UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class PABLO P. IRIZARRY, JR.
United States Air Force

ACM 37748

15 March 2012

Sentence adjudged 20 August 2010 by GCM convened at Dyess Air Force Base, Texas. Military Judge: William C. Muldoon, Jr.

Approved sentence: Bad-conduct discharge, confinement for 45 days, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Matthew F. Blue; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

A general court-martial composed of officer members convicted the appellant contrary to his pleas of one specification of larceny of military property of a value greater than $500.00, in violation of Article 121, UCMJ, 10 U.S.C. § 921, and sentenced him to a bad-conduct discharge, confinement for 45 days, and reduction to E-1. The convening authority approved the sentence adjudged. The appellant assigns two errors: (1) the military judge erred by admitting over appellant's objection evidence seized from his off-base apartment, and (2) the military judge erred by failing to instruct that the members should not rely on possible mitigating action by the convening or higher authority in arriving at a sentence.

I

The appellant leased an apartment from Cedar Creek Apartments (CCA) in Abilene, Texas. After the appellant failed to respond to delinquent rent notices, the CCA community manager entered the apartment pursuant to the lease and discovered extensive damage. After the appellant failed to respond to the notices, CCA contacted the appellant's military unit in an effort to get the appellant to make necessary repairs. The appellant's first sergeant and supervisor entered the apartment at the request of--and accompanied by--the CCA maintenance representative to inspect the damage to the apartment. While in the apartment, the first sergeant discovered and seized the military aircraft part alleged as stolen by the appellant.

The military judge denied the appellant's motion to suppress the evidence seized from his apartment. The appellant argued that his first sergeant entered the apartment without consent or other lawful authority. After taking evidence on the motion, the military judge found by clear and convincing evidence that "CCA had the authority to consent to walking [the first sergeant and supervisor] through the accused's apartment" and that their purpose was to "effectuate repairs upon the property, a purpose specifically listed in the lease at Paragraph 28." Based on his findings, the military judge concluded that the seizure of the aircraft part did not violate the Fourth Amendment.[*]

We review a military judge's evidentiary ruling for an abuse of discretion. *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996). Conclusions of law are reviewed de novo; however, findings of fact "will not be overturned unless they are clearly erroneous or unsupported by the record." *Id.* Furthermore:

> In reviewing a ruling on a motion to suppress, we consider the evidence "in the light most favorable to the" prevailing party. "We will reverse for an abuse of discretion if the military judge's findings of fact are clearly erroneous or if his decision is influenced by an erroneous view of the law."

Id. (quoting *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995); *United States v. Kitts*, 43 M.J. 23, 28 (C.A.A.F. 1995) (internal quotation marks omitted)).

The record supports the findings of the military judge. The lease agreement specifically provides that CCA may enter the apartment to pursue remedies authorized by the lease upon default by the tenant as well as to make repairs or estimate repair and refurbishing costs. CCA representatives testified that CCA invited the appellant's military supervisors to view the apartment in an effort to secure compliance by the appellant with his obligations under the lease. This was the military supervisor's understanding as well:

[*] U.S.Const. amend. IV.

> My intent was to find out how bad things really were, how much money did he really owe, so that when I sat down with [the appellant] later and/or his supervision, I could say what they were saying were the facts about how much he owed so that he could be counseled and he could be talked to, and see if we can get the situation remedied.

Consistent with the terms of the lease, CCA could lawfully invite the appellant's military supervisor into the apartment for the purpose of arranging necessary repairs. *United States v. Jacobs*, 31 M.J. 138 (C.M.A. 1990). In *Jacobs*, the landlord contacted the appellant's supervisor to ensure proper repairs, and the supervisor agreed to "look and, if necessary, counsel the [appellant] or responsible parties to ensure the deficiencies were corrected." *Id*. at 139. Finding that the entry by the landlord complied with a clause in the lease that permitted entry without prior permission to make emergency repairs, the Court held that the military supervisor lawfully entered the leased premises "'in the shoes' of the landlord" for the purpose of accomplishing the necessary repairs. *Id*. at 144 (quoting *United States v. Sledge*, 650 F.2d 1075, 1080 n.10 (9th Cir. 1981)). The Court distinguished the situation from that of a landlord consenting to a law enforcement search of an apartment for evidence of crime which would require actual or apparent common authority. *Id*. (citing *Chapman v. United States*, 365 U.S. 610 (1961)).

As in *Jacobs*, CCA management invited the appellant's supervisor to inspect the apartment for the purpose of encouraging the appellant to make the necessary repairs. The lease permitted such entry even without an emergency, and the supervisor accompanied the CCA representative to get the facts before discussing the matter with the appellant. The military judge did not abuse his discretion in denying the appellant's motion to suppress.

II

We review the completeness of required instructions de novo. *United States v. Schroder*, 65 M.J. 49, 54 (C.A.A.F. 2007) (citations omitted); *United States v. Miller*, 58 M.J. 266, 269 (C.A.A.F. 2003). "The military judge bears the primary responsibility for ensuring that mandatory instructions . . . are given and given accurately." *Miller*, 58 M.J. at 270. Instructions on sentencing must include, "[a] statement informing the members that they are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority." Rule for Courts-Martial (R.C.M.) 1005(e)(4); *see also* Department of the Army Pamphlet 27-9, *Military Judges' Benchbook*, ¶ 2-6-9 (1 January 2010) ("You must not adjudge an excessive sentence in reliance upon possible mitigating action by the convening or higher authority.").

The military judge did not give this required instruction. Although trial defense counsel did not object to the military judge's instructions, or call the missing instruction

to the military judge's attention, the waiver rule of R.C.M. 1005(f) "does not serve to forfeit review of" certain mandatory instructions, such as the one required under R.C.M. 1005(e)(4). *Miller*, 58 M.J. at 270. We therefore conclude that the military judge erred by failing to instruct the court members as required by R.C.M. 1005(e)(4).

Having found error, we test for prejudice. *See Miller*, 58 M.J. at 271. The military judge correctly instructed the court members that the maximum punishment was a dishonorable discharge, confinement for 10 years, forfeiture of all pay and allowances, and reduction to the grade of E-1. He instructed that they should sentence the appellant only for the offense of which he has been found guilty based on all the evidence presented both before and after findings. He reminded them that "[they] alone are responsible for determining an appropriate sentence . . . which will best serve the ends of good order and discipline, the needs of the accused, and the welfare of society." The trial counsel argued for a bad-conduct discharge and confinement for six months, and neither party argued the possibility of post-trial sentence mitigation in support of their respective recommendations. The members adjudged a bad-conduct discharge, confinement for 45 days, and reduction to the grade of E-1. The appellant waived his opportunity to petition the convening authority for a lower sentence in clemency. Under the circumstances of this case, we conclude that the error did not have a substantive influence on the sentence and that the appellant was not prejudiced by the absence of the instruction required by R.C.M. 1005(e)(4). *See United States v. McCollum*, 58 M.J. 323, 343 (C.A.A.F. 2003); *Miller*, 58 M.J. at 271.

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, 10 U.S.C. § 866(c); *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
Clerk of the Court