

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JEREMY B. RUSSELL
United States Air Force

ACM 37210

12 March 2009

Sentence adjudged 20 December 2007 by GCM convened at Francis E. Warren Air Force Base, Wyoming. Military Judge: Timothy D. Wilson.

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Major Shannon A. Bennett, and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain Coretta E. Gray.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

Contrary to his plea, the appellant was convicted of one specification of wrongfully and knowingly possessing child pornography in violation of 18 U.S.C. § 2252 (a)(4)(A), in violation of Article 134, UCMJ, 10 U.S.C. § 934. The approved sentence consists of a bad-conduct discharge and reduction to E-1.

The issue on appeal is whether the military judge abused his discretion by granting the government a 40-day continuance during the testimony of its first merits witness in a contested members' trial due to the absence of a prosecution witness whose absence was caused by the United States. Finding no prejudicial error, we affirm.

Background

Based upon information provided to the Air Force Office of Special Investigations (AFOSI), they obtained a search warrant and seized the appellant's computer and some CDs from the appellant's room. The items were sent to Defense Computer Forensic Laboratory (DCFL) for analysis. The AFOSI then interviewed the appellant. The appellant confessed to possessing child pornography by saying, "I am admitting to downloading illegal images of the child pornography. Performing adult searches on my computer led to illegal underage files coming up. I unfortunately was curious and different [sic] various intervals have downloaded things I knew was [sic] illegal. It has ranged from almost all ages from toddler [sic] to 17."

At the initial hearing on the merits, in November 2007, the government called the expert computer forensic examiner, Ms. VSS, to testify about what she discovered on the computer seized from the appellant's dormitory room. The defense objected as to lack of foundation and the military judge sustained the objection. The government then called one of the two AFOSI agents who had worked on the case. Special Agent KEM's involvement in the case included: being present when the computer was seized, being involved in the appellant's interview, being the equipment custodian who receipted for the computer and CDs, and being the agent who released the computer to another agent to be shipped to DCFL. Because Special Agent KEM could not remember who wrote the address on the appellant's Air Force Form 1168 and on the affidavit for the warrant, the military judge sustained another defense objection that the agent had not provided proper foundation tying the computer examined by the expert to the appellant.

After the military judge sustained the objection to lack of foundation, the government counsel requested a delay to obtain the other AFOSI agent, Special Agent MRG, who was present and involved in the search, seizure, and interview. The trial counsel explained that they had attempted to have Special Agent MRG present for trial but the agent had been sent on a mission-essential temporary duty (TDY), and the AFOSI headquarters had refused to cancel the TDY. The government requested a continuance until 21 November 2007.

The defense counsel objected. The objection was overruled and a continuance was granted until 18 December 2007, when the military judge and the parties were next available.

On 18 December 2007, the trial defense counsel made a Motion to Dismiss based upon an "Unjust Continuance." The defense pointed out that the computer expert had continued her investigation during the interim and more damaging evidence had been discovered. The judge denied the motion and made thorough findings of fact and conclusion of law, and the trial resumed.

Discussion

A military judge's decision to grant or deny a continuance is reviewed for an abuse of discretion. *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997); *United States v. Wiest*, 59 M.J. 276, 279 (C.A.A.F. 2004). Factors to be considered include "surprise, nature of any evidence involved, timeliness of the request, . . . length of continuance, prejudice to opponent, moving party received prior continuances, good faith of moving party, . . . possible impact on verdict, and prior notice. *Miller*, 47 M.J. at 358 (citations omitted). Rule for Courts-Martial 703(b)(3) states

[I]f the testimony of a witness who is unavailable is of such central importance to the issue that it is essential to a fair trial, and if there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness' presence or shall abate the proceedings, unless the unavailability of the witness is the fault of or could have been prevented by the requesting party.

The military judge did not abuse his discretion when he denied the defense motion based upon the continuance. He found that there was no legal prejudice to the appellant and that the government had acted in good faith. We agree. Further, the government presented what it thought to be an adequate substitute, Special Agent KEM. Although the military judge did not agree, that does not necessitate this Court find it was the government's fault that Special Agent MRK was not present at the initial session.

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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL



STEVEN LUCAS, YA-02, DAF
Clerk of the Court