UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain JEFF R. RUTHERFORD
United States Air Force

ACM 36651

19 June 2007

Sentence adjudged 21 December 2005 by GCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: Ronald A. Gregory (sitting alone).

Approved sentence: Dismissal, confinement for 3 months, forfeiture of $1,000.00 pay per month for 3 months, and a reprimand.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Anniece Barber, and Major Chadwick A. Conn.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, and Captain Donna S. Rueppell.

Before

FRANCIS, JACOBSON, and SCHOLZ
Appellate Military Judges

OPINION OF THE COURT

FRANCIS, Judge:

Consistent with his pleas, a military judge sitting as a general court-martial convicted the appellant of one specification each of absence without leave (AWOL), violating a lawful general order, violating a lawful general regulation, and dereliction of duty, in violation of Articles 86 and 92 UCMJ, 10 U.S.C. §§ 886, 892. Contrary to his pleas, the appellant was also convicted of one additional specification of violating a lawful general regulation and one specification of violating a lawful order, both in violation of Article 92, UCMJ. The adjudged and approved sentence consists of a

dismissal, confinement for 3 months, forfeiture of $1,000.00 pay per month for 3 months, and a reprimand.

The appellant raises two allegations of error: 1) The military judge erred by admitting evidence obtained during an illegal search of the appellant's government-issued laptop computer; and 2) The evidence is legally and factually insufficient to support his conviction for violating a "no-contact" order issued by his commander.

Background

In June 2004, the appellant deployed to Afghanistan to serve as commander of the Air Force Office of Special Investigations (AFOSI) detachment at Bagram Airfield. Shortly thereafter, he attended a conference in Qatar, where he met Master Sergeant (MSgt) NK. MSgt NK was assigned to the AFOSI detachment at Karshi-Khanabad Air Base (K2), Uzbekistan, where she was the special agent in charge. The appellant and MSgt NK continued to keep in touch via telephone and e-mail communications after returning to their respective duty locations. Although both agents were married to others, their communications quickly grew more personal and more frequent as a mutual romantic attraction developed. By July 2004, they were communicating daily by both telephone and e-mail, with the telephone calls sometimes lasting 2-3 hours. Virtually all of their communications used government telephone, computer and e-mail systems.

Ultimately, long distance communication alone proved unsatisfactory, leading the appellant to twice travel to K2, where he and MSgt NK engaged in sexual intercourse. The second time, the appellant left his command in Afghanistan without authority on 20 August 2004, caught an intra-theater hop to Uzbekistan on a government C-130 aircraft, and spent the weekend with MSgt NK, returning to his duty station on 23 August 2004.

The AFOSI facility at Bagram was a small one, with all agents, including the appellant, sharing a single office. Operating in this environment, the appellant's subordinates soon took note of his personal telephone and e-mail communications with MSgt NK and, in November 2004, one of them reported his behavior to superiors.[1] On 13 November 2004, the appellant's commander relieved him of command, ordered him not to contact MSgt NK, and initiated a Commander Directed Investigation (CDI). In violation of his commander's order, the appellant thereafter continued to contact MSgt NK on multiple occasions, both by telephone and through e-mail messages.

[1] In addition to engaging in an unprofessional relationship with MSgt NK, the appellant, in contravention of a general order prohibiting alcohol use by personnel deployed in Afghanistan, on several occasions drank alcohol in his office and allowed his subordinates to do so.

Search of the Appellant's Government Computer

In his first assignment of error, the appellant asserts the military judge improperly denied his motion to suppress improper personal e-mail messages found on his government computer and other "derivative" evidence. We do not agree.

We review rulings on motions to suppress for abuse of discretion. *United States v. Monroe*, 52 M.J. 326, 330 (C.A.A.F. 2000); *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). The trial judge's conclusions of law on such motions are reviewed de novo and his findings of fact will be upheld unless clearly erroneous. *Ayala*, 43 M.J. at 298. When conducting such a review, "we consider the evidence 'in the light most favorable to the' prevailing party." *Monroe*, 52 M.J. at 330, (quoting *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996).

