

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

**Before
J.R. PERLAK, J.K. CARBERRY, M.D. MODZELEWSKI
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JEFFREY J. NIX
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 201100634
GENERAL COURT-MARTIAL**

Sentence Adjudged: 12 August 2011.

Military Judge: Maj Clay Plummer, USMC.

Convening Authority: Commanding General, 2d Marine
Division, Camp Lejeune, NC.

Staff Judge Advocate's Recommendation: Col T.M. Dunn,
USMCR.

For Appellant: CDR R.D. Evans, Jr., JAGC, USN.

For Appellee: Maj William C. Kirby, USMC.

19 June 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 general court-martial, convicted the appellant, pursuant to his pleas, of two specifications of aggravated sexual assault, one specification of abusive sexual contact, and one specification of enticement of a minor, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The appellant was sentenced to confinement for 100 days, reduction to pay

grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

The appellant raises three assignments of error. First, he alleges that the CA did not consider the appellant's clemency request prior to taking his action. Secondly, the appellant argues that the military judge improperly failed to sequester the Government's witness in aggravation and requests a sentencing rehearing. Finally, the appellant asserts that certain photographs included in the record should be placed under seal.

We have examined the record of trial, the assignments of error, and the Government's response. We conclude that the findings and the sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Consideration of Clemency Matters

The appellant asserts that the CA failed to consider the appellant's clemency request prior to taking his action, noting that the CA did not explicitly reference the clemency request in his action.¹

A careful examination of the record fails to reveal any support for the appellant's assignment of error. To the contrary, we note that the appellant's clemency petition of 29 October 2011 is included in the record of trial. Further, when the staff judge advocate forwarded the case to the convening authority for his review and action, he not only included the clemency request as an enclosure, but also explicitly described the relief requested in the clemency request, and advised the convening authority that he must now carefully consider the clemency matters prior to taking action.²

It is well-settled law that there is no requirement that the convening authority highlight his consideration of a clemency petition. His doing so may be presumed absent evidence

¹ The action reads: "Prior to taking action in the case, I considered the results of trial, the record of trial, and the recommendation of the staff judge advocate."

² Staff Judge Advocate ltr of 28 Nov 2011.

to the contrary.³ Further, it is also well-settled that where, as in this case, the clemency petition is attached to the record of trial and predates the convening authority's action, there is "more than a mere presumption that the convening authority considered the appellant's petition."⁴ The appellant has offered nothing to suggest that this settled law should not apply in this instance. We find this assignment of error to be without merit and decline to provide the relief requested.

Failure to Sequester Witnesses

These charges arose from the appellant's relationship with a fifteen-year-old girl, whom he considered his girlfriend. Her parents saw photos of a sexual nature on her cell phone and reported the relationship to the appellant's command. During sentencing, the trial counsel called the victim's mother, who testified about the impact of this incident on her daughter's life and on her relationship with the family.⁵ Following direct examination of the witness, the defense counsel requested that the victim's father be sequestered from the courtroom. The military judge denied the request. The father remained in the courtroom for cross-examination, and was then called as the next witness in aggravation. He testified briefly about how he discovered that his daughter had a sexual relationship with the appellant, and about how that relationship had changed his daughter and affected the family dynamics.⁶ Cross-examination was very brief - just two questions about when the witness discovered the incriminating photos.⁷ The appellant now asserts that the failure to sequester the witness was prejudicial error under MILITARY RULE OF EVIDENCE 615, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

When asked, a military judge shall exclude witnesses from the courtroom "so that they cannot hear the testimony of other witnesses." MIL. R. EVID. 615. The purpose of the sequestration rule is to prevent witnesses from shaping their testimony to

³ *United States v. Barnette*, 21 M.J. 749, 750 (N.M.C.M.R. 1985).

⁴ *United States v. Doughman*, 57 M.J. 653, 655 (N.M.Ct.Crim.App. 2002) (quoting *United States v. Zaptin*, 41 M.J. 877, 881 (N.M.Ct.Crim.App. 1995)).

⁵ Record at 47-51.

⁶ *Id.* at 54-56.

⁷ *Id.* at 57.

match another's and to discourage fabrication and collusion.⁸ MIL. R. EVID. 615, however contains several exceptions. In 2002, the rule was amended to extend to victims at courts-martial the statutory rights extended to victims in federal criminal cases, including the general right to be present at court proceedings relating to the offense.⁹ As the father of a minor victim, this witness was entitled to remain in the courtroom during the sentencing hearing.¹⁰

Even assuming arguendo that the military judge erred in not excluding the witness upon defense request, we find no prejudice. Prejudice under is determined by considering whether the witness's testimony was affected by the trial proceedings that the witness heard.¹¹ The appellant has failed to demonstrate that the father's presence during his wife's cross-examination affected the veracity of his own testimony. Moreover, our own review of the record reveals no evidence to suggest that the father shaped or shaded his brief testimony during the sentencing hearing to match his wife's, or that they in any way fabricated or colluded in their testimony.¹² Accordingly, we decline to grant relief.

Finally, we direct that the Clerk of Court seal Prosecution Exhibit 3 and the CD that contains the Electronic Record of Trial.

⁸ *United States v. Lofton*, 69 M.J. 386, 391 (C.A.A.F. 2011).

⁹ MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Analysis of MIL. R. EVID 615, App. 22, at A22-49.

¹⁰ 42 U.S.C. § 10607(e)(2).

¹¹ *United States v. Quintanilla*, 63 M.J. 29, 38(C.A.A.F.2006); *United States v. Langston*, 53 M.J. 335, 338 (C.A.A.F.2000); *United States v. Spann*, 51 M.J.89, 93(C.A.A.F.1999).

¹² *Lofton*, 69 M.J. at 391.

Conclusion

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

For the Court

R.H. TROIDL
Clerk of Court