UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman CARLOS J. WILLIAMS
United States Air Force

ACM 35066

28 July 2004

Sentence adjudged 15 November 2001 by GCM convened at Kadena Air Base, Japan. Military Judge: Kurt D. Schuman (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 7 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Lieutenant Colonel Gilbert J. Andia Jr., Major Terry L. McElyea, Major Patricia A. McHugh, and Captain L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Shannon J. Kennedy.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

MOODY, Judge:

The appellant was convicted, contrary to his pleas, of a violation of a lawful general regulation and assault with a loaded firearm, in violation of Articles 92 and 128, UCMJ, 10 U.S.C. §§ 892, 928. The general court-martial, consisting of a military judge sitting alone, sentenced the appellant to a bad-conduct discharge, confinement for 7 months, and reduction to E-1. The convening authority approved the sentence adjudged. The appellant has submitted three assignments of error: (1) The military judge abused his discretion by denying defense counsel access to the victim's medical records; (2) This Court improperly denied appellate defense counsel access to the victim's sealed medical records; and (3) The military judge abused his discretion by not dismissing one of the

offenses based on an unreasonable multiplication of charges. Finding no error, we affirm.

Facts

The appellant was a member of the Security Forces Squadron at Kadena Air Base, Japan. On the date alleged in the charges, the appellant encountered the victim, a female member of the Security Forces Squadron, and engaged in an altercation with her, apparently over her having asked him to take out the trash. According to the testimony of the victim, the appellant aimed an M-16 rifle at her and charged it, meaning that he caused a round to enter the chamber. This was done in the presence of other Security Forces personnel. According to witnesses, the appellant subsequently cleared the chamber of the round. The entire incident took less than thirty seconds.

Based upon these facts, the appellant was charged with violating a lawful general regulation, Air Force Instruction (AFI) 31-207, *Arming and Use of Force by Air Force Personnel*, 1 Sep 1999, ¶ 2.12. This provision authorizes the drawing or aiming of firearms only when the use of deadly force reasonably appears necessary. The appellant was also charged with assault with a dangerous weapon.

At trial, the defense counsel moved for the production of the victim's mental health records. Through the trial counsel, the victim invoked the psychotherapist-patient privilege as set forth in Mil. R. Evid. 513. The military judge examined the records in camera and released to the defense a portion of them, which concerned the victim's reaction to the offense sub judice. The military judge sealed the remainder of these documents and attached them to the record as an appellate exhibit. Likewise, this Court has performed its own in camera examination of the sealed documents and denied appellate defense counsel's request for access.

Unreasonable Multiplication of Charges

We review this issue for an abuse of discretion. *United States v. Quiroz*, 55 M.J. 334, 339 (C.A.A.F. 2001). Prior to pleas, the trial defense counsel moved the court to dismiss the Article 92, UCMJ charge or to grant "other appropriate relief" on the grounds of multiplicity and unreasonable multiplication of charges. The military judge concluded that the charges were not multiplicious. However, he also concluded that, because they were based upon a "single instance of conduct," the offenses constituted an unreasonable multiplication of charges. He did not dismiss the Article 92 charge, although he did limit the maximum punishment to a dishonorable discharge, confinement for 8 years, total forfeitures, and reduction to E-1. This is the maximum punishment for assault with a loaded weapon.

We find no reason to disturb the military judge's conclusion that the offenses were not multiplicious within the meaning of *United States v. Teters*, 37 M.J. 370 (C.M.A.

1993). As the charges against the appellant require the proof of different elements, they did not violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

The only question is whether the military judge erred by failing to dismiss the regulatory violation, having found that the charging, though constitutional, was nonetheless unreasonable. *See* Rule for Courts-Martial 307(c)(4), Discussion. We conclude that he did not. When remedying such an infirmity, the military judge may "adjust the maximum sentence *without having to dismiss one or the other of the charges*." *United States v. Earle*, 46 M.J. 823, 825 (A.F. Ct. Crim. App. 1997), *aff'd in part and modified in part*, 49 M.J. 130 (C.A.A. F. 1998). As this Court has stated, "even if the multiplicity doctrine permits the conviction and punishment of an accused for more than one offense for what is a single act, a military judge may exercise his equitable powers to adjust the maximum sentence." *United States v. Aaron*, 54 M.J. 538, 549 (A.F. Ct. Crim. App. 2000).

We hold that the military judge did not abuse his discretion by failing to dismiss the Article 92 charge.

Remaining Issues

We hold that the military judge also did not abuse his discretion by limiting access to the victim's mental health records. Mil. R. Evid. 513(e). *See United States v. Rivers*, 49 M.J. 434 (C.A.A.F. 1998); *United States v. Branoff*, 38 M.J. 98 (C.M.A. 1993). Furthermore, we find no basis to revisit our own denial to appellate defense counsel of access to the sealed records. *See* United States Air Force Court of Criminal Appeals Rules of Practice and Procedure, Rule 19.1 (1 Sep 2000) for the criteria we employ in evaluating requests for reconsideration.

The 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 findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court