UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic DEAN R. ROEHRIG
United States Air Force

ACM S30785

28 December 2006

Sentence adjudged 3 December 2004 by SPCM convened at Sheppard Air Force Base, Texas. Military Judge: Mary M. Boone (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 100 days.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Karen L. Hecker, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Jamie L. Mendelson.

Before

BROWN, MATHEWS, and THOMPSON
Appellate Military Judges

PER CURIAM:

This case was originally submitted on its merits. During our initial review, we noted that a prosecution exhibit offered and admitted at trial was missing from the record. This exhibit, a videotape purportedly depicting the appellant at the time of his apprehension for driving under the influence of alcohol, was offered and admitted in conjunction with the appellant's plea of guilty to the offense of drunk driving, in violation of Article 111, UCMJ, 10 U.S.C. § 911. We ordered counsel for the government to attempt to locate the missing exhibit and, when they proved unable to do so, we specified the following issue:

> WHETHER THE RECORD OF TRIAL IS COMPLETE, AS REQUIRED BY RULE FOR COURTS-MARTIAL 1103(b)(2)(D)(v), WHERE A PROSECUTION EXHIBIT ADMITTED INTO EVIDENCE, SPECIFICALLY, PROSECUTION EXHIBIT 6, A VIDEOTAPE, IS MISSING FROM THE RECORD.

We reviewed the briefs submitted by counsel for both sides on this issue and commend them for their excellent work. The appellant contends that the omission of the videotape renders the record incomplete. Relying primarily upon *United States v. Henry,* 53 M.J. 108 (C.A.A.F. 2000), the government argues that even though the exhibit is missing its absence is not a "substantial" omission and the appellant has suffered no prejudice thereby. We consider this issue de novo. *Id.* at 110.

It is clear the record does not comport with Rule for Courts-Martial (R.C.M.) 1103(b)(2)(D)(v), requiring inclusion of all exhibits admitted at trial. Whether this omission entitles the appellant to relief, however, depends on whether it renders the record "incomplete" within the meaning of Article 54(c), UCMJ, 10 U.S.C. § 854(c). Answering this question requires the analysis suggested by the government: we must determine whether the omitted matter is substantial or insubstantial. In so doing, we generally require an undisputed description of its contents. *United States v. Mariscal,* ACM S29424 (A.F. Ct. Crim. App. 14 Jul 1998) (unpub. op.). We have such a description here.

According to the detailed stipulation of fact signed by the appellant, the missing videotape shows a field sobriety test and breath test performed by the appellant – with varying degrees of cooperation and success – at the Wichita Falls, Texas, Police Department (WFPD). The appellant admitted during his providency inquiry that he "had too much to drink" the night he was arrested and was "not thinking rationally" as a consequence of his overindulgence, and further admitted that the now-missing videotape showed his condition at the WFPD station. Finally, in his unsworn statement, the appellant described the impact of seeing the videotape:

> Earlier today I sat down and watched the video from my DUI. *I was very appalled at my behavior* and couldn't believe that I put my life and others [*sic*] lives in danger. Please do not think this is how I normally act. *Watching that video was like seeing a completely different person. I do not like how I acted* after I had been drinking. *Seeing the video is something that motivates me to never drink alcohol again, because I can obviously not drink responsibly and I am not the same person after I have been drinking.* I wish to never put myself or anyone else in that situation again, and I believe that this is something I can achieve by not drinking alcohol.

Defense Exhibit O, ¶ 14 (emphasis added).

While we cannot view the tape for ourselves, we are able to conclude from the appellant's undisputed description that it shows him visibly intoxicated. This is consistent with the appellant's description of his condition during the providency inquiry and in the stipulation of fact. Thus, the omission of the videotape, while inexplicable, was also insubstantial. *See Henry*, 53 M.J. at 111. The record, *considered as a whole,* is complete within the meaning of Article 54(c), UCMJ, and is sufficient to permit us to perform our statutory obligations under Article 66(c), UCMJ, 10 U.S.C. § 866(c).

The 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 findings and sentence are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator