UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class ADAM G. COTE
United States Air Force

ACM 37745

28 March 2012

Sentence adjudged 11 June 2010 by GCM convened at Minot Air Force Base, North Dakota. Military Judge: Don M. Christensen, Paula B. McCarron, Michael J. O'Sullivan, and Nancy Paul.

Approved sentence: Bad-conduct discharge, confinement for 12 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Maria A. Fried; Major Michael S. Kerr; and Major Nicholas McCue.

Appellate Counsel for the United States: Major Naomi N. Porterfield and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

PER CURIAM:

A general court-martial composed of officer and enlisted members convicted the appellant contrary to his pleas of one specification of possessing child pornography, in violation of Article 134, UCMJ, 10 USC § 934, and sentenced him to a bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence adjudged except for the forfeitures. The appellant assigns four errors. He first renews the argument previously addressed in an appeal under Article 62, UCMJ, 10 U.S.C. § 862, that the search of the computer drive on which Government agents found the charged child pornography

violated the terms of a search warrant and should be suppressed. He next disputes the legal and factual sufficiency of the evidence to support his conviction on the basis that the evidence fails to show knowing possession of the charged child pornography. Third, he argues that the military judge erred in denying two challenges for cause. Finally, the appellant asserts that the record is incomplete because it does not have the sealed exhibit containing the charged child pornography. We find no error that materially prejudiced the rights of the appellant and affirm.

Admissibility of Evidence from the Seized Computer Drive

While conducting an internet peer-to-peer child pornography investigation in May 2008, Special Agent (SA) SH of the North Dakota Bureau of Criminal Investigation (NDBCI) discovered nine files of suspected child pornography on a computer with a specific internet protocol address. He contacted SA BN of Immigration and Customs Enforcement to subpoena the name and address of the subscriber. The internet service provider identified the subscriber as the appellant and his location as Minot Air Force Base, North Dakota.

SA BN received search authorization for the appellant's Minot Air Force Base dormitory room in a written warrant issued by the Federal Magistrate, United States District Court for the District of North Dakota, on 1 July 2008. The warrant commanded that the search of the dormitory room be completed by 10 July 2008 and authorized the seizure of any items listed in an attachment to the warrant to include electronic devices and storage media. SA SH and SA BN executed the warrant on 2 July 2008 and seized, among other items, a Sony laptop computer, a Hewlett-Packard (HP) laptop computer, and one Western Digital (WD) external hard drive. During an on-site forensic preview of the devices, SA SH found "one or two" files believed to be child pornography on the Sony but was unable to preview the HP or WD drives.

An addendum to the warrant directed that the search of any electronic device or storage media seized during the search be completed within 90 days. Notably, this clause does not apply to electronic data or documents – only the electronic devices and storage media themselves. On 18 August 2008, within the 90-day time limit specified in the warrant, SA SH made forensic copies of the data on the Sony and HP laptop hard drives and stored the copies on clean NDBCI hard drives. He found two suspected child pornography videos on the copy of the Sony drive but the data on the copy of the HP drive was scrambled. SA SH was unable to copy or analyze the data on the WD drive.

In September 2009, the Air Force Office of Special Investigations sent the WD drive, which had been in their custody for the past year, to the Defense Computer Forensics Laboratory (DCFL) for possible repair. DCFL repaired the drive, made a forensic copy of the data, and sent both to SA SH. In October 2009, SA SH analyzed the forensic copy of the WD drive and found 22 video files of suspected child pornography.

The appellant moved to suppress all evidence obtained from the searches of the three computer drives and the forensic copies of those drives that occurred after 28 September 2008, the 90-day deadline imposed by the search warrant for searches of devices or media seized pursuant to the warrant. The military judge granted the motion, essentially finding that any analysis of the drives, data in drives, or copies of data in drives after the warrant's 90-day limit violated the warrant and was, therefore, unlawful. Although she expressly found "good cause" for getting an extension of time from the magistrate if the Government had requested it, she nevertheless held that the evidence must be suppressed.

The Government appealed the ruling by the military judge, pursuant to Article 62, UCMJ. We granted the appeal and reversed the ruling of the trial judge. We agreed with the military judge's finding that the DCFL search of the WD device and the derivative search of the data violated the 90-day time limit in the warrant for searches of devices and media, but we found that the military judge erred in concluding that the violation of the terms of the warrant in this case required suppression of the evidence.[1] The case proceeded to trial with no further litigation on the motion and the military judge admitted the evidence from the WD device.

We review rulings on the admission or exclusion of evidence for an abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239 (C.A.A.F. 2004). We are bound by the judge's factual findings unless they are clearly erroneous, and we consider conclusions of law de novo. *United States v. Terry*, 66 M.J. 514, 517 (A.F. Ct. Crim. App. 2008). As in the appeal under Article 62, UCMJ, we find that the evidence recovered from the WD drive was admissible.

