performance of those duties. *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 16.b.(3) (2008 ed.).

The specifications as written, when considered along with the Government's answer to the bill of particulars and the entire record of trial, clearly put the appellant on notice of the offense of which he is charged. Each specification alleged that the appellant exposed his nude or partially nude body to a female in an Air Force recruiting office. Each specification further alleged that the appellant had a duty to refrain from that action. While the defense may argue that no such duty actually existed or that the duty did not apply to the appellant, those arguments go to the sufficiency of the evidence. On its face, each specification, following the draft specification provided in the *Manual*, met the *Conway* requirements. *See MCM*, Part IV, ¶ 16.f.(4). The specifications alleged each element of the offense: the duty, that the accused knew the duty, and that he was willfully derelict.

Legal and Factual Sufficiency

United States v. Turner, 25 M.J. 324 (C.M.A.1987), provides precedence for reviewing cases for legal and factual sufficiency. Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), an appellate court must determine both the legal sufficiency of the evidence and its factual sufficiency. "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humphreys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. The standard of review for legal and factual sufficiency of the evidence is de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). *See also United States v. Oliver*, 70 M.J. 64 (C.A.A.F. 2011).

After reviewing the record ourselves and applying the applicable standards we find the appellant's convictions are both legally and factually sufficient. The three victims testified and, along with the other evidence presented, provided sufficient evidence that a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. They described the appellant's office, his appearance on the days they

went to his office, and gave detailed descriptions of the appellant's actions. Each recitation, although separate, provided a similar account of the appellant's exposures. Each female was subjected to vigorous cross-examination which may have uncovered some facts in the appellant's favor but, ultimately, the factfinders found them unpersuasive in light of the other facts. Additionally, we are ourselves firmly convinced of the accused's guilt beyond a reasonable doubt.

Multiplicity

The appellant avers that the dereliction of duty specifications, Specifications 2-4 of Charge I, are multiplicious with Specifications 1-4 of Charge II which allege an indecent act by exposing himself to recruits. Because he was acquitted of Specification 1 of Charge II, it is better presented as whether the appellant's dereliction of duty convictions under Article 92, UCMJ, are multiplicious with his indecent acts convictions under Article 120, UCMJ, as both are based on the same facts: exposing himself to young women in an Air Force recruiting office.

We review issues of multiplicity de novo. *United States v. Paxton*, 64 M.J. 484, 490 (C.A.A.F. 2007). Multiplicity is an issue of law that enforces the Double Jeopardy Clause. *Blockburger v. United States*, 284 U.S. 299 (1932); *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993); *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012). Our superior court held the proper test for multiplicity is the one applied by the Supreme Court in *Blockburger* and *Teters*. *Campbell*, 71 M.J. at 23. An accused may not be convicted and punished for two offenses where one is necessarily included in the other, absent congressional intent to permit separate punishments. *See Teters*, 37 M.J. at 376. *See also* R.C.M. 907(b)(3), Discussion. Where legislative intent is not expressed in the statute or legislative history, "it can also be presumed or inferred based on the elements of the violated statutes and their relationship to each other." *Teters*, 37 M.J. at 376-77 (citation omitted). Thus, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one [] is whether each provision requires proof of [an additional] fact which the other does not." *Blockburger*, 284 U.S. at 304 (citation omitted); *see also Teters*, 37 M.J. at 377 (The *Blockburger* rule "is to be applied to the elements of the statutes violated."). Accordingly, multiple convictions and punishments are permitted for a distinct act if the two charges each have at least one separate statutory element from the other.

Applying *Blockburger*, we find these specifications are not multiplicious. The dereliction of duty specifications under Article 92, UCMJ, required proof of a duty, that the accused had knowledge of that duty, and that the accused breached that duty. *See MCM*, Part IV, ¶ 16.b.(3). The indecent exposure specifications under Article 120, UCMJ, did not require proof of any of those elements, but did require proof of an intentional exposure of his body in an indecent manner. *See MCM*, Part IV, ¶ 45.b.(14).

Clearly under the elements test, Congress has permitted an accused to be convicted for both offenses without creating a violation of the Double Jeopardy Clause. Accordingly, the specifications under Charges I and II are not multiplicious.

Discussing Sex Offender Registration During Sentencing Argument

The appellant claims the military judge erred when he denied trial defense counsel permission to argue to the members that they should consider the appellant's post-trial obligation to register as a sex offender when they deliberate on an appropriate sentence. He argues sex offender registration exists to protect the public which is also one of the recognized purposes of sentencing. He also argues that another purpose of sentencing under military law, deterrence of the wrongdoer, is also a purpose of sex offender registration requirements and could have affected the member's deliberations had they been aware of the requirement. He therefore asserts that the members should have been able to consider it during their sentencing deliberations because it might have negated confinement as a punishment.

We review a military judge's decision to restrict sentencing argument using an abuse of discretion standard. *United States v. Boyd*, 55 M.J. 217, 220 (C.A.A.F. 2001). This Court and our superior court have long held that, generally, the collateral consequences of a sentence are not matters for members to consider. *United States v. Griffin*, 25 M.J. 423, 424 (C.M.A. 1988) ("[C]ollateral consequences are not germane."); *United States v. Quesinberry*, 31 C.M.R. 195 (C.M.A. 1962) (the sentence should reflect the accused and the charged offenses, not collateral administrative effects); *United States v. Briggs*, 69 M.J. 648, 650-51 (A.F. Ct. Crim. App. 2010) (the availability of an administrative discharge is a collateral matter and may not be argued by counsel). We have previously held that sex offender registration is a collateral matter, not appropriate to be considered in sentencing. *United States v. Datavs*, 70 M.J. 595 (A.F. Ct. Crim. App. 2011).[4]

In this case, the military judge did not allow sex offender registration requirements to be argued by trial defense counsel during sentencing, reasoning that members should not hear collateral matters and such information would lead to confusion, wasted time, and delay. He did, however, permit the appellant to discuss this issue during his unsworn statement. Given our precedence, we find that the military judge did not abuse his discretion by prohibiting the appellant's trial defense counsel the opportunity to argue the effect of sex offender registration during sentencing argument.

[4] We do not find this holding incongruent with our superior court's more recent decision in *United States v. Riley*, 72 M.J. 115 (2013). In *Riley*, our superior court held that sex offender registration information was not a collateral matter when accepting a guilty plea from an accused for an eligible offense. *Id.* at 122. They reasoned that for the accused to have a knowing, intelligent, and conscious waiver of their rights, they must be informed of the ramifications of a sex offender registration requirement. *Id.* In *United States v. Datavs*, 70 M.J. 595 (A.F. Ct. Crim. App. 2001), as here, the accused did not plead guilty. The concern of our superior court in ensuring the accused understands the ramifications of his plea not present in either case.

Sentence Severity

The appellant argues that his sentence is inappropriately severe based on his service history including his awards, his service in a combat zone, and the strength of the clemency submission. Given the offenses he committed and the manner in which he committed them, we disagree.

This Court reviews sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). We "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. "We assess sentence appropriateness by considering 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. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). *See also United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Although we are accorded great discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Nerad*, 69 M.J. 142, 146 (C.A.A.F. 2010).

After carefully examining the submissions of counsel, the record of trial, the appellant's entire military record, and taking into account all the facts and circumstances surrounding the numerous 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.

Erroneous Personal Data Sheet

The appellant raises two issues with respect to his personal data sheet (PDS). First, he claims the military judge erred when he did not ensure that the appellant's PDS was accurate regarding his service in a combat zone. Second, he claims the staff judge advocate (SJA) erred when he did not correctly inform the convening authority of the appellant's service in a combat zone.

In preparation for sentencing, the military judge admitted into evidence the appellant's PDS, which was submitted by the Government with no objection from trial defense counsel. Under the heading "Combat Service," the PDS indicated "None." Later, when discussing sentencing instructions, the defense indicated to the military judge that the appellant received "fire pay" while on deployment. Trial counsel noted there was nothing annotated in the appellant's personnel records to indicate that the appellant was authorized to claim combat service. The base military personnel section confirmed combat service would have been annotated if his deployment had qualified in terms of length and location "for overseas service in combat." Trial defense counsel had no

authority to show the PDS was inaccurate, but argued that because there was doubt, it should be changed to show combat service. Admitting he was not an expert on combat service rules, the military judge ruled that the PDS would remain admitted into evidence as it was originally printed and the burden was on the defense to show some authority that it should indicate combat service. The PDS showing no combat service went to the members during their deliberations on sentencing.

The PDS indicating the appellant had no combat service also went to the convening authority when he considered what action he would take on the findings and sentence. In the SJA's recommendation, the fact that the PDS indicated no combat service was mentioned, and the recommendation specifically informed the convening authority that despite that annotation, the appellant "served in Oman from 24 September 2002 through 22 December 2002, in support of Operation Enduring Freedom."

Ordinarily we review the military judge's decision to admit evidence for an abuse of discretion. *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008). However, because there was no objection at trial to the admission of the PDS, we review under a plain error analysis.[5] *See United States v. Carey*, 62 M.J. 277 (C.A.A.F. 2006). Thus, the appellant must show (1) that error occurred, (2) that it was plain, clear, or obvious, and (3) that it materially prejudiced a substantial right. *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008).

In his appellate brief, the appellant indicated that Executive Order 12744,[6] signed by President George Bush in 1991, designated the country of Oman, where the appellant was deployed, as a combat zone. In support of his allegation of prejudice, the appellant cites a sister service case, *United States v. Seal*, 38 M.J. 659 (A.C.M.R. 1993), for the proposition that combat service has a special distinction as a matter in mitigation in courts-martial. That court was concerned with the completeness of the record of trial, holding that the actual films of the appellant in combat were not included in the record resulting in an incomplete record. *Id.* at 663. The appellant also cites *United States v. Demerse*, 37 M.J. 488, 492 (C.M.A. 1993), where the predecessor to our superior court held it was error for the Government to withhold awards and decorations referring to the appellant's Vietnam service. However that is not the case here since the appellant's Air Force Achievement Medal for his three month deployment to Oman as a "Utilities Journeyman, Reverse Osmosis Water Purification Units Plant Operator" in the 321st Air Expeditionary Wing, Masirah, Island Air Base, Oman, was admitted into evidence as a defense exhibit for the members to consider.

[5] While trial defense counsel questioned the absence of the appellant's combat service on the personal data sheet (PDS), he did not raise an objection to the language in the PDS or its admission as an exhibit. This distinction is important for the applicable rule, but not the result. Had trial defense counsel objected to the PDS, we would have given less deference to the military judge, but in this case the military judge did not abuse his discretion when he admitted the PDS. .

[6] Executive Order No. 12744, 56 Fed. Reg. 2663 (Jan. 23, 1991).

Thus, looking at the entire record, it appears the error that occurred was the omission on the PDS which wrongly indicated the appellant had no combat service. However, there is no doubt that the members were fully aware of his combat service which was fully described in the achievement medal awarded for that service that was given to them as a defense exhibit. Although there was an error in the PDS, we find no material prejudice to a substantial right of the appellant concerning that error. The members were fully informed of the appellant's combat service. Further, in his recommendation, the SJA informed the convening authority that the PDS failed to properly note combat service. Thus, the convening authority was fully aware of the appellant's service, eliminating any possible error the faulty PDS could have caused when the convening authority took action.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred.[7] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *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

[7] The Court notes BP's first name and AE's last name were misspelled on the Court-Martial Order (CMO). We order a corrected CMO. Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 10.10 (6 June 2013).