UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic ISMAEL HERNANDEZ
United States Air Force

ACM S32118

5 December 2013

Sentence adjudged 12 October 2012 by SPCM convened at Misawa Air Base, Japan. Military Judge: Gregory O. Friedland (sitting alone).

Approved Sentence: Bad-conduct discharge and confinement for 9 months.

Appellate Counsel for the Appellant: Appellate Counsel Waived.

Appellate Counsel for the United States: None appeared.

Before

HELGET, WEBER, and PELOQUIN
Appellate Military Judges

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, consistent with his pleas, of one charge and specification of wilfully damaging military property of a value greater than $500, in violation of Article 108, UCMJ, 10 U.S.C. § 908. The appellant pled not guilty to a charge and specification of wrongfully inhaling aerosol propellant for the purpose of becoming intoxicated, an alleged violation of Article 134, UCMJ, 10 U.S.C. §934. The military judge acquitted him of this charge and specification. The adjudged and approved sentence consisted of a bad-conduct discharge and confinement for 9 months.

The record of trial contains two Air Force (AF) Forms 304 signed by the appellant. On both of these forms, the appellant elected not to request appellate defense counsel. As a result, the Air Force Appellate Defense Division declined to assign counsel

to the appellant. The appellant, however, has not waived appellate review of his case. This Court contacted the appellant's trial defense counsel to inquire whether the appellant still desired not to be represented by appellate counsel and whether the appellant wished to personally raise any issues for this Court's consideration. The appellant's trial defense counsel attempted to contact the appellant at his supplied e-mail address but did not receive a reply. Efforts by this Court to locate the appellant have also proved unsuccessful.

Under Article 70(c), UCMJ, and Rule for Courts-Martial 1202(b)(2), appellate defense counsel are to represent an appellant in cases before this Court when requested by the accused, or in other situations not applicable here.[1] We therefore find that the proper course of action is to conduct a review of the record under Article 66, UCMJ, 10 U.S.C. § 866, without the benefit of a brief from the appellant. Our superior court has stressed the importance of appellate defense counsel and receiving a brief from the appellant, but the Court did so in the context of a case where "an appellant has requested representation that does not appear to be forthcoming." *United States v. Roach*, 66 M.J. 410, 418 (C.A.A.F. 2008). In *Roach*, the Court held that "[i]f the court determines that circumstances warrant proceeding without a brief filed by appointed military appellate counsel, the court must first provide adequate notice to the appellant so that the appellant can determine whether to request substitute counsel under Article 70, obtain civilian counsel at the appellant's expense, or waive the right to counsel and proceed pro se." *Id.* (citation omitted).

This case presents a different situation than that in *Roach*, but this Court has nonetheless attempted to contact the appellant both directly and through counsel, without success. In addition, the appellant in this case has twice affirmatively elected not to be represented by counsel on appeal. We therefore hold that the appellant has waived his right to appellate counsel and we are to proceed without the benefit of a submission on the appellant's behalf. *See also United States v. Mathews*, 19 M.J. 707, 708 (A.F.C.M.R. 1984) (holding that where appellant disappeared during trial and was unavailable to complete an AF Form 304, "such absence constitutes a waiver of the right to be represented by appellate defense counsel before this Court just as that absence waives the accused's right to be present at trial").

We note that our superior court has held that where an appellant waives his right to appellate defense counsel on the day of his trial, such waiver is premature and without effect because it takes place prior to the convening authority's action. *United States v. Avery*, 34 M.J. 160 (C.M.A. 1991) (mem.). Here, the appellant signed two AF Forms 304 – one at the conclusion of trial and one following the convening authority's action. Thus, the appellant's waiver was not premature and has legal effect.

[1] One other situation requiring appellate defense counsel occurs when the United States is represented by counsel. No appellate government attorneys have entered appearances in this case on behalf of the Government.

Having found that we are to review the record without the benefit of an appellate brief, we find that the findings and sentence in this case are legally and factually sufficient, and that they should be approved. The appellant's conviction came after a previous nonjudicial punishment action and a summary court-martial conviction, both for alcohol-related incidents. In August 2012, his commander notified the appellant of his intent to administratively discharge the appellant. The appellant responded that night by consuming alcohol to excess and damaging three dayrooms in his dormitory buildings. The appellant smashed televisions and ovens, placed a microwave oven in a sink and ran water over it, pulled a refrigerator icemaker line out of the wall, threw furniture out the window, and stopped up a sink and let the water run until it drenched the floor, leaking into the ceiling of the floor below. Altogether, more than 30 items were damaged, plus damage to facilities. Estimates of damage to property and the building approached $20,000, and the dayrooms were unusable for residents for some time.

We reviewed the record in its entirety and carefully considered all possible issues in this case. In particular, we focused on the appropriateness of the appellant's sentence, the providency of the appellant's guilty plea, whether the military judge properly admitted the testimony of a mental health provider in sentencing, and whether the appellant was entitled to credit for an alleged violation of Article 13, UCMJ, 10 U.S.C. § 813. We find that none of these issues warrants relief.

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred.[2] 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).

[2] We note one issue with the record of trial. In sentencing proceedings the Government introduced a record of nonjudicial punishment imposed upon the appellant on 21 June 2012. The record of nonjudicial punishment proceedings indicates that the appellant submitted a written presentation for the commander's consideration, but that written presentation is not included in the record of trial. Normally, when the Government introduces derogatory information from an accused's personnel record, it must, if challenged by the defense, also introduce the favorable information which is included within the record. *United States v. Salgado-Agosto*, 20 M.J. 238, 239 (C.M.A. 1985). However, where defense counsel does not identify any such favorable documents or objects to the introduction of the derogatory evidence, we may presume that the record is complete and any error is waived. *Id.*; *United States v. Merrill*, 25 M.J. 501, 503 (A.F.C.M.R. 1987). Since defense counsel did not object to the introduction of the nonjudicial punishment record and did not identify that the appellant provided a response, we presume that the record of trial is complete and any error is waived.

Accordingly, the approved findings and the sentence are

AFFIRMED.

FOR THE COURT

LEAH M. CALAHAN
Deputy Clerk of the Court