UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant DENNIS R. SAVARD
United States Air Force

ACM 37346

19 January 2010

Sentence adjudged 19 May 2008 by GCM convened at Yokota Air Base, Japan. Military Judge: Mark L. Allred.

Approved sentence: Bad-conduct discharge, confinement for 1 year, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Jennifer J. Raab, and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain G. Matt Osborn, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Senior Judge:

Contrary to his pleas, a panel of officers sitting as a general court-martial convicted the appellant of six specifications of making a false official statement and two specifications of larceny of military allowances and entitlements on divers occasions, in violation of Articles 107 and 121, UCMJ, 10 U.S.C. §§ 907, 921. The adjudged and approved sentence consists of a bad-conduct discharge, one year of confinement, and reduction to the grade of E-1. On appeal, the appellant asks this Court to: set aside the findings and sentence and dismiss the charges and specifications with prejudice, set aside

the findings and sentence and remand the case for a new trial, or set aside the sentence and remand the case for a new sentencing hearing.

As the basis for his request, the appellant opines the military judge: (1) erred by denying the motion to dismiss the charges due to a Rule for Courts-Martial (R.C.M.) 707 speedy trial violation because the military judge abused his discretion when he granted the government's motion for a continuance to conduct depositions; (2) violated R.C.M. 905(h) by denying the defense motion to reconsider the denial of a motion to submit questionnaires to members without conducting an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session despite the appellant's request for an Article 39(a), UCMJ, session; (3) violated R.C.M. 905(h) by denying the appellant's motion to forbid depositions without conducting an Article 39(a), UCMJ, session despite the appellant's request for an Article 39(a), UCMJ, session; (4) erred by preventing the defense from introducing evidence during findings that the appellant had applied for retirement; and (5) erred by ruling that the appellant's offer to make restitution was inadmissible as extenuation and mitigation evidence during the sentencing portion of trial. Finding no prejudicial error, we affirm the findings and the sentence.

Background

On 10 October 2006, the Air Force Audit Agency reported the results of a base-wide audit of personnel assigned to Yokota Air Base (AB), Japan. The purpose of the audit was to verify the military allowances and entitlements received by the Yokota AB personnel. The audit revealed the appellant claimed his wife and daughter lived in Laguna Hills, California; however, they actually resided in the Philippines. As a result of the appellant's misrepresentations, which he had made on various military pay documents, the Air Force significantly overpaid the appellant military allowances and entitlements.

On 18 December 2007, charges were preferred against the appellant. On 13 March 2008, the appellant moved to submit questionnaires to the prospective court members. The military judge denied the appellant's motion. On 21 March 2008, the appellant requested an Article 39(a), UCMJ, session and submitted a motion to prevent the government from conducting depositions. Without conducting an Article 39(a), UCMJ, session, the military judge denied the appellant's motion. On 26 March 2008, the appellant requested an Article 39(a), UCMJ, session and moved for reconsideration of his motion to submit questionnaires to the prospective court members. The military judge, without conducting an Article 39(a), UCMJ, session, reconsidered and denied the appellant's motion to submit the questionnaires.

The trial was originally scheduled to proceed on 1 April 2008, but on 26 March 2008, the government moved for a continuance to conduct depositions of witnesses in the Philippines. The appellant opposed the motion for a continuance and informed the

military judge that if the continuance were granted and the trial did not occur on 1 April 2008, the defense "requests that [an Article 39(a), UCMJ, session] on pending motions be set at a later date before trial." On 28 March 2008, the military judge granted the government's motion for a continuance. In granting the government's motion for a continuance, the military judge excluded the time period from 1 April 2008 until arraignment for speedy trial purposes. On 11 May 2008, the appellant asserted a R.C.M. 707 speedy trial violation and moved to dismiss the charges and specifications. The government opposed the motion and the military judge, after hearing arguments by counsel, denied the motion. On 13 May 2008, the appellant was arraigned.

During the findings portion of the trial, the trial counsel asked the military judge for a preliminary ruling on the admissibility of evidence relating to whether the appellant had been granted the opportunity to retire. The military judge held the probative value of the proposed testimony, if relevant, was "outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members." Finally, during presentencing, the appellant moved to admit evidence that the appellant had offered to pay restitution if the government dismissed all charges and specifications and allowed him to retire as a master sergeant. The military judge held the evidence was not admissible as mitigation evidence and any probative value of the evidence was "substantially outweighed by danger of unfair prejudice, confusing the issues, and so forth."

Discussion

Denial of Motion to Dismiss: R.C.M. 707 Speedy Trial Violation

We review the military judge's ruling on a speedy trial motion for an abuse of discretion. *United States v. Dooley*, 61 M.J. 258, 262 (C.A.A.F. 2005). "An abuse of discretion means that when judicial action is taken in a discretionary manner, such action cannot be set aside . . . unless [the reviewing court] has a definite and firm conviction that the [military judge] committed a clear error of judgment." *Id.* (quoting *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004)). Stated alternatively, to set aside the military judge's action we must find his findings of fact, which are given substantial deference, are "clearly erroneous" or "his decision is influenced by an erroneous view of the law." *Id.* (quoting *Gore*, 60 M.J. at 187); *see also United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999). Lastly, the ultimate issue of whether the appellant received a speedy trial is a matter of law that we review de novo. *Doty*, 51 M.J. at 465. We conclude the military judge's findings of fact in this case are not clearly erroneous and, though we are not obliged to defer to his legal conclusion, after due consideration we have no reason to disagree with his analysis.

R.C.M. 707(a) provides, in part, that a military accused must be brought to trial within 120 days after the preferral of charges. However, R.C.M. 707(c) states delays authorized by a military judge are excludable. While the decision on whether to grant or

deny a delay is within the sole discretion of the military judge, to be excludable the reason for the delay must be reasonable. R.C.M. 707(c), Discussion. An example of reasonable delay is time the military judge allots to counsel to secure evidence or witnesses. *Id.*

In the case at hand, the military judge granted the government a delay to secure the depositions of relevant witnesses whom he found unavailable for trial. He also excluded the time period from 1 April 2008 until the arraignment for R.C.M. 707 speedy trial purposes. Lastly, the military judge found that after the excludable delay, 106 days had elapsed between the time of preferral and arraignment and such a delay did not constitute a R.C.M. 707 speedy trial violation.

We have reviewed the military judge's findings of fact and his exclusions and find the military judge did not abuse his discretion by granting the government a continuance for the depositions, excluding the time period for the delay for R.C.M. 707 speedy trial purposes, and ruling that the appellant's R.C.M. 707 speedy trial rights had not be violated. Moreover, having conducted a de novo review on this issue, we find the delay in this case was reasonable and the appellant's R.C.M. 707 speedy trial rights were not violated.[1]

Failure to Grant the Appellant's Requests for Article 39(a), UCMJ, Sessions

Upon request, trial counsel and trial defense counsel are entitled to an Article 39(a), UCMJ, session to present oral argument or to have an evidentiary hearing concerning the disposition of written motions. R.C.M. 905(h). A military judge's decision to deny a requested Article 39(a), UCMJ, session, whether the request is specifically denied or it results from a failure to grant, is reviewed for an abuse of discretion. *United States v. Acosta*, 49 M.J. 14, 18-19 (C.A.A.F. 1998) (citing *United States v. Laurins*, 857 F.2d 529, 538 (9th Cir. 1988)).

Here, prior to making a ruling, the military judge knew of the respective parties' positions on both the use of pretrial questionnaires to voir dire the members and the depositions of unavailable government witnesses. Additionally, once at trial, the appellant had ample opportunity to request reconsideration of the rulings and to present additional evidence and argument. He failed to do so. Most importantly, there has been

[1] The invited error doctrine provides a secondary basis for finding against the appellant on this issue. The record makes clear that the government wanted to proceed with motions, and thus arraignment, on 1 April 2008. However, the appellant, though opposed to the continuance, requested a date after 1 April 2008 to conduct the motions hearing. Therefore, at least some of the delay in arraigning the appellant can be attributed to the appellant's opposition to proceeding with the arraignment on 1 April 2008. An appellant cannot create or exacerbate an error and then take advantage of a situation of his own making. Invited error, as in the case here, "does not provide a basis for relief." *United States v. Raya*, 45 M.J. 251, 254 (C.A.A.F. 1996) (citing *United States v. Johnson*, 26 F.3d 669, 677 (7th Cir. 1994)).

no showing that an Article 39(a), UCMJ, session on these issues would have convinced the military judge to distribute pretrial questionnaires to the members and to prevent the depositions of material, unavailable witnesses. In short, the military judge did not abuse his discretion in failing to grant the appellant's requests for Article 39(a), UCMJ, sessions.

Retirement Evidence During Findings

We review the military judge's Mil. R. Evid. 403 ruling for an abuse of discretion. *United States v. Dewrell*, 55 M.J. 131, 138 (C.A.A.F. 2001). "A military judge enjoys 'wide discretion' in applying Mil. R. Evid. 403. . . . When [he] conducts a proper balancing test under Mil. R. Evid. 403, the ruling will not be overturned unless there is a 'clear abuse of discretion.'" *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000) (internal citations omitted). However, when the military judge does not articulate the balancing analysis on the record, we give his evidentiary ruling less deference. *Id*. Lastly, we give the military judge's evidentiary ruling no deference if he does not perform a Mil. R. Evid. 403 balancing test. *Id*.

When considering the admissibility of retirement evidence during the findings portion of the trial, the military judge conducted a Mil. R. Evid. 403 analysis but he failed to articulate his analysis on the record. Moreover, though he cited the proper Mil. R. Evid. 403 balancing standard in other evidentiary rulings, he cited the wrong standard on this ruling.[2] Thus, we give his ruling no deference and examine the record ourselves. The fact that the appellant may have applied for or may have been granted retirement was, at best, marginally relevant on findings. However, the probative value of the evidence was substantially outweighed by the danger of confusing the issues or misleading the members. Accordingly, the military judge did not abuse his discretion by preventing the admission of this retirement evidence during the findings portion of the trial.

Offer of Restitution

We review a military judge's decision on admission of sentencing evidence for an abuse of discretion. *United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009) (citing *Manns*, 54 M.J. at 166). During presentencing, the defense may present evidence in mitigation and extenuation as well as evidence to rebut materials presented by the government. R.C.M. 1001(c)(1). "Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency." R.C.M. 1001(c)(1)(B). Here, the appellant moved to admit as evidence in mitigation his offer to make restitution in return for a dismissal of all

[2] Mil. R. Evid. 403 provides relevant evidence may be excluded if the probative value of the evidence is "substantially outweighed," not simply "outweighed" as the military judge erroneously stated.

charges and specifications and permission to retire as a master sergeant. The appellant's offer to compromise, in essence an offer that if accepted would have allowed the appellant to both avoid criminal liability for his actions and collect his retirement benefits, hardly qualifies as mitigation evidence. The military judge did not abuse his discretion by excluding evidence of the appellant's offer to provide restitution.

Additionally, assuming, arguendo, that the military judge erred by excluding the appellant's written offer to make restitution, we find no prejudice. Placing the excluded evidence in context with the overall sentencing case and the crimes of which the appellant committed and was sentenced, any error in excluding the evidence did not substantially influence the adjudged sentence. *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005) (citing *United States v. Boyd*, 55 M.J. 217, 221 (C.A.A.F. 2001)). At the end of the day, the military judge did not abuse his discretion in refusing to admit the appellant's offer to compromise.

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