

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman DENTON M. STEVENS
United States Air Force

ACM 37160

30 April 2009

Sentence adjudged 19 September 2007 by GCM convened at Francis E. Warren Air Force Base, Wyoming. Military Judge: Bryan D. Watson.

Approved sentence: Bad-conduct discharge, confinement for 1 year, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain G. Matt Osborn.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JACKSON, Judge:

Contrary to the appellant's pleas, a panel of officers and enlisted members sitting as a general court-martial convicted the appellant of two specifications of obstruction of justice, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The adjudged and approved sentence consists of a bad-conduct discharge, one year confinement, total forfeitures of pay and allowances, and reduction to the grade of E-1.

On appeal the appellant asks this Court to set aside the findings. The basis for his request is that he asserts: (1) the military judge erred by denying his motion for

appropriate relief and (2) the evidence is legally and factually insufficient to sustain his obstruction of justice convictions. We disagree, and finding no prejudicial error, we affirm.

Background

On 10 November 2005, agents with the Computer Crime Unit of the Wyoming Division of Criminal Investigations (WDCI) went to the appellant's off-base residence to interview him. Upon arriving at the appellant's residence, the agents informed the appellant they were investigating the use of a computer at his Internet Protocol address that was being used to download, receive, and transfer child pornography and asked to speak to him concerning the investigation. The appellant informed the agents that he had to depart for work and declined to be interviewed at that time. Shortly thereafter, the agents saw the appellant carry a computer and a paper bag to his car, get into his car, and drive toward Francis E. Warren Air Force Base.

Believing the appellant was planning to destroy evidence, the agents stopped the appellant's car, informed the appellant of their belief, and seized the appellant's computer.¹ The appellant informed the agents that he was taking his computer to be repaired. The agents obtained a search warrant to search the appellant's computer, and a subsequent analysis identified suspected child pornography.² Civilian authorities initially charged the appellant with possessing child pornography but dismissed the charges after the appellant's civilian attorney provided them with an audiotape of Ms. KD, the appellant's ex-girlfriend, allegedly confessing to using the appellant's computer to download child pornography.

The WDCI agents interviewed Ms. KD, and she initially denied using the appellant's computer. When confronted with her alleged audio taped confession, Ms. KD told the agents that the appellant gave her a script to read confessing to using the appellant's computer to download child pornography.³ At trial the appellant moved to dismiss the second obstruction of justice specification and to suppress evidence that the appellant moved his computer from his residence. He asserted: (1) WDCI agents, prior to seizing his computer, took photographs of the peripheral devices and software the appellant had with his computer; (2) the photographs were exculpatory in that they would corroborate his assertion that he was taking his computer to be repaired; (3) that the loss or destruction of these photographs denied him a fair trial; and (4) that the failure of the government to provide him the photographs constituted a violation of his discovery rights

¹ The appellant's actions of placing his computer into his car and driving toward base formed the basis for the second obstruction of justice specification.

² The appellant was charged with but acquitted of possessing child pornography.

³ The appellant's alleged actions of "coaching" Ms. KD to lie formed the basis for the first obstruction of justice specification.

under Article 46, UCMJ, 10 U.S.C. § 846 and Rule for Courts-Martial (R.C.M.) 703 and a violation of his due process rights.⁴ The military judge denied the appellant's motion.

Military Judge's Ruling on the Appellant's Motion for Appropriate Relief

We review a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000) (citing *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995)). A military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). We review claims of improper loss or destruction of evidence de novo. *United States v. Blaney*, 50 M.J. 533, 543 (A.F. Ct. Crim. App. 1999).

