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

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

UNITED STATES OF AMERICA

v.

JESSE O. COOPER
ELECTRONICS TECHNICIAN THIRD CLASS (E-4), U.S. NAVY

NMCCA 201200470
GENERAL COURT-MARTIAL

Sentence Adjudged: 13 July 2012.
Military Judge: CAPT Edward Smith, JAGC, USN.
Convening Authority: Commander, U.S. Naval Forces Japan, Yokosuka, Japan.
Staff Judge Advocate's Recommendation: CDR T.D. Stone, JAGC, USN.
For Appellant: LT Carrie Theis, JAGC, USN.
For Appellee: Maj Crista Kraics, USMC; Maj William Kirby, USMC.

30 May 2013

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 general court-martial convicted the appellant, pursuant to his pleas, of one specification of receiving child pornography and one specification of possessing child pornography in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The military judge sentenced the appellant to confinement for four years, reduction to pay grade E-1, and to be discharged with a bad-conduct discharge.

Pursuant to a pretrial agreement, the convening authority (CA) approved the sentence as adjudged, suspended confinement in excess of 36 months for 12 months from the date of his action and, except for the punitive discharge, ordered it executed.

The appellant asserts four assignments of error.[1] Having reviewed the record of trial and the parties' pleadings, we conclude that the findings and the sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c) UCMJ.

Background

On December 3, 2010, the alarm from the appellant's unattended iPad, left on his rack in open berthing space, began to sound. Awoken by the sound, another Sailor in the same berthing area, Electronics Technician First Class (ET1) CH, heard the alarm sounding from the rack below. ET1 CH picked up the appellant's iPad and accessed the home screen in order to locate the alarm and shut it off. On the home screen, ET1 CH observed several icons depicting pictures of young naked boys posing in a sexually suggestive manner. After silencing the alarm, ET1 CH returned the iPad to the appellant's rack and notified his chain-of-command, thereby prompting an investigation. The investigation later uncovered images of

[1] (1) RULE FOR COURTS-MARTIAL 1106(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) requires a staff judge advocate's recommendation (SJAR) to comment on any allegation of legal error raised in clemency. Here, the SJAR did not comment on the appellant's allegation, raised twice during clemency, that he suffered oppressive punitive conditions before and after his court martial.

(2) Article 55, UCMJ, and the Eighth Amendment prohibit cruel and unusual punishment. Before the appellant's court martial, he was forced to sleep in an unclean rack without linens. After the court-martial, due to Government negligence, he was forced to spend the night shackled in a hot open van subject to public gawking and ridicule.

(3) The Sixth Amendment protects the right of an accused to confer privately with his attorney. Over defense objection, the military judge forced the appellant and his attorney to sit next to the court reporter for the duration of the testimony in a dispositive motion session conducted via video teleconferencing. We have reviewed this assignment of error submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982) and find it to be without merit. *United States v. Clifton*, 35 M.J. 79 (C.M.A. 1992).

(4) The Fourth Amendment protects against unreasonable searches and seizures. Here, the military judge abused his discretion when he denied the appellant's motion to suppress.

child pornography on the appellant's iPad and a laptop stored in the appellant's "coffin-locker" under his rack.

Analysis

1. Post-Trial Complaints of Pretrial and Post-Trial Accommodations

Subsequent to trial, trial defense counsel (TDC) submitted matters for the convening authority's consideration pursuant to RULE FOR COURTS-MARTIAL 1105, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). In her first letter, TDC complained that during the evening before trial, the trial counsel "failed to take adequate measures to secure a room for [the appellant and consequently TDC and the appellant] spent hours late into the night before trial attempting to locate a place where [the appellant] could sleep, which resulted in [the appellant] spending the night in TPD shared berthing that had not been cleaned with no linens on his rack." Clemency Request of 19 Oct 2012 at 2. Such conditions, TDC argued, "provide additional justification for a reduction of [the appellant's] sentence." *Id.* The force judge advocate (FJA) did not comment on this matter in his recommendation to the CA.

Following service of the FJA's recommendation, TDC submitted further matters for the CA's consideration; again complaining of the appellant's berthing accommodations during the evening before trial. In addition, the TDC referenced how following trial

> [A] paperwork error caused the masters in arms (sic) to bring [the appellant] to medical while in handcuffs twice to conduct a pre-confinement physical, and prevented his admission to the brig. Thus because of careless preparation of paperwork, [the appellant] suffered through nearly nine hