UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
J.A. MAKSYM, J.R. PERLAK, R.E. BEAL
Appellate Military Judges

UNITED STATES OF AMERICA

v.

MICHAEL T. JENKINS
CHIEF WARRANT OFFICER TWO (CWO2), U.S. MARINE CORPS

NMCCA 201000663
GENERAL COURT-MARTIAL

Sentence Adjudged: 18 June 2010.
Military Judge: LtCol Robert Ward, USMC.
Convening Authority: Commanding General, 3d Marine Division (REIN), Kaneohe Bay, HI.
Staff Judge Advocate's Recommendation: LtCol K.J. Estes, USMC.
For Appellant: Maj Jeffrey Liebenguth, USMC.
For Appellee: Capt Samuel Moore, USMC.

9 August 2011

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULEIF PRACTICE AND PROCEDURE 18.2.

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of conspiracy, making a false official statement, aggravated sexual contact with a child, rape of a child, sodomy, conduct unbecoming an officer and a gentleman, adultery, possession of child pornography, possession of child pornography with intent to distribute, receipt of child pornography, and attempting to induce, persuade, or entice a person under the age of 18 years of age to engage in sexual activity, in violation of Articles 81, 107, 120, 125, 133, and 134 of Uniform Code of Military Justice, 10 U.S.C. §§ 881, 907, 920, 925, 933, and 934. The military judge sentenced the

appellant to confinement for life with the possibility of parole, forfeiture of all pay and allowances, and a dismissal. Pursuant to a pretrial agreement the convening authority approved the adjudged sentence, but suspended confinement in excess of 480 months for the period of confinement served plus twelve months, waived automatic forfeitures for six months, and disapproved the adjudged forfeitures.

The appellant assigns two errors: 1) the appellant was illegally placed in pretrial confinement, and 2) all Specifications of Charge IV and the sole Specification under Additional Charge IV fail to state an offense. Having carefully reviewed the record of trial and the parties' pleadings, we find that no error materially prejudicial to the substantial rights of the appellant occurred and affirm the findings and sentence. Articles 59(a) and 66(c), UCMJ.

Background

While deployed to Afghanistan, the appellant was the subject of an investigation into suspected adultery with a fellow Marine's wife. The appellant provided a statement to Naval Criminal Investigative Service (NCIS) agents in which he admitted to engaging in an extramarital affair with LN that involved sexual intercourse, emails, and live video chats. The appellant denied any involvement in the sexual abuse of LN's children. Appellate Exhibit I at 23. A search was then conducted with command authorization and NCIS seized the appellant's computer. *Id.* at 24.

The appellant's commanding officer issued a military protective order (MPO) to the appellant that precluded him from contacting or approaching members of LN's family, being alone with anyone under 18 years old, or using the internet to observe anyone under the age of 18 years old. *Id.* at 30. A week following the issuance of the MPO, the appellant was relieved of his duties and sent back to his command's remain behind element (RBE) in Hawaii. *Id.* at 35. Shortly after his return, the appellant was issued another MPO, this time the MPO prohibited contact with his own wife and children, required marital counseling, and allowed visitation of his children only under the supervision of a chaplain. *Id.* at 36. About a week later the second MPO was relaxed in that the prohibition against contact with the appellant's wife was lifted, and visitation with the appellant's children was permitted under the supervision of the appellant's wife or others. *Id.* at 38. About a month later, the second MPO was lifted in its entirety and the appellant resumed living with his family again. Record at 120.

Shortly after the appellant moved back home, NCIS received a preliminary analysis report on the contents of the appellant's computer. The report stated the appellant's computer contained evidence indicating the appellant had participated in the sexual abuse of LN's children. *Id.* at 60. Specifically the evidence

indicated that the appellant directed LN to engage in various sexual acts with her children as the appellant watched during live video chats. The appellant also directed LN to commit other sexual assaults on her children and record those assaults for his later viewing. The commanding officer ordered the appellant confined after he was briefed on the new evidence. *Id.* at 149-51. At the review hearing, the initial review officer (IRO) declined to release the appellant from pretrial confinement. At trial, the appellant moved to be released from pretrial confinement, asserting that the convening authority and the IRO had abused their discretion in ordering his confinement. The military judge denied the appellant's motion.

