UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic Kemuel W. Samuels
United States Air Force

ACM S32060

20 September 2013

Sentence adjudged 26 April 2012 by SPCM convened at Altus Air Force Base, Oklahoma. Military Judge: Natalie D. Richardson (sitting alone).

Approved Sentence: Bad-conduct discharge and confinement for 4 months.

Appellate Counsel for the Appellant: Captain Nicholas D. Carter.

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

Before

ORR, HARNEY, and MITCHELL
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MITCHELL, Judge:

The appellant was convicted by a military judge sitting as a special court-martial, contrary to his pleas, of three specifications of failure to go; one specification of being absent without leave; two specifications of disobeying a noncommissioned officer's orders; and one specification of dereliction of duty for smoking in his dorm room, in violation of Articles 86, 91, and 92, UCMJ, 10 U.S.C. §§ 886, 891, 892. The adjudged and approved sentence was a bad-conduct discharge and confinement for 4 months.

On appeal, the appellant avers two issues: (1) The record is incomplete because the trial defense counsel's Motion to Compel an Expert Consultant does not include the

two referenced attachments, and (2) The military judge's decision to deny the defense request for an expert consultant in the field of "sleep medicine" was erroneous. We disagree on both issues and affirm the findings and sentence.

Background

The appellant was a 21-year-old Airman with four years of service at the time of trial. Prior to the court-martial, he was referred to a Medical Evaluation Board (MEB) for a disability determination based upon, *inter alia*, his sleep apnea diagnosis. By the time of trial, the appellant had been reduced from a Senior Airman to an Airman Basic.

The court-martial charges arose from a course of conduct over several months, between January and March 2012. During that time, on multiple occasions, the appellant failed to report to work at his scheduled duty time of 0730. Supervisors and coworkers would wake him and the appellant would show up to work about 30 minutes to an hour later. On one occasion at the end of January 2012, his supervisor attempted to contact the appellant multiple times. When the appellant answered his phone sometime around noon, he remarked to his supervisor, "It's already noon," and, "Why do I need to come in to work?" On another occasion, the squadron commander ordered a dorm cleanup to occur on a Saturday morning. On the morning of the clean-up, the appellant was not present at his dorm room and never appeared for duty that day.

The appellant also failed to complete his physical fitness test in early January 2012. His supervisor ordered him to meet with his primary care manager, however, the appellant failed to schedule that appointment. On several occasions, the appellant smoked in his dorm, which is against a policy that is briefed to all dorm residents at move-in and which the first sergeant reminded the appellant of. Further, the appellant failed to keep his room clean, after receiving an order from his first sergeant, a Master Sergeant.

Completeness of the Record

On 10 April 2012, trial defense counsel filed a Motion to Compel Production of Expert Consultant in the field of "sleep medicine" with the military judge. The motion listed as attachments the trial defense counsel's earlier request to the convening authority and the convening authority's denial of that request. Trial counsel filed a response in opposition on 12 April 2012, which also listed the convening authority's denial as an attachment. On 17 April 2012, the military judge denied the trial defense counsel's motion and provided her ruling in writing. As part of her findings of fact, she included information from the trial defense counsel's request to the convening authority and quoted from the convening authority's earlier denial of the expert request.

At trial, trial defense counsel marked his Motion as Appellate Exhibit IV, and noted it was a three-page document (it was actually a four-page document). Trial counsel marked their Response to the Motion as Appellate Exhibit V, a five-page document. Appellate Exhibit VI is the military judge's ruling. Neither Appellate Exhibit IV nor Appellate Exhibit V contain the listed attachments: the original request to the convening authority and the convening authority's denial.

On 7 May 2012, trial defense counsel certified that he examined the record of trial. Trial counsel previously certified that he reviewed the record of trial and determined it to be accurate and complete. The record of trial was authenticated by the military judge on 8 May 2012. By 14 May 2012, both trial defense counsel and the appellant received a complete copy of the authenticated record of trial. Neither the appellant nor his trial defense counsel raised any issue regarding the completeness of the record as an issue during clemency or at any other point prior to seeking appellate relief.

On 15 January 2013, we granted the Government's Motion to Attach Documents in order to supplement the record. Government appellate counsel then amended the record with the attachments and an affidavit from trial counsel certifying as to authenticity of the documents.

A complete record of trial is required in a special court-martial when the sentence includes a bad-conduct discharge. Article 54(c)(1)(B), UCMJ, 10 U.S.C. § 854(c)(1)(B); Rule for Courts-Martial (R.C.M.) 1103(b)(2)(B). *See also United States v. Santoro*, 46 M.J. 344 (C.A.A.F. 1997). R.C.M. 1103(b)(2)(D) requires appellate exhibits to be included in the record of trial.

A substantial omission from the record of trial renders it incomplete. *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000). "Whether an omission from a record of trial is 'substantial' is a question of law that we review de novo." *United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000). A record of trial may be complete and verbatim if the omissions are insubstantial. *Henry*, 53 M.J. at 111 (record complete even though four prosecution exhibits omitted from the record because omission was not substantial as the rest of the record of trial incorporated the information contained therein); *United States v. Barnes*, 12 M.J. 614 (N.M.C.M.R. 1981), *aff'd on other grounds*, 15 M.J. 121 (C.M.A. 1983) (omission from the record of questionnaires completed by members prior to voir dire did not make record incomplete as omission was insubstantial). *Cf. United States v. McCullah*, 11 M.J. 234, 236-37 (C.M.A. 1981) (prosecution exhibit that was prima facie evidence omitted from record was substantial omission and left the record incomplete); *United States v. Abrams*, 50 M.J. 361, 364 (C.A.A.F. 1999) (failure to attach personnel records of witness to record, which trial judge reviewed, but did not release to the defense, was substantial).

We analyze whether an omission is substantial on a case-by-case basis. *Abrams*, 50 M.J. at 363. The omission of rulings or evidence which affect an appellant's rights at trial render appellate review impossible and are substantial omissions. *Id.* at 364; *United States v. Gray*, 7 M.J. 296, 298 (C.M.A. 1979) (omission of sidebar conference involving a ruling by the trial judge that affected the appellant's rights was substantial).

Because a substantial omission renders a record incomplete, it raises a presumption of prejudice that the Government must rebut. *United States v. Harrow*, 62 M.J. 649, 654 (A.F. Ct. Crim. App. 2006) (citing *McCullah*, 11 M.J. at 237). The Government may rebut the presumption by reconstituting the omitted portion of the record. *Id*. at 654-55. "The main reason for a verbatim record is to ensure an accurate transcript for the purpose of appellate review." *United States v. Harmon*, 29 M.J. 732, 733 (A.F.C.M.R. 1989).

Here, the omission of the trial defense counsel's request to the convening authority is not substantial. The Motion to the military judge contained much of the same information as included in the request to the convening authority. The primary purpose of this attachment was to establish that an earlier request had been made to the convening authority pursuant to R.C.M. 703(d). Similarly, the omission of the document recording the convening authority's denial of the request for expert assistance is not substantial in this case. The record is clear that the appellant, trial defense counsel, trial counsel, and the military judge were aware the convening authority denied the request. Even if either of these omissions were substantial, the Government has overcome its burden by appending the documents to the record. The record of trial now contains the documents that were reviewed by the military judge. Appellate review of the military judge's decision is possible and is conducted below.

Motion to Compel Expert Consultant in "Sleep Medicine"

The appellant next argues the military judge abused her discretion in denying his motion to compel the production of an expert consultant in the field of sleep medicine.

We review a military judge's ruling on a request for expert assistance for an abuse of discretion. *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (citation omitted). An abuse of discretion occurs when: "(1) [T]he findings of fact [predicating the ruling] are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) [an] application of the correct legal principles to the facts is clearly unreasonable." *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010) (citing *United States v. Mackie*, 66 M.J. 198, 199 (C.A.A.F. 2008)). The "standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (internal quotation marks and citations omitted). When the trial judge has taken action in a discretionary matter, this Court cannot set that action aside unless

there is a "definite and firm conviction" the trial judge made a clear error of judgment. *Ellis*, 68 M.J. at 344.

"An accused is entitled to expert assistance provided by the Government if he can demonstrate necessity." *United States v. Gunkle*, 55 M.J. 26, 31 (C.A.A.F. 2001). "[T]he accused has the burden of establishing that a reasonable probability exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial." *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008) (citations ommitted). To satisfy the first prong of this test, our superior court applies a three-part test where the defense must show (1) why the expert is necessary; (2) what the expert would accomplish for the accused; and (3) why trial defense counsel is unable to accomplish that without the expert assistance. *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994). The appellant must show more than the mere possibility of assistance from a requested expert. There must be a showing of a reasonable probability that the expert would assist the defense and that denial would result in a fundamentally unfair trial. *Lloyd*, 69 M.J. at 99. The third prong requires the defense counsel to do their own homework and educate themselves to attain competence. *United States v. Warner*, 59 M.J. 573, 578 (A.F. Ct. Crim. App. 2003) (citing *United States v. Kelly*, 39 M.J. 235 (C.M.A. 1994)).

Here, the military judge concluded that the defense failed to meet its burden to show the necessity of the expert consultant. The military judge determined that the trial defense counsel had the basic skills to determine if the appellant's sleep apnea was relevant in findings or sentencing. The military judge also concluded that the trial defense counsel had access to the appellant's medical records, to include his medical evaluation records, and his treating physicians, in order to evaluate the information and to present evidence at trial as needed. The military judge concluded that the defense did not establish that there was a real probability that denial would result in a fundamentally unfair trial.[1] The evidence in the record of trial supports the military judge's findings and shows she applied the appropriate legal standards in making her determination. Therefore, we hold that the military judge did not abuse her discretion when she denied the defense motion for an expert in sleep medicine.

[1] Although unknown to the military judge at the time, the appellant in his unsworn statement blamed his tardiness on an inability to work on the day shift and that he never had trouble while on the later swing or mid-shifts. The appellant also included that his medical doctor prescribed the use of a continuous positive airway pressure (CPAP) machine which helped him sleep for a few weeks. However, the appellant decided to stop using the CPAP and then had multiple instances of late reporting. The appellant thus would need to show that an expert was necessary when the appellant voluntarily ceased treatment for his medical condition.

Conclusion

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

Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court