UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant HARLEN L. STAMPER
United States Air Force

ACM 36191

15 December 2006

Sentence adjudged 21 August 2004 by GCM convened at Barksdale Air Force Base, Louisiana. Military Judge: Mary M. Boone.

Approved sentence: Dishonorable discharge, confinement for 4 years, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Lieutenant Colonel Andrew S. Williams, Major David P. Bennett, Captain Kimberly A. Quedensley, and Captain John S. Fredland.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Kimani R. Eason, and Captain Daniel J. Breen.

Before

ORR, MATHEWS, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MATHEWS, Judge:

The appellant was tried at Barksdale Air Force Base, Louisiana, before a general court-martial convened under the authority of the Commander, Third Air Force. A panel of officer and enlisted members found the appellant guilty of committing indecent acts, on divers occasions over the course of a four-year period, with a child under the age of 16, in violation of Article 134, UCMJ, 10

U.S.C. § 934. The appellant's approved sentence consists of a dishonorable discharge, confinement for 4 years, and reduction to E-1.

On appeal, the appellant challenges the legitimacy of his court-martial, arguing that he is entitled to a new trial because the officer serving as the general court-martial convening authority was improperly appointed to command and the court-martial therefore lacked jurisdiction. He further claims that he received ineffective assistance of counsel when his lawyer, faced with an adverse ruling regarding the admissibility of incriminating rebuttal evidence, decided to offer that evidence during the defense case-in-chief. Finally, the appellant contends that the military judge erred in two respects: first, by admitting the rebuttal testimony of a witness who described the appellant's sexual interest in underage girls, and second, by instructing the members that confinement is "corrective rather than punitive." Finding merit as to only the last assignment of error, we affirm the findings and reassess the sentence.

Improper Convening Authority

The appellant contends that the appointment of Colonel (Col) JW as Commander, Third Air Force (3 AF) was improper, because at least two officers senior in grade eligible to command 3 AF were present for duty within that unit at the time of Col JW's appointment. The appointment of Col JW violated Air Force Instruction (AFI) 51-604, *Appointment to and Assumption of Command* (1 Oct 2000), ¶¶ 2.5 and 2.5.1, which provide, respectively, that officers "assigned to an organization, present for duty, eligible to command the organization, *and senior or equal in grade to all other officers in the organization* may be appointed to command," and that when "one or more officers senior in grade . . . eligible to command and present for duty, are assigned to an Air Force unit, superior competent authority *may not appoint another officer of lower grade to command that unit* . . . ." (emphasis added).[*]

While we by no means condone this violation of Air Force regulations, as we recently wrote in a similar case, *United States v. Ross,* ACM 36139 (A.F. Ct. Crim. App. 13 Dec 2006), we believe this issue is controlled by our superior appellate court's decisions in *United States v. Bunting*, 15 C.M.R. 84 (C.M.A. 1954), *United States v. Jette,* 25 M.J. 16 (C.M.A. 1987), *United States v. Yates*, 28 M.J. 60 (C.M.A. 1989), *United States v. Watson,* 37 M.J. 166 (C.M.A. 1993), *United States v. Brown*, 39 M.J. 114 (C.M.A. 1994), and *United States v. Kohut*, 44 M.J. 245 (C.A.A.F. 1996). Considering the appellant's claim de novo, we find

[*] A new version of AFI 51-604 was issued on 4 April 2006. There are no differences between the versions of the instruction material to the resolution of the appellant's claim.

no basis for relief. *United States v. Hardy,* 60 M.J. 620 (A.F. Ct. Crim. App. 2004).

Ineffective Assistance of Counsel

We consider the appellant's claim of ineffective assistance of counsel de novo. *United States v. Wean,* 45 M.J. 461, 463 (C.A.A.F. 1997). We evaluate the performance of counsel using the guidelines set forth by our superior appellate court in *United States v. Polk,* 32 M.J. 150, 153 (C.M.A. 1991), asking first whether the appellant's allegations are true; if so, whether there is a reasonable explanation for counsel's actions; and if not, whether the trial defense counsel's level of advocacy fell measurably below the performance ordinarily expected of fallible lawyers. We also test for prejudice: whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 695 (1984).

The appellant's trial defense counsel did indeed, as the appellant claims, adopt a prosecution exhibit - a videotape the trial counsel intended to play before the members during rebuttal - as a defense exhibit. The trial defense counsel did so, as he informed the military judge, so that the defense's expert witness could point out inconsistencies between evidence shown in the tape and testimony given at trial. While this strategy was not in the final analysis completely successful, we conclude that it was a reasonable effort to draw the sting out of damaging evidence already ruled admissible by the military judge, and we will not second-guess it. *United States v. Morgan,* 37 M.J. 407, 410 (C.M.A. 1993).

Appellate courts apply a strong presumption of competence to the performance of counsel at trial. *United States v. Grigoruk,* 56 M.J. 304, 306-07 (C.A.A.F. 2002). We find the appellant has failed to overcome that presumption. We further find no reasonable probability that the appellant would have obtained a better result had the evidence been admitted as part of the prosecution case, rather than coming in as it did. The appellant's trial defense counsel was not ineffective.

Rebuttal Evidence

During the defense case-in-chief, the appellant's mother offered testimony concerning interactions between the appellant and his daughter - the alleged victim of the offenses - as well as the appellant's character. In particular, the appellant's mother testified that the appellant felt "guilty" about being away from his daughter because of his military duties and as a consequence "tried to make up the time" when he returned. She further testified that the appellant was an "excellent" father, and added that "[a]nyone" in the community who knew him would agree.

The trial counsel in rebuttal sought to offer testimony from CM, a friend of the appellant, to the effect that the appellant admitted having sex with an unrelated 14-year-old girl; that the appellant stated that he had a sexual preference for young girls; and that, upon being warned that his sexual exploits could get him in trouble, the appellant said he considered "having sex with younger girls" to be "just having fun." The trial defense counsel objected to this testimony on the grounds that it was uncharged misconduct. The military judge concluded that the appellant had placed his character in issue through the testimony of his mother, which attempted to portray the appellant as a "pillar of the community," and allowed CM to testify in rebuttal.

We review the military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995). Military judges are "given wide discretion" in determining whether evidence offered in rebuttal should be admitted. *United States v. Shields*, 20 M.J. 174, 176 (C.M.A. 1985). The defense must accept responsibility not only for the specific evidence it offers, but also for the reasonable inferences which may be drawn from it. *United States v. Strong*, 17 M.J. 263, 266-67 (C.M.A. 1984); *United States v. Matthews*, 50 M.J. 584, 589 (A.F. Ct. Crim. App. 1999). The proferred testimony served to rebut the glowing portrayal offered by the appellant's mother, and served an additional purpose as well, providing an alternative explanation for the appellant's desire to spend as much time as possible with his daughter. Rather than guilt over prolonged military absences, the members could conclude the appellant's conduct was motivated by his sexual preference for young girls. The military judge did not abuse her discretion.

Instructional Error

The appellant correctly notes that the military judge's instruction, to the effect that confinement is corrective in nature, rather than punitive, is erroneous. As we recently observed in *United States v. Brewster*, 64 M.J. 501 (A.F. Ct. Crim. App. 2006), though "in light of the many counseling and rehabilitative programs offered in military confinement facilities, it would certainly be accurate to say that military confinement is corrective *as well as* punitive in nature, any suggestion that confinement is not a form of punishment is simply wrong." *Id.* at 502 (citing Article 58(a), UCMJ, 10 U.S.C. § 858(a)); Rule for Courts-Martial 1003(b)(7); *United States v. Holmes*, 61 M.J. 148, 149 (C.A.A.F. 2005) (summary disposition). The military judge erred.

Having found error, we consider what form of relief is appropriate. If we can determine that, "absent the error, the sentence would have been at least of a certain magnitude," then we "may cure the error by reassessing the sentence

instead of ordering a sentence rehearing." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)). We can make such a determination here. Instructions must be considered in their entirety. *United States v. Green*, 62 M.J. 501, 503 (A.F. Ct. Crim. App. 2005). Here, the military judge instructed the members that confinement was an authorized form of "punishment," and we do not believe the complained-of language could plausibly have led them to believe otherwise. We are satisfied that the members would have imposed a sentence of no less than a dishonorable discharge, confinement for forty-two months, and reduction to the grade of E-1. Moreover, we find the reassessed sentence appropriate for this appellant and his crimes. *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005); Article 66(c), UCMJ, 10 U.S.C. § 866(c).

Conclusion

The findings and sentence, as reassessed, 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 findings and reassessed sentence are

AFFIRMED.

ORR, Senior Judge (concurring in part, dissenting in part):

As articulated by the majority, Col JW's appointment to command 3 AF violated AFI 51-604. Because the convening authority was not properly in command, I am not convinced that he had the authority to convene the appellant's court-martial. Therefore, I respectfully dissent.

I agree with the majority's interpretation of our superior court's decisions in the *Watson* and the *Yates* cases. However, the facts of this case are distinguishable from the cases cited by the majority. The officers who convened the trials in the *Watson* and *Yates* cases were junior in rank, but in the same grade as a more senior officer within the command. As a result, these convening authorities were eligible command, they just were not properly appointed. In the case sub judice, the commander of USAFE, appointed Col JW as the commander of 3 AF when there were two brigadier generals within the command who were eligible to command the organization. Because of this grade disparity, the commander of USAFE did not have the authority to appoint Col JW as the commander. His appointment was not an administrative oversight; it was a violation of AFI 51-604 and long-standing military customs and traditions. As a result, I am convinced Col JW was ineligible to serve as the commander of 3 AF or as the convening authority. Therefore, the trial court convened by Col JW

lacked jurisdiction to try that appellant. I would set aside the appellant's conviction and authorize a rehearing by a properly convened court-martial.

If it is later determined that the court did have jurisdiction to try the appellant, I concur with the majority's determination that the appellant did not receive ineffective assistance of counsel and that the military judge did not abuse her discretion by admitting the contested rebuttal evidence. Additionally, I am convinced that the military judge gave an erroneous instruction to the panel members and that the sentence as reassessed by the majority cures the error. *Doss*, 57 M.J. at 185.

Senior Judge ORR participated in this decision prior to his reassignment.

OFFICIAL

LAQUITA J. SMITH
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