

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

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

UNITED STATES OF AMERICA

v.

**RAYVOHN D. WALLACE
OPERATIONS SPECIALIST THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 201100300
GENERAL COURT-MARTIAL**

Sentence Adjudged: 18 February 2011.

Military Judge: CAPT Carole Gaasch, JAGC, USN.

Convening Authority: Commander, Navy Region Southwest, San Diego, CA.

Staff Judge Advocate's Recommendation: CDR L.B. Sullivan, JAGC, USN.

For Appellant: LT Daniel Napier, JAGC, USN; LCDR Michael Torrissi, JAGC, USN.

For Appellee: LT Benjamin Voce-Gardner, JAGC, USN.

30 March 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.**

WARD, Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of three specifications of failure to obey a lawful general regulation¹, in violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892. In addition, members with enlisted representation

¹ Secretary of the Navy Instruction 5300.26D (3 Jan 2006), Department of the Navy Policy on Sexual Harassment.

convicted the appellant, contrary to his pleas, of one additional specification of failure to obey that same general regulation and one specification each of wrongful sexual contact, forcible sodomy, and assault consummated by battery, in violation of Articles 92, 120, 125, and 128, UCMJ, 10 U.S.C. §§ 892, 920, 925, and 928. The members sentenced him to confinement for five years, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged.

The appellant seeks relief from the military judge's pretrial rulings denying his motion to admit evidence of the victim's mental health history and denying his motion to dismiss three of the four sexual harassment specifications due to prior imposition of nonjudicial punishment. After reviewing the record of trial and the parties' pleadings, we find that the military judge did not abuse her discretion in denying the appellant's motions, but that he is entitled to credit pursuant to *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989) due to the prior imposition of nonjudicial punishment for three of the four order violation offenses. We further conclude that following our corrective action the findings and sentence are correct in law and fact and that no errors materially prejudicial to the substantial rights of the appellant remain.

MILITARY RULE OF EVIDENCE 513

In a pretrial motion, the defense sought an order compelling the Government to produce mental health records of the victim, Airman (AN) TG. Record at 90-95; Appellate Exhibit II. The Government did not oppose production for an *in camera* review and was only aware of mental health records prepared by the medical department aboard USS RONALD REAGAN (CVN 76), the ship to which AN TG was assigned. Record at 96-97. Consequently, the military judge ordered production of AN TG's mental health records from the ship for an *in camera* review. *Id.* at 97; AE XIII. After completing her *in camera* review, the military judge ordered disclosure of AN TG's mental health records to the parties, pursuant to MILITARY RULE OF EVIDENCE 513(d)(8), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Record at 110; App. AE XIV.

In a pretrial motion hearing, trial defense counsel requested production of a mental health expert to review AN TG's mental health records and determine the extent of any diagnosis and treatment for Bipolar II disorder and how it may be relevant to the case. Record at 219-26. Trial defense counsel explained

that the disorder could potentially support a defense theory that AN TG consented to the appellant's conduct and later fabricated her allegation against him. *Id.* Over the Government's objection, the military judge ordered production of a Navy psychiatrist to review AN TG's mental health records previously produced, and, if necessary, consult the parties on the viability of any such theory.² *Id.* at 224-26. The military judge later supplemented her order by directing the release of all Navy mental health records of AN TG to the parties and Lieutenant Commander (LCDR) William Sauve, MC, USN, a staff psychiatrist from the nearby Naval Medical Center San Diego and the psychiatric expert identified by the Government pursuant to the military judge's previous order. *Id.* at 230; AE XXXVIII.

Shortly before trial, the military judge held a hearing on a defense motion for a continuance and request for production of LCDR Sauve as an expert witness at trial.³ Trial defense counsel explained that LCDR Sauve's testimony was relevant to explain AN TG's pre-enlistment diagnosis of Bipolar II disorder and common characteristics of the disorder to include impulsiveness, risk taking, and hyper sexuality experienced while the person was under a "hypomanic episode" associated with the disorder. Record at 239. However, trial defense counsel also conceded the limited factual predicate to his potential theory, stating "there's not (sic) knock-down drag-out evidence that she has this disorder; but there is certainly some evidence, and there's some evidence to corroborate that she was in a hypomanic stage at the dates in question in this case, and that is relevant because of the characteristics and symptoms of that stage of the disorder." *Id.* at 240.

LCDR Sauve then testified that Bipolar II disorder typically involves hypomanic episodes, which can involve sleeplessness, lowered inhibitions, risk-taking behavior, and hypersexuality. *Id.* at 243-44. He explained that a review of AN TG's records revealed that she reported a pre-enlistment diagnosis for Bipolar II disorder.⁴ However, no military mental

² The military judge noted that this would not be a confidential consultant for the defense. Record at 226.

³ AE XXXIX.

⁴ At the time of trial, AN TG had served in the Navy for approximately three and a half years. Following recruit training and "A" school, her first duty assignment was to an aircraft carrier. Her next duty station was to a Naval Air Station, followed by her then-current assignment to REAGAN. Record at 687-88. According to LCDR Sauve, AN TG's military mental health records revealed evaluation and treatment for anxiety and depression while she was

health provider had made any independent diagnosis. *Id.* at 245-46. On cross-examination, LCDR Sauve conceded that he had never personally interviewed AN TG, saw no prescription medication for the disorder noted in her medical records, and he had no idea if she was experiencing any of the different stages of the Bipolar II disorder during the events in question. *Id.* at 247. He also conceded that hypomanic episodes from Bipolar II disorder typically have no bearing on a person's truthfulness. *Id.* at 247-49.

When asked by the military judge for his own opinion on the viability of any Bipolar II diagnosis, LCDR Sauve stated "[l]ooking at the whole record, I mean, I think that any diagnosis of bipolar disorder, it may be there, but it's not well supported. So that's not—just from reviewing the record alone, I would not be ready to make that call."⁵ *Id.* at 254. Following argument, the military judge denied the defense motion to call LCDR Sauve as an expert psychiatric witness, citing a lack of evidence that AN TG suffered from Bipolar II disorder and that any evidence of her pre-enlistment diagnosis was not relevant to any issue in the case. She then noted that any limited probative value would be substantially outweighed by the danger of confusion of the issues, misleading the members and undue delay. *Id.* at 258-60. The appellant now challenges that ruling.

We review a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. Roberts*, 69 M.J. 23, 26 (C.A.A.F. 2010). This includes alleged violations of an accused's right to confrontation under the Sixth Amendment. *United States v. Smith*, 68 M.J. 445, 448 (C.A.A.F. 2010). "The military judge's 'findings of fact will not be overturned unless they are clearly erroneous or unsupported by the record.' We review conclusions of law *de novo*." *United States v. Owens*, 51 M.J. 204, 209 (C.A.A.F. 1999) (quoting *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996)). This standard for our review of the military judge's findings of fact is a strict one, requiring more than a mere

assigned at the Naval Air Station in the fall of 2008. Following her transfer to the REAGAN, there were no records of subsequent mental health treatment until she was treated for post-traumatic stress disorder on board REAGAN following the offenses. *Id.* at 249-54.

⁵ AE XCVIII is a copy of the records of AN TG's mental health treatment from 31 July 2011 to the time of trial. Although not included in this exhibit, LCDR Sauve also reviewed mental health records from AN TG's previous duty station at the Naval Air Station. Record at 244-47.

difference of opinion. *United States v. McElhane*y, 54 M.J. 120, 130 (C.A.A.F. 2000). Additionally, we must consider the evidence in the light most favorable to the prevailing party. *Reister*, 44 M.J. at 413.

Turning to the case at hand, trial defense counsel argued to the military judge that evidence of AN TG's prior diagnosis of Bipolar II disorder could establish a motive to fabricate her allegation out of regret and depression. Record at 238-40, 256-57; AE XXXIX at 3-4. While motive to fabricate an allegation of sexual assault may be proper for impeachment under MIL. R. EVID. 608(c), *United States v. Moss*, 63 M.J. 233, 238 (C.A.A.F. 2006), an appellant must still demonstrate that the proffered evidence is both logically and legally relevant to this theory. *United States v. Sullivan*, 70 M.J. 110, 115 (C.A.A.F. 2011) (an appellant's burden requires more than simply describing evidence in terms of credibility, truthfulness or bias). Instead, an appellant must establish "a real and direct nexus" between the proffered evidence and a fact or issue in the case. *Id.* In this case, the military judge found that the appellant failed to establish logical and legal relevance.

We find that the military judge's findings are well-supported in the record and our own *de novo* review brings us to the same conclusions of law. Trial defense counsel argued that AN TG's pre-enlistment diagnosis was sufficient to support their theory that she suffered from the disorder at the time of the offenses, an assertion they conceded was not confirmed by military mental health providers.⁶ LCDR Sauve himself acknowledged that AN TG's records established "very little" as to a proper diagnosis for Bipolar II disorder and "no necessarily clear symptomatology of a hypomanic or a manic episode" at the time of the offenses. Record at 245. He conceded on cross-examination that he saw no indication of any prescribed medication for the disorder or any formal diagnosis despite multiple visits for other mental health related issues. *Id.* at 247.

We also find that the appellant similarly failed to establish that AN TG was laboring under a hypomania episode at the time of the offenses. LCDR Sauve conceded that he had no

⁶ Trial defense counsel acknowledged that "[t]here is not sufficient history documented by [her treating psychiatrists and counselors] to confirm the earlier diagnosis. Nor do the records reveal who diagnosed her earlier or why or on what basis, but we know that that diagnosis was made." Record at 239.

knowledge on the subject just from reviewing her mental health records. And even though trial defense counsel argued "there is specific evidence . . . that shows that on the dates in question [AN TG] was exhibiting some of the symptoms and characteristics of hypomania,"⁷ they failed to establish any such factual nexus either through independent evidence or the opinion of LCDR Sauve.

Last, although not advanced at trial, the appellant now raises the additional possibility that AN TG's diagnosis of Bipolar II disorder, with its associated hypomania, "may have caused her to perceive events differently than they were in reality" and thereby offer an alternate explanation for her conduct. Appellant's Brief of 4 Aug 2011 at 8. No evidence to substantiate this claim was offered to the military judge, nor does the record contain any.

Prior Imposition of Nonjudicial Punishment

In his second assignment of error, the appellant argues that the military judge abused her discretion in denying his pretrial motion to dismiss Charge 1, Specifications 1-4; or in the alternative, to sever these offenses from the remainder due to prior imposition of nonjudicial punishment. AE VII.

RULE FOR COURTS-MARTIAL 907(b)(2)(D)(iv), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) and Part V, ¶1e of the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) bar prosecution if prior punishment under Article 15, UCMJ was imposed, provided that the offense was minor. Whether an offense is minor depends on such factors as: the nature of the offense and the circumstances surrounding its commission; the offender's age, rank, duty assignment, record and experience; and the maximum sentence authorized for the offense if tried by general court-martial. M.C.M., Part V, ¶1e. "Ordinarily, a minor offense is an offense which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than 1 year if tried by general court-martial." *Id.* Ultimately, though, the decision whether an offense is "minor" lies within the commander's discretion. *Id.*, see also *United States v. Gammons*, 51 M.J. 169, 182 (C.A.A.F. 1999).

In a pretrial hearing, trial defense counsel presented the testimony of the victims of these four specifications along with the nonjudicial punishment record and related command

⁷ Record at 256; see also Record at 239-40 and AE XXXIX at 2-3.

investigation that substantiated sexual harassment. Record at 20-68; AE VII. Trial defense counsel then argued that these four specifications were "minor" and should be dismissed under R.C.M. 907(b)(2)(D)(iv). Record at 68-76. In the alternative, they asked that these four specifications be severed from the one remaining Article 92 specification and the Articles 120, 125, and 128 specifications which all involved AN TG. *Id.*; AE VII at 8-9. This would guard against the "the panel members from inferring that an accused who would make sexual comments to fellow Sailors would be more likely to sexually assault another Sailor." AE VII at 9.

Following the hearing, the military judge issued her essential findings of fact and conclusions of law. AE XVI. She granted the motion to dismiss as to Specification 4 but denied the motion as to Specifications 1-3.⁸ In denying the motion as to Specifications 1-3, she did not limit her inquiry to the maximum authorized punishment. Instead, she also focused on the nature of the general order involved and the facts and circumstances surrounding each offense. *Id.* at 6. She found that all three offenses had in common the seniority of the appellant, his presumed awareness of the Navy policy on sexual harassment, his status as a fellow member of the same department, that the offenses occurred while the ship was underway, and the lack of any evidence of bad faith in the referral. *Id.* at 7-8. On this last fact, she noted that the special court-martial convening authority (SPCMCA) who imposed the nonjudicial punishment was not the same SPCMCA who forwarded a recommendation to try these offenses at general court-martial. *Id.* at 8. Finally, she cited the repeated instances of the appellant's unwelcome and offensive conduct and the plainly offensive nature of his conduct. *Id.*

We review a military judge's findings of fact in this regard for an abuse of discretion, *United States v. Hudson*, 39 M.J. 958, 961 (N.M.C.M.R. 1994), and here we find none. The circumstances cited by the military judge more than adequately support her conclusions that these three offenses were not minor within the meaning of Part V, ¶1e of the MCM. We additionally note that these offenses all occurred within close temporal

⁸ Initially there were five specifications under Charge I each alleging a violation of SECNAVINST 5300.26D, the Navy policy on sexual harassment. The defense motion sought to dismiss Specifications 1-4. Specification 5, which involved AN TG, was not included in the defense motion. After the military judge's ruling dismissing Specification 4, Specification 5 was then renumbered and referred to thereafter as Specification 4.

proximity.⁹ The appellant's pattern of sexually unwelcome and offensive conduct involving fellow shipmates in his department further supports the military judge's conclusion that these offenses were not minor.

Finally, as noted by the appellant even though he raised the issue of appropriate *Pierce* credit in his post-trial submission to the CA, the CA's action failed to provide any appropriate sentence credit.¹⁰ The Government agrees. Accordingly, we will grant the appellant appropriate *Pierce* credit for the ten days of restriction he served as nonjudicial punishment until he was placed in pretrial confinement.

Conclusion

We affirm the findings and the sentence as approved by the convening authority. Further, the supplemental court-martial order will reflect an additional five days confinement credit pursuant to *United States v. Pierce*, 27 M.J. 369 (C.M.A. 1989).

Senior Judge MAKSYM and Judge PAYTON-OBRIEN concur.

For the Court

R.H. TROIDL
Clerk of Court

⁹ The appellant's remarks and conduct underlying these offenses occurred during the months of April, May and June 2010 on board the REAGAN. AE VII, enclosure (a).

¹⁰ Clemency Request of 26 May 2011 at 3-4. The CA's action does grant *Allen* credit for 199 days served in pretrial confinement; however, it fails to provide any additional *Pierce* credit. General Court-Martial Order No. 14-11 of 2 June 2011.