Illegal Confinement

This court reviews a military judge's ruling on the legality of pretrial confinement for abuse of discretion. *United States v. Wardle*, 58 M.J. 156, 157 (C.A.A.F. 2003)(citing *United States v. Gaither*, 45 M.J. 349, 351,352 (C.A.A.F. 1996)). There is an abuse of discretion when a military judge applies an erroneous view of the law. *Unites States v. Taylor*, 47 M.J. 322, 325 (C.A.A.F. 1997).

The appellant argues under the holding of *United States v. Heard*, 3 M.J. 14 (C.M.A. 1977), that lesser forms of restraint must be tried and found to be inadequate before pretrial confinement can be legally imposed. The appellant further argues that because he was subject to lesser forms of restraint before he was placed in pretrial confinement, and those forms of restraint were adequate, the military judge abused his discretion when he permitted continued pretrial confinement and when he upheld earlier confinement decisions.

In *Heard*, the appellant was confined before trial on charges of forgery and wrongful appropriation. The officer that ordered the pretrial confinement openly admitted he did so because Heard was a "pain in the neck," not because of a perceived flight risk or a risk for further misconduct. *Id.* at 21. The *Heard* court held that because the airman was neither a flight risk nor a threat for further serious misconduct, his confinement had been illegal. The court also stated in dicta "we believe that the only time that circumstances require the ultimate device of pretrial incarceration is when lesser forms of restriction or conditions on release have been tried and have been found wanting." *Id.* at 21-22. The court specifically stated in a footnote: "As there was no *basis* in this case for pretrial confinement, it is irrelevant to our decision here that lesser forms of restriction or conditions on release were not first utilized in lieu of confinement". *Id.* at 22 n.20. The appellant asks us to interpret the dicta in *Heard* as requiring lesser forms of restraint to be tried and found to be inadequate before confinement can be ordered.

In *United States v. Burke*, 4 M.J. 53 (N.C.M.R. 1977), we found the dicta in *Heard* did not require lesser forms of restraint be attempted and proven inadequate before confinement can be legally imposed. We see no reason to reverse that opinion.

> In construing the *Heard* decision, it is considered necessary to read between the lines to arrive at a correct application of the law to a given case.
>
> The *Heard* decision is not interpreted to be so inflexible as to absolutely require a stepped confinement process in all but a capital case. Rather, *Heard* is taken to require the exercise of reasonable judgment in determination of pretrial confinement issues, bearing in mind society's need to protect itself, the need for an accused's presence at trial, and the complete undesirability and unlawfulness of unnecessary pretrial confinement.

Id. at 534-35.

The military judge in this case correctly applied this standard in his review, made correct applications of the law, and his findings of fact were not clearly erroneous. We find the military judge acted well within his discretion and we find no error.

Failure to State an Offense

In his second assignment of error, the appellant argues that he failed to receive proper notice of what he needed to defend against in each of the eleven specifications charged under Article 134, UCMJ. The appellant argues that each specification fails to state an offense because each fails to allege the circumstances which make the alleged acts prejudicial to good order and discipline or service discrediting. We are not persuaded by the appellant's argument.

Whether a specification states an offense is a question of law that we review *de novo*. *United States v. Sutton*, 68 M.J. 455, 457 (C.A.A.F. 2010). We find that each specification clearly alleges the elements of Article 134, i.e., 1) that the appellant committed an act, and 2) the act was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. Furthermore, we find that each act that was alleged in each specification was sufficiently specific in detail to put the appellant on notice as to what he must defend against. We note that the appellant pled guilty to each of these specifications without seeking a bill of particulars and provided the military judge the factual basis which supported both elements of the offense. Accordingly, we find no error.

Conclusion

We affirm the findings and sentence as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court