United States Air Force Court of Criminal Appeals

No. ACM 39234

UNITED STATES
Appellee

v.

Brandon N. MYERS
Staff Sergeant (E-5), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 30 August 2017

Military Judge: Vance H. Spath.

Approved sentence: Dishonorable discharge, confinement for 8 months, and reduction to E-1. Sentence adjudged 28 February 2017 by GCM convened at Joint Base Lewis-McChord, Washington.

For Appellant: Major Annie W. Morgan, USAF.

For Appellee: Colonel Laura J. Megan-Posch, USAF; Major Ellen Payne, USAF.

Before DREW, MAYBERRY, and DENNIS, *Appellate Military Judges.*

Chief Judge DREW delivered the opinion of the court, in which Senior Judge MAYBERRY and Judge DENNIS joined.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4.

DREW, Chief Judge:

A military judge sitting as a general court-martial convicted Appellant, in accordance with his pleas and pursuant to a pretrial agreement (PTA), of two specifications of attempting to commit a lewd act upon a person Appellant believed to be a child less than 16 years of age, in violation of Article 80, Uni-

form Code of Military Justice (UCMJ), 10 U.S.C. § 880. The court-martial sentenced Appellant to a dishonorable discharge, confinement for eight months, total forfeitures, and reduction to E-1.[1] The convening authority disapproved the adjudged forfeitures but otherwise approved the sentence.[2]

Appellant raises one assignment of error on appeal: whether the military judge abused his discretion by admitting a record of nonjudicial punishment that was issued more than five years prior to referral of the charges. Although not raised by Appellant, we also address the staff judge advocate's recommendation (SJAR) to the convening authority which included an inaccurate personal data sheet (PDS). Having found errors, we nevertheless find that Appellant was not prejudiced and, accordingly, affirm the findings and sentence.

I. BACKGROUND

In July 2015, an agent of the Air Force Office of Special Investigations (AFOSI) posted an advertisement on Craigslist.com in a section associated with Ramstein Air Base, Germany, with the title "Bored on Base Looking for Summer Fun – w4m (Ramstein)." The advertisement included "I'm a young dependent girl lookin for some full time fun ;-). My fam's new to the area, I'm on Ramstein lookin for Air Force guys." Appellant was on temporary duty at Ramstein Air Base at the time of the posting. Over the course of the next day, Appellant and the agent exchanged messages over a texting application. The agent told Appellant that she was a 14-year-old girl. Appellant, intending to gratify his sexual desires, sent the agent a photograph of himself with his penis partially exposed (Specification 1) and communicated various indecent language (Specification 2). Charges were referred on 18 November 2016.

During the sentencing portion of Appellant's trial, the Prosecution offered several documents, including Appellant's Enlisted Performance Reports (EPRs), a PDS, and a record of an Article 15, UCMJ, 10 U.S.C. § 815, nonjudicial punishment (Article 15).

Appellant was notified of his commander's intent to impose the Article 15 punishment on 19 May 2008, eight and one-half years before the referral. The PDS reflected that Appellant had received one Article 15. When the military

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[1] The adjudged sentence was unaffected by the PTA, which limited confinement to no more than 13 months.

[2] The convening authority deferred the adjudged and mandatory forfeitures until action and waived the mandatory forfeitures for a period of six months, for the benefit of Appellant's dependents.

judge asked the Defense if they had any objections to the PDS, the assistant defense counsel responded, "No, Your Honor." When the military judge asked the Defense if they had any objections to the Article 15 itself, the assistant defense counsel responded, "Yes, Your Honor, object to relevance. Under R.C.M. 1001(b) this being older than five years old at time of referral is not relevant under that rule." Over the course of the discussion that ensued between the military judge, assistant defense counsel, and assistant trial counsel, the Defense pointed to Air Force Instruction (AFI) 51-201, *Administration of Military Justice* (6 Jun. 2013), specifically paragraphs 8.13.1 and 8.13.1.2.2. In response to the latter paragraph, which applies to documents retrieved from an accused's local Personnel Information File (PIF), the military judge correctly pointed out that the Article 15 was not retrieved from Appellant's PIF, but rather from the central derogatory information file maintained by the Air Force Personnel Center. The assistant defense counsel clarified that the objection was not to the location from which the Article 15 had been retrieved, but that it was older than five years old at the time of referral. The assistant trial counsel countered "that a regulatory opinion isn't binding on this court-martial."