Several considerations impact the constitutional analysis necessary to determine admissibility of evidence obtained after expiration of time requirements imposed by rule or warrant and we adopt various findings from the Federal circuit courts. First, violation of the time requirements imposed by a rule or warrant will result in a constitutional violation when probable cause lapses during the delay. *See United States v. Brewer*, 588 F.3d 1165 (8th Cir. 2009). In the present case, the military judge expressly found "good cause" for extending the time permitted in the warrant and the evidence supports that finding. The delay had absolutely no impact on probable cause since, as in *Brewer*, the computer device had been in the continuous custody of law enforcement since it was seized.

Second, the policy underlying the time requirement assists in determining whether a violation rises to a constitutional level. Where the policy is intended to implement the Fourth Amendment's[2] probable cause requirement, the appropriate constitutional analysis

[1] We also addressed the search of two other computer drives seized during the search of the appellant's dormitory room, but the court acquitted the appellant of all charges related to those other computer drives.
[2] U.S. CONST. amend IV.

is whether violation of the policy actually resulted in a lapse of probable cause. *See Brewer*, at 1173. In the present case, the language in the warrant clearly shows that the policy behind the warrant's time requirement is the return of seized property or data that does not contain contraband rather than implementation of some Fourth Amendment requirement. The warrant directs return of seized devices and media only if contraband is not found on them and directs return of *copies* of data files that have either (1) been already searched and not seized or (2) not searched as beyond the scope of the warrant. Because the WD drive was inoperable, the Government could not comply with the warrant's requirement to return non-contraband items until it could be repaired and searched. The warrant's recognition of the personal utility of computer devices, media, and data files, by requiring the search to be completed within 90 days so that non-contraband items could be returned to the owner, does not implement any constitutional requirement such that violation requires suppression of the evidence.

By focusing on constitutional requirements, the court in *Brewer* rejects a mechanistic approach to the exclusion of evidence based on violation of time requirements in a rule or warrant. Relying on *United States v. Brunette*, 76 F.Supp.2d 30 (D.Me. 1999), the appellant argues for such an approach. In *Brunette*, the court suppressed the results of a search that occurred only a few days after the expiration of a time requirement in the warrant. Though the court did not discuss whether this equated to a Fourth Amendment violation, the discussion of precedent in the opinion appears to focus on the Fourth Amendment's probable cause requirement by highlighting that the "element of time can admittedly affect the validity of a search warrant" and that "a search pursuant to a stale warrant is invalid." *Id*. at 36. To the extent that *Brunette* stands for de facto exclusion of evidence based on violation of time requirements in a rule or warrant, the *Brewer* court implicitly rejects that view in favor of a constitutional analysis to determine the admissibility of evidence. *Brewer*, 588 F.3d at 1172 (citing *United States v. Syphers*, 426 F.3d 461 (1st Cir. 2005), *cert. denied*, 547 U.S. 1158 (2006)). We find such analysis appropriate.

Like *Brewer*, the court in *Syphers* looked to the policy underlying a particular time requirement to determine whether a constitutional violation occurred such that the evidence seized had to be suppressed: where the policy is intended to ensure probable cause, violations of time requirements will result in suppression of evidence when probable cause lapses as a result of the violation. Analyzing a warrant's one-year time limit to conduct a computer search that violated a federal requirement to execute search warrants within ten days, the court in *Syphers* found the delayed search constitutional because (1) probable cause had not lapsed, (2) the delay did not prejudice the defendant, and (3) law enforcement officers did not act in bad faith. *Syphers*, 426 F.3d at 469.

Application of *Sypher's* constitutional analysis to the facts of the present case shows that the evidence obtained from the delayed search should not have been suppressed. First, as already discussed, probable cause did not lapse as a result of the

delay since the data on the WD drive remained as it was on the date it was seized. Second, for reasons similar to those supporting continued probable cause, the evidence shows no prejudice to the appellant in the sense that either (1) evidence was discovered after the delay that would not have been discovered had the search taken place before the delay or (2) the appellant's property rights were adversely affected. As with the continuing probable cause, the data remained unchanged and the appellant's property interest did not change from when the item was first seized. Third, the record shows no evidence of bad faith. The military judge's summary finding of "good cause" to get an extension not only recognizes the continued existence of probable cause but also implicitly finds no prejudice or bad faith. Evidence obtained from the WD drive was properly admitted against the appellant.[3]

Legal and Factual Sufficiency

The appellant argues that the evidence is legally and factually insufficient to support conviction because it fails to show knowing possession of the child pornography contained on the external hard drive. 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 test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (citing *Turner*, 25 M.J. at 325). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

[3] Assuming arguendo that the delayed search of the WD drive rose to the level of a constitutional violation, we find that the evidence would have been inevitably discovered in the normal course of processing seized evidence. Mil. R. Evid. 311(b)(2). As discussed above, the warrant directed the return of only those devices and media that did not contain contraband. Although agents could not access the inoperable WD drive, probable cause to believe that child pornography would be found on it continued to exist. Therefore, the drive could not be returned to the owner without analyzing it for contraband. To ultimately dispose of the property as directed by the warrant, agents would have had to either repair it and analyze it for contraband or destroy it.

