

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

**Before
B.L. PAYTON-O'BRIEN, R.Q. WARD, J.R. MCFARLANE
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JASON R. FROST
MUSICIAN THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 201200190
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 27 February 2012.

Military Judge: CAPT John Waits, JAGC, USN.

Convening Authority: Commander, Navy Region Southeast,
Jacksonville, FL.

Staff Judge Advocate's Recommendation: CDR M.C. Holifield,
JAGC, USN.

For Appellant: Maj Babu Kaza, USMCR.

For Appellee: Maj William Kirby, USMC.

30 November 2012

OPINION OF THE COURT

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

PER CURIAM:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of three specifications of indecent conduct and three specifications of unlawful entry in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The military judge sentenced the appellant to nine months confinement, reduction to pay grade E-1, and a bad-conduct discharge. In an act of clemency, the convening authority (CA)

deferred and waived a portion of automatic forfeitures for the benefit of the appellant's dependent child. The CA otherwise approved the sentence and, except for the punitive discharge, ordered it executed.

In a sole assignment of error, the appellant argues that the military judge erred in not considering Bureau of Personnel (BUPERS) Instruction 1640.22, which outlines Department of the Navy confinement assignment policies as evidence regarding the appellant's rehabilitation potential.

After carefully considering the record of trial and the submissions of the parties, we are convinced that the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Factual Background

The appellant entered pleas of guilty to unlawfully entering unoccupied hotel rooms on three separate occasions and masturbating on the bed until being discovered by maids. Subsequent to these incidents, but before the appellant entered his pleas, he began attending group therapy for "sexaholics" in the Jacksonville, Florida area. Record at 150; 160-61. The appellant's sponsor from this group therapy testified at the presentencing hearing and explained that the program was loosely based on the twelve step recovery model commonly associated with Alcoholics Anonymous. The sponsor also testified that if the appellant were confined away from the Jacksonville area, he would not likely be able to continue his rapport with the appellant. *Id.* at 166. Trial defense counsel (TDC) later sought to introduce BUPERS Instruction 1640.22, which sets out the assignment criteria for confinement facilities within the Department of the Navy (DoN). Defense Exhibit L. When the Government objected, TDC argued the exhibit was relevant to show that if the appellant received a sentence of confinement greater than thirty days, he would likely be reassigned to DoN confinement facilities beyond the local area, making contact with his sponsor difficult if not impossible. The military judge ultimately excluded Defense Exhibit L as not relevant and a waste of time. Record at 176-82.

Discussion

A military judge's ruling on the admissibility of evidence is reviewed for an abuse of discretion. *United States v. Schlamer*, 52 M.J. 80, 84 (C.A.A.F. 1999). A military judge's ruling on admissibility of evidence will only be overturned if it is "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997) (internal quotation marks and citation omitted).

In this case, the military judge's ruling was not arbitrary or clearly unreasonable. The military judge correctly noted that the court-martial did not know if confinement was going to be awarded; if awarded whether it was going to be approved; and if approved where the convening authority was going to designate as the place of confinement. This, coupled with the fact that the court could not dictate where the appellant would be confined, led the military judge to find that the proposed evidence was speculative and a waste of time; a conclusion that was not clearly erroneous, and therefore not an abuse of discretion. Furthermore, even if we were to find that the military judge abused his discretion by excluding the evidence, we fail to discern any prejudice. The only relevance of the excluded evidence was to show that the appellant would potentially lose contact with his "sexaholics" support group if he received more than 30 days confinement. Given the severity of his crimes, which would have carried a maximum penalty of 16 and a half years of confinement but for the fact that the accused negotiated a pretrial agreement for referral to a special court-martial, the likelihood of him receiving such a light sentence was extremely remote. Therefore, assuming that the military judge's decision to exclude the exhibit was error, we find no material prejudice. Art. 59(a), UCMJ.

Conclusion

The findings and sentence as approved by the CA are affirmed.

For the Court

R.H. TROIDL
Clerk of Court