The Fourth Amendment[2] protects individuals against unreasonable searches and seizures and, with limited exceptions, evidence obtained in violation thereof is inadmissible. Mil. R. Evid. 311. The threshold requirement for a protectable Fourth Amendment interest is a subjective expectation of privacy that is objectively reasonable. *United States v. Long*, 64 M.J. 57, 61 (C.A.A.F. 2006). "Whether a party has manifested a subjective expectation of privacy is a question of fact, reviewed under the clearly erroneous standard. Whether that subjective expectation is objectively reasonable is a matter of law subject to de novo review." *Monroe*, 52 M.J. at 330, (quoting *United States v. Maxwell*, 45 M.J. 406, 417 (C.A.A.F. 1996)).

Our superior court recently held that military members may in some cases have a Fourth Amendment privacy interest in personal information stored on or transmitted through government computer and e-mail systems. *See Long*. However, such protection is not automatically afforded every personal use of a government computer. Rather, "the reasonableness of a privacy expectation will differ according to the context, and the 'operational realities of the workplace'". *Long*, 64 M.J. at 64 (quoting *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987)).

At trial, the appellant's defense counsel asserted there were two searches of his government-issued laptop computer; one by Technical Sergeant (TSgt) BK, a subordinate, and one by Special Agent TC, the person appointed by the appellant's commander to conduct the CDI. Trial defense counsel argued that both searches were illegal and that evidence obtained by the government as a result of those searches, including any derivative evidence, should be suppressed. Counsel asserted that "derivative evidence" included the testimony of MSgt NK about their relationship and

[2] U.S. CONST. amend. IV.

e-mail communications. Although the appellant's arguments on appeal are less comprehensive, we address all aspects of the suppression motion.

The first asserted "search" of the appellant's government computer was by TSgt BK, who was deployed to the Bagram AFOSI detachment during the period the appellant was assigned there as the commander. As the unit Information Manager and Work Group Manager, TSgt BK was responsible for keeping the office computers operating properly. TSgt BK testified the appellant asked her on several occasions to resolve problems with his government-issued laptop computer.[3] Each time, the appellant left his computer on and unlocked, allowing TSgt BK access to the machine without having to use the administrative access rights she held as the Work Group Manager. On one occasion when TSgt BK worked on the appellant's laptop, she saw an inappropriate personal e-mail from MSgt NK to the appellant. She did not search the appellant's e-mail, but simply saw it on the open screen when she touched the computer mouse and the screen saver automatically deactivated. Based on these facts, the military judge correctly ruled that the appellant did not have a reasonable expectation of privacy in the personal e-mail viewed by TSgt BK, in that the appellant invited her to look at his computer and the e-mail was in plain view when she did so. Indeed, given these circumstances, TSgt BK's actions were not even a "search" within the meaning of Mil. R. Evid. 311-315.

The primary focus of the appellant's motion to suppress was the search of his government-issued laptop computer by Special Agent TC after he was removed from command. That search, accomplished without a search authorization, disclosed 486 pages of improper personal e-mail correspondence between the appellant and MSgt NK. At the time she conducted the search, Special Agent TC had been appointed by the appellant's commander to investigate allegations of misconduct. She had already personally suspected the appellant of having committed offenses punishable under the UCMJ, and she suspected that evidence of those offenses was contained on the appellant's government-issued laptop computer.

The military judge found that Special Agent TC's search did not violate the appellant's Fourth Amendment rights because the appellant, given the circumstances in existence at the time, did not have a reasonable expectation of privacy in the information on his computer, and further that such information would in any event have been inevitably discovered through other legitimate means. Evidence obtained as a result of an unlawful search is admissible when it inevitably would have been discovered through independent, lawful means. Mil. R. Evid. 311(b)(2); *Nix v. Williams*, 467 U.S. 431

[3] In direct conflict with this testimony, the appellant testified he never asked TSgt BK to fix his computer and certainly not while leaving his computer unlocked, with an open e-mail from MSgt NK on the screen. Based on his findings of fact, it is evident the military judge found TSgt BK's testimony more credible. Recognizing that the military judge had the opportunity to personally view the witnesses and assess their credibility, his findings of fact concerning TSgt BK's actions were not clearly erroneous.

(1984); *United States v. Kaliski*, 37 M.J. 105, 108 (C.M.A. 1993). Judicial determinations that the "inevitable discovery" doctrine applies are reviewed using an abuse of discretion standard. *Kaliski*, 37 M.J. at 109.

Testifying in support of the motion to suppress, the appellant admitted that the government laptop on which the contested e-mails were found was intended for use by commanders of the Bagram AFOSI detachment. The appellant's predecessor turned the computer over to the appellant when he arrived and the appellant was required to turn it over to his successor. The appellant's commander, Colonel (Col) M, testified that at the time he relieved the appellant of command and seized the government laptop, the appellant was nearing the end of his deployment. Further, the officer assigned to take the appellant's place as detachment commander was already on station. The two were in the process of transitioning and the command change would have occurred "within a matter of days." Despite the imminent command change, the illicit e-mails remained on the government computer the appellant was required to pass to his successor and the e-mails themselves were not separately encrypted or protected to preclude access by someone using that computer. Given the arrival of the appellant's replacement, and the impending need to turn the computer over to him for his use as the commander-designate, the military judge found both that the appellant did not have a subjective expectation of privacy in personal information on that computer, and that in any event, it would have been discovered by the new commander when he started to use the same computer.[4] Based on the evidence, the judge's determination that the appellant did not have a subjective expectation of privacy was not clearly erroneous. We also find no abuse of discretion in his determination that, even if there was a protectable privacy interest, the doctrine of inevitable discovery applied. *Id.*

The appellant's motion to suppress encompassed not only the e-mails found during Special Agent TC's search, but also the testimony of MSgt NK, on the theory that her testimony was derivative of that search. The evidence does not support the appellant's claim. Based on the initial allegation of misconduct she was appointed to investigate, Special Agent TC already knew of MSgt NK's existence and of her alleged inappropriate relationship with the appellant before the government computer was searched. Further, when MSgt NK was interviewed by AFOSI, she was not confronted with copies of the e-mails from the appellant's computer and was not told that such e-mails had been seized. Given these two factors, MSgt NK's testimony, including her testimony about the extent of their e-mail communications, was not "derivative" of the e-mails found during the search of the appellant's government computer.

[4] The appellant testified he believed the personal e-mails on his government computer were private. Based on the military judge's findings after weighing all the evidence, it is evident that he once again found the appellant's testimony less than credible.

Legal and Factual Sufficiency

In his second assignment of error, the appellant claims the evidence was legally and factually insufficient to support his conviction for violating his commander's "no-contact" order. The appellant admitted, through a stipulation of fact, that his commander ordered him not to contact MSgt NK and that he violated that order. However, the appellant contends the order was illegal, in that it was overly broad and was not limited in duration. Again, we do not agree.

We review claims of legal and factual insufficiency de novo, examining all evidence properly admitted at trial. *See* Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, any rational trier of fact could have found the elements of the contested crimes beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). 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 ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325.

Whether an order is legal is a question of law we review de novo. *United States v. Moore*, 58 M.J. 466, 467 (C.A.A.F. 2003). "[A]n order is presumed lawful, provided it has a valid military purpose and is a clear, specific, narrowly drawn mandate." *Id*. at 468. To determine if an order meets this test, we look to "the specific conduct at issue in the context of the purposes and language of the order", not to hypothetical applications. *Id.*; *United States v. Jeffers*, 57 M.J. 13, 15 (C.A.A.F. 2002).

The appellant stipulated at trial that when his commander relieved him of command and told him he was under investigation, he ordered the appellant not to contact "MSgt [NK] or anyone else regarding the investigation other than his defense counsel." The appellant argues the order is illegal because it contained no specified expiration date and could be read to preclude communications with his spouse, his minister, or even a qualified mental health provider.

The appellant's argument ignores reality. He was not charged with violating the order by talking to his wife, minister, or health provider, but by contacting MSgt NK, the very person with whom he was suspected of committing the offenses under investigation. The appellant's commander issued the order both to preclude the potential destruction of evidence and to stop the unprofessional relationship between the appellant and MSgt NK. Both are valid military purposes. *Moore*, 58 MJ at 468-69. Further, when read in context

of the events at the time, the order was clearly tied to the investigation of the appellant's offenses and, by logical inference, was bounded by the time needed to complete that investigation. The appellant's admitted violations of the no-contact order were not remote in time, but occurred within the first 30 days after the order was given, while the investigation was still underway. Under these circumstances, the order was lawful.

Having determined the order was lawful, we find the facts stipulated by the appellant, considered in the light most favorable to the prosecution, were sufficient for a reasonable factfinder to find beyond a reasonable doubt all essential elements of the offense of violation of a lawful order. Further, we ourselves are convinced beyond a reasonable doubt the appellant is guilty of that offense.

Conclusion

We conclude 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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

MARTHA E. COBLE-BEACH, TSgt, USAF
Court Administrator