The strong circumstantial evidence of knowledge presented in this case convinces us that the evidence is legally and factually sufficient to support conviction. The evidence shows that (1) the appellant had exclusive control of the WD drive, (2) the child pornography was discovered in folders created by the drive's user, (3) the drive contained letters written by the appellant to his bank, and (4) the drive contained photos of the appellant taken with his digital camera. The military judge instructed the members that to convict the appellant they must find beyond a reasonable doubt that the appellant knowingly possessed the child pornography found on the WD drive. Turning first to legal sufficiency, we find that from this evidence the court members could have found all the essential elements beyond a reasonable doubt. As to factual sufficiency, we independently determine that the evidence is sufficient proof that the appellant knowingly possessed the child pornography found on the WD drive and that his conduct was of a nature to bring discredit upon the armed forces.

Denial of Challenges for Cause

We review a military judge's ruling on a challenge based on actual bias for abuse of discretion; we review challenges based on implied bias with less deference than abuse of discretion by using an objective standard of public perception. *United States v. Downing*, 56 M.J. 419 (C.A.A.F. 2002). A member shall be excused for cause whenever it appears that the member "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." Rule for Courts-Martial (R.C.M.) 912(f)(1)(N). This rule applies to both implied and actual bias. *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996).

With implied bias, we focus on the perception or appearance of fairness of the military justice system as viewed through the eyes of the public. *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998); *United States v. Dale*, 42 M.J. 384, 386 (C.A.A.F. 1995). Simply stated, implied bias exists when most people in the same position would be prejudiced. *Daulton*, 45 M.J. at 217 (quoting *United States v. Smart*, 21 M.J. 15, 20 (C.M.A. 1985)). For both types of challenges, military judges must apply the liberal grant mandate which recognizes the unique nature of the court member selection process. *Downing*, 56 M.J. at 422.

The appellant challenged four members for cause, Lieutenant Colonel (Lt Col) G, Captain (Capt) S, First Lieutenant (Lt) M, and Technical Sergeant (TSgt) M. The military judge granted the challenges against Capt S and TSgt M but denied those against Lt Col G and Lt M. The appellant used his peremptory challenge against Lt M, stating that he would have used it against Lt Col G had the challenge for cause against Lt M been granted. The appellant argues that the military judge erred by denying the challenges for cause on both members. Review of the challenge against Lt M is waived by peremptorily removing him from the panel. *See* R.C.M. 912(f)(4).

The appellant challenged Lt Col G for implied bias on the basis that (1) he had supervised someone accused of misconduct similar to that of the appellant and (2) he is a friend of the commander who preferred charges against the appellant, Lt Col B. Concerning the prior case, Lt Col G stated that he did not have any active involvement in the case which ultimately did not go to trial and that his limited knowledge of the case would not impact his ability to be fair and impartial in the appellant's case. Concerning his friendship with Lt Col B, Lt Col G stated that he had attended some military social events at which he socialized with Lt Col B but that they have not been to each other's residences. He stated that his acquaintance with Lt Col B would not influence his participation in the case in any way and that they had never discussed any aspect of the appellant's case.

The military judge denied the challenge for cause and expressly considered the liberal grant mandate. He explained that Lt Col G's limited involvement with the prior case would not support a finding of implied bias nor would his association with Lt Col B. Applying an objective standard of public perception, we find no error in the denial of the challenge. Lt Col G explained that had very limited involvement in the prior case, a case which did not even result in a trial, and his limited knowledge of it would not impact his decisions in the appellant's case. He also unequivocally stated that his association with Lt Col B would not impact his decision: they only socialized at military functions and had never discussed the appellant's case. Under these circumstances, we find no basis to conclude that a member of the public would perceive the military justice system as unfair.

Incomplete record

The appellant asserts that the record of trial is incomplete because it does not contain Prosecution Exhibit 41, the disk containing copies of files from the WD drive that was ordered sealed by the military judge. The original record of trial before us contains the exhibit and has been available for the appellant's examination through his counsel. Sealed exhibits are not provided in copies of the record of trial.

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;

Reed, 54 M.J. at 41. Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court