To prevail on a claim of improper loss or destruction of evidence the appellant must show: (1) the lost or destroyed evidence possessed an exculpatory value that was apparent before it was lost or destroyed; (2) the evidence was of such a nature that the appellant would be unable to obtain comparable evidence by other reasonable means; and (3) the government lost or destroyed the evidence in bad faith. *Id.* (citing *California v. Trombetta*, 467 U.S. 479, 488-89 (1984); *Arizona v. Youngblood*, 488 U.S. 51 (1988); *United States v. Garries*, 22 M.J. 288, 292-93 (C.M.A. 1986); *United States v. Gill*, 37 M.J. 501, 506-07 (A.F.C.M.R. 1993); *United States v. Anderson*, 36 M.J. 963 (A.F.C.M.R. 1993); *United States v. Mobley*, 28 M.J. 1024, 1028 (A.F.C.M.R. 1989)).

To be entitled to relief for an Article 46, UCMJ, discovery violation, the appellant must make the same showing. *United States v. Kern*, 22 M.J. 49, 51 (C.M.A. 1986) (holding that the rule announced in *Trombetta* satisfies both constitutional and military standards of due process and should therefore be applicable to courts-martial). Lastly, to be entitled to relief for a R.C.M. 703 violation, the appellant must show: (1) the evidence is relevant and necessary; (2) the evidence is destroyed, lost, or otherwise not subjected to compulsory process; (3) the evidence is of such central importance to an issue that it is essential to a fair trial; (4) there is no adequate substitute for such evidence; and (5) he is not at fault for and could not have prevented the unavailability of the evidence. R.C.M. 703(f).

In the case at hand, the military judge made extensive findings of fact and conclusions of law. His findings of fact are well-supported by the record, and his conclusions of law are correct. There is no evidence that the WDCI agents took photographs of the peripheral devices and software the appellant allegedly had with his computer. Additionally, there is no evidence that the photographs, if they existed, were exculpatory, apparently exculpatory, or of such central importance to an issue that they

⁴ For this last assertion the appellant cited *Brady v. Maryland*, 373 U.S. 83, 88 (1963).

were essential to a fair trial. Nor has there been a showing that the photographs, if they existed, were lost or destroyed due to bad faith on the part of the government.

The failure to provide that which did not exist or the failure to provide that which might have existed but which was neither exculpatory, apparently exculpatory, or essential to a fair trial, does not violate the appellant's discovery or due process rights. The military judge correctly found the appellant failed to meet the *Trombetta*, *Youngblood*, and R.C.M. 703 tests. In short, the military judge did not abuse his discretion in denying the appellant's motion for appropriate relief.

Legal and Factual Sufficiency

In accordance with Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

The appellant avers that: (1) he was taking his computer in for repairs; (2) prior to moving his computer he had not been informed he was being investigated for the possession of child pornography; and (3) therefore, there is reasonable doubt that he intended to impede an investigation by placing his computer into his car and driving toward base. He also avers Ms. KD's testimony was not credible and there is reasonable doubt that he provided Ms. KD a script, recorded her practicing the script, and intended to impede an investigation. The trier-of-fact heard and reviewed the evidence and rejected the appellant's arguments.

We have considered the evidence produced at trial in a light most favorable to the government and find a reasonable fact finder could have found all of the essential elements of the obstruction of justice specifications. On this point, we note the following legally supports the appellant's convictions: (1) the agents' testimony that they informed the appellant they were investigating the use of a computer at his Internet Protocol address that was being used to download, receive, and transfer child pornography and asked to interview him concerning the investigation; (2) the agents' testimony that shortly after the appellant declined to be interviewed, they saw the appellant carry his computer to his car and drive toward Francis E. Warren Air Force Base; (3) the agents' testimony that they, believing the appellant was planning to destroy evidence, stopped the

appellant's car, informed the appellant of their belief, and seized the appellant's computer; (4) Ms. KD's testimony that the appellant gave her a script to read confessing to using the appellant's computer to download child pornography; and (5) Ms. KD's audio taped "confession" and the transcript produced there from.

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] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973). We have carefully considered the evidence and are convinced beyond a reasonable doubt that the appellant is guilty of these specifications.

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; *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