The military judge overruled the Defense objection and admitted the Article 15:

> I'm not going to exclude it because [AFI] 51-201 talks about the five years. I've got the R.C.M. in front of me and it discusses quite clearly. Now, [Mil. R. Evid.] 403 balancing test is easy, it's a judge alone trial, and I can put it in perspective, given the time in which the [Article] 15 was given and how old it is. It's also reflected in the EPRs that I was looking at. So clearly the information's already before me in one way or the other. I will certainly not put undo [sic] weight on an Article 15, Defense Counsel. So, your objection's overruled.

II. DISCUSSION

A. Admission of the Article 15

Appellant argues that the military judge abused his discretion by admitting the Article 15 at sentencing. We review a military judge's admission or exclusion of sentencing evidence for an abuse of discretion. *United States v. Carter*, 74 M.J. 204, 206 (C.A.A.F. 2015) (citing *United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009)). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (quoting *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010)) (internal quotation marks omitted).

"An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact." *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003) (citing *United States v. Humpherys*, 57 M.J. 83, 90 (C.A.A.F. 2002)).

"A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Article 59(a) UCMJ, 10 U.S.C. § 859. Non-constitutional error is harmless unless it had "a substantial influence on the findings" or sentence.[3] *United States v. Solomon*, 72 M.J. 176, 182 (C.A.A.F. 2013) (quoting *United States v. Berry*, 61 M.J. 91, 97 (C.A.A.F. 2005)). However, for constitutional error to be harmless, we must be convinced "beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005) (quoting *United States v. Kaiser*, 58 M.J. 146, 149 (C.A.A.F. 2003)).

Under Rule for Courts-Martial (R.C.M.) 1001(b)(2), the Prosecution may introduce personal data and information pertaining to the character of the accused's prior service:

> *Under regulations of the Secretary concerned*, trial counsel may obtain and introduce from the personnel records of the accused . . . character of prior service. Such evidence includes copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions including punishments under Article 15.
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> "Personnel records of the accused" includes any records *made or maintained in accordance with departmental regulations* that reflect the past military efficiency, conduct, performance, and history of the accused. . . .

(Emphasis added).

In the Air Force, AFI 51-201, paragraph 8.13 and its sub-paragraphs implement R.C.M. 1001(b)(2):

> 8.13. Personnel Data and Character of Prior Service. "Personnel records of the accused," as referenced in RCM 1001, includes all those records made or maintained in accordance with

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[3] *Solomon* does not address the harmlessness standard for non-constitutional errors during presentencing. However, *see United States v. Latorre*, 53 M.J. 179, 182, n.7 (C.A.A.F. 2000) ("While the test was formulated to determine prejudice at guilt or innocence phase of trial, we feel it also appropriate in this context.").

> Air Force directives that reflect the past military efficiency, conduct, performance, and history of the accused, as well as any evidence of disciplinary actions, including punishment under Article 15, UCMJ, and previous court-martial convictions.
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> > 8.13.1. Personnel Information File. Relevant material contained in an accused's unit personnel information file (PIF) may be admitted pursuant to RCM 1001(b) if:
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> > > 8.13.1.2. There is some evidence in the document or attached to it that:
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> > > > 8.13.1.2.2. The document is not over 5 years old on the date the charges were referred to trial.
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> > > . . . .
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> > 8.13.2. Nonjudicial Punishment. Records of punishment under Article 15, UCMJ, from any file in which the record is properly maintained by regulation, may be admitted if not over 5 years old on the date the charges were referred. Measure this time period from the date the commander notified the accused of the commander's intent to impose nonjudicial punishment. . . .

It is black letter law in the Air Force that, with certain narrow exceptions not applicable here, an Article 15 that is more than five years old is not admissible under R.C.M. 1001(b)(2). The Rule is not a blanket rule of admissibility for *all* personnel data and character of prior service. The Rule is subject to any limitations imposed "[u]nder regulations of the Secretary concerned." Contrary to the assistant trial counsel's assertion that "a regulatory opinion isn't binding on this court-martial," the Secretary of the Air Force's regulation limiting the use of Article 15 evidence during presentencing *is* binding on Air Force courts-martial.

While the assistant defense counsel pointed to paragraph 8.13.1.2.2. of AFI 51-201 (which as the military judge correctly pointed out did not apply), it is unfortunate that the parties did not turn to the very next page in the regulation, where the long-standing rule that Article 15s older than five years are inadmissible is plainly stated in paragraph 8.13.2. The Government on appeal would have us apply forfeiture because assistant defense counsel mis-cited the specific paragraph of the AFI. We decline to do so. The Defense's objection was plainly stated, that under R.C.M 1001(b) and the implementing Service regulation, the Article 15 was inadmissible because it was

older than five years. The military judge abused his discretion by erroneously applying R.C.M. 1001(b) and AFI 51-201.

The Government also argues that the error did not prejudice Appellant because one of his EPRs, which was properly admitted, already referenced the old Article 15. Indeed, the military judge mentioned an EPR reference in his ruling. However, the Government is and the military judge was incorrect. The EPR in question, which closed out on 30 April 2008 (before the Article 15 was finalized on 29 May 2008), references Appellant being reprimanded by his commander for *dereliction of duty*. A reprimand is not an Article 15 and the Article 15 was for *failure to go*. If the Article 15 had been referenced in an EPR, it would have to have been in Appellant's *next* EPR, which covered the period of 1 May 2008 through 30 April 2009. However, Appellant was not downgraded in his 30 April 2009 EPR and received an overall "5" (the highest rating).

The PDS did reference the old Article 15, but did so only by indicating that Appellant had "1" previous Article 15 action, without any further details. It was error for the PDS to reference an inadmissible Article 15. However, when asked by the military judge if the Defense had any objection to the PDS, the assistant defense counsel said they did not. We need not decide whether the failure to object to the reference to the inadmissible Article 15 in the PDS constituted waiver or merely forfeiture, as Appellant has not raised this error on appeal.[4] Based on the military judge's comments on the record and the sentence he ultimately adjudged, we are confident that the erroneous admission of the Article 15 and the reference to it in the PDS did not have a substantial influence on the sentence, and thus did not materially prejudice Appellant.[5]

B. Personal Data Sheet Attached to Staff Judge Advocate Recommendation

Proper completion of post-trial processing is a question of law which we review de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)). Failure to comment in a timely manner on matters in the SJAR, or on matters

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[4] We also note that the PDS erroneously indicates for prior service: "None," despite the PDS correctly stating that the Term of Current Service is "4 years," and the total Length of Service is "11 years."

[5] At trial, the Defense also complained that the Article 15 did not include Appellant's response. However, by regulation, a member's response is not part of the record of punishment. *See* AFI 51-202, *Nonjudicial Punishment*, ¶¶ 6.11–6.12 (31 Mar. 2015).

attached to the SJAR, forfeits any later claim of error in the absence of plain error. R.C.M. 1106(f)(6); *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005). "To prevail under a plain error analysis, [Appellant bears the burden of showing] that: '(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right.'" *Scalo*, 60 M.J. at 436 (quoting *Kho*, 54 M.J. at 65). Because of the highly discretionary nature of the convening authority's action on a sentence, we grant relief if Appellant presents "some colorable showing of possible prejudice" affecting his opportunity for clemency. *Kho*, 54 M.J. at 65 (quoting *United States v. Wheelus*, 49 M.J. 283, 289 (1998)).

The SJAR shall be a concise written communication, setting forth, *inter alia*, the findings, sentence, and confinement credit to be applied; a copy or summary of the PTA, if any; and the staff judge advocate's concise recommendation. R.C.M. 1106(d)(3). The SJAR in the Air Force should also contain a copy of the PDS admitted at trial. AFI 51-201, ¶ 9.16. Before a convening authority may take action on a sentence, he must consider the SJAR. R.C.M 1107(b)(3)(A)(ii).

An error in the SJAR "does not result in an automatic return by the appellate court of the case to the convening authority." *United States v. Green*, 44 M.J. 93, 95 (C.A.A.F. 1996). "Instead, an appellate court may determine if the accused has been prejudiced by testing whether the alleged error has any merit and would have led to a favorable recommendation by the SJA or corrective action by the convening authority." *Id.*

Attached to the SJAR was a PDS that purported to be a copy of Prosecution Exhibit 7, the PDS admitted by the military judge. It is not. Although dated the same date as the actual Prosecution Exhibit 7, the one attached to the SJAR has a completely different label and has different information in some respects. Ironically, it indicates "0" for number of previous Article 15 actions. Most significantly, it is incomplete in that it fails to list all of Appellant's overseas service. It was error for the SJAR to include inaccurate information. However, neither Appellant nor his trial defense counsel mentioned the erroneous information in their submissions to the convening authority. While we do not condone the Government's lack of attention to detail, which resulted in incomplete advice to the convening authority, we are confident on this record that the correct information would not have led to a more favorable recommendation by the staff judge advocate or more favorable action by the convening authority.

In another case, this kind of simple error could have resulted in, at a minimum, the need to remand the case for a new post-trial action and significant time and effort by very busy individuals. The Air Force's scarce resources

should not be wasted due to legal professionals' failure to apply sufficient attention to detail and exercise due diligence in processing post-trial matters.

III. CONCLUSION

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and the sentence are **AFFIRMED**.

FOR THE COURT

KURT J. BRUBAKER
Clerk of the Court