UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Second Lieutenant DANIEL F. TAYLOR
United States Air Force

ACM 35685

22 February 2006

Sentence adjudged 24 March 2003 by GCM convened at Schriever Air Force Base, Colorado. Military Judge: James L. Flanary (sitting alone).

Approved sentence: Dismissal and confinement for 10 years.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, Major Jennifer K. Martwick, and Captain Diane M. Paskey.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Jin-Hwa L. Frazier.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT

JACOBSON, Judge:

The appellant was convicted, in accordance with his pleas, of 1 specification of desertion, 1 specification of larceny, 8 specifications of conduct unbecoming an officer and a gentleman, 1 specification of counterfeiting $20 federal notes, 12 specifications of passing counterfeit federal notes, 4 specifications of creating counterfeit documents, 2 specifications of using a false social security account number to open checking, savings, or credit card accounts, 1 specification of furnishing false information to the Commissioner of Social Security, 2 specifications of using a false social security account number to obtain a driver's license, 3 specifications of possessing a false military identification card with intent to defraud, 1 specification of subscribing false statements

on a voter registration application, and 1 specification of using a false name to transfer mail between post office boxes, in violation of Articles 85, 121, 133 and 134, UCMJ, 10 U.S.C. §§ 885, 921, 933, 934. Contrary to his pleas, he was convicted of attempted larceny, in violation of Article 80, UCMJ, 10 U.S.C. § 880. The general court-martial, consisting of a military judge sitting alone, sentenced the appellant to a dismissal and confinement for 10 years. The convening authority approved the findings and sentence as adjudged.

On appeal, the appellant asserts, that: (1) The evidence was legally and factually insufficient to support his conviction for attempted larceny, (2) The court should order a corrected action to indicate that the convening authority deferred and waived mandatory forfeitures, (3) He was subjected to illegal pretrial punishment,[1] and (4) His Due Process rights were violated when the prosecution team engaged in prosecutorial misconduct.[2] For the reasons set out below, we find merit only in the second assignment of error. We therefore affirm the findings but return the action to the convening authority for correction.

Background

The appellant is a 30-year-old second lieutenant assigned to the 4th Space Operations Squadron at Schriever Air Force Base, Colorado. At the time of his trial he had served approximately 30 months on active duty. While awaiting trial on charges of counterfeiting and passing approximately 160 $20 bills, the appellant, on 31 January 2002, mailed letters to his wife, his commander, his parents, and several congressmen to inform them that he was going to commit suicide. Included in the letter to his wife was information on how she could collect $250,000 from his Servicemember's Group Life Insurance policy after his death. Several days later a park ranger at Lake Powell, Utah, discovered an inflatable kayak that contained the appellant's wallet, some personal items, and a spent 9mm shell casing. There were blood smears on the inside wall of the kayak. The Air Force Office of Special Investigations investigated and quickly determined that the evidence found at the lake was consistent with someone faking suicide. After further investigation, the appellant was arrested approximately one month later in Las Vegas, Nevada. During the intervening month the appellant had created a new life for himself under a new identity. To support this new identity, the appellant created, among other things, a variety of forged identification cards, a college transcript, fake Air Force discharge documents, and death certificates for his wife, son, and parents. During a search of the appellant's new residence, investigators also found two informative articles the appellant had downloaded several months prior to his disappearance. One was entitled "How to Change Your Identity," and the other "How to Get Lost and Stay That Way."

[1] This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[2] This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Legal and Factual Sufficiency

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 crime 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 are ourselves convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. We conclude that there is sufficient competent evidence in the record of trial to support the court's findings. The testimony of the prosecution witnesses and the voluminous amount of documentary evidence was credible and compelling and leaves us convinced of the appellant's guilt beyond a reasonable doubt. *See Turner*, 25 M.J. at 324-25; Article 66(c), UCMJ, 10 U.S.C. § 866(c).

The Convening Authority's Action

On 26 and 27 March 2003, the appellant, through counsel, requested a deferment and waiver of automatic forfeitures pursuant to Articles 57(a)(2) and 58b(b), UCMJ, 10 U.S.C. §§ 857(a)(2), 858b(b), for the benefit of his dependents. On 2 April 2003, the convening authority granted both requests. A declaration submitted to this Court from the appellant's counsel indicates that the appellant actually continued to receive full pay and allowances for over a year after his trial concluded. Nonetheless, the appellant now alleges, and the government concedes, that the action failed to reflect the convening authority's approval of the deferment and waiver requests. We agree, and return the record to the convening authority for a corrected action. *See* Air Force Instruction 51-201, *Administration of Military Justice*, ¶¶ 9.7.3, 9.8.4 (26 Nov 2003);[3] Rule for Courts-Martial 1107(g).

Additional Assignments of Error

We find the appellant's additional assignments of error to be without merit. In regard to the allegation of illegal pretrial punishment, we find that the appellant, in consultation with his trial defense counsel, affirmatively waived the issue. *See United States v. Inong*, 58 M.J. 460, 465 (C.A.A.F. 2003); *United States v. King*, 58 M.J. 110, 114 (C.A.A.F. 2003). After the facts surrounding the appellant's pretrial confinement were fully developed during motion practice and the sentencing phase of trial, the military judge asked the appellant no less than three times whether there was an issue of illegal pretrial punishment. Each time, either the appellant or his counsel replied that there was no such issue. The appellant's post-trial claim that he "did not understand the full effect of what [he] was saying" is disingenuous. The record of trial clearly indicates

[3] This provision is substantially the same as the previous version that was in effect at the time of the appellant's post-trial action.

that the appellant was a highly intelligent individual, fully involved in his defense strategy, and constantly in consultation with his team of one military and two civilian defense counsel. The appellant and his team raised many written and oral motions with varying degrees of success. As his affidavit before this Court states, the appellant made a tactical decision to not raise the issue in favor of "bringing up all these problems I had through the testimony of Mr. Powell in sentencing, which we did." His assertion of error before this Court is merely an attempt at a second bite at the Article 13, UCMJ, apple, albeit from a different angle. Further, after a careful review of the record, we find that the appellant, in fact, was not subjected to illegal pretrial punishment.

We review the appellant's assertion that the prosecutors engaged in misconduct de novo. *United States v. Argo*, 46 M.J. 454, 457 (C.A.A.F. 1997). After a full review of the record, paying special attention to the evidence surrounding the appellant's pretrial conditions and experiences, we first find that the appellant has failed to establish that the prosecutors engaged in any misconduct. Assuming arguendo that the prosecutor's actions did rise to the level of prosecutorial misconduct, we find that the appellant has failed to show how any alleged misconduct affected the fairness of his trial. *See United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003). By the time of trial the appellant had been diagnosed as having a bipolar disorder and was regularly receiving medication and therapy. He had every opportunity to present this information to the military judge and did so through live testimony, character statements, and his unsworn statement. His appellate submissions provide no cause for us to believe that he did not receive a fair trial due to the actions he attributes to the prosecutors, or for any other reason.

Conclusion

We conclude the findings are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Therefore, on the basis of the entire record, the findings are affirmed. Because the convening authority action fails to reflect the convening authority's decision to defer, and then waive mandatory forfeitures for the benefit of the appellant's dependents, the action was improperly completed. Accordingly, we return the record of trial to The Judge Advocate General for remand to the convening authority to withdraw the erroneous action and substitute a corrected action and promulgating order. Thereafter, Article 66, UCMJ, 10 U.S.C. § 866, shall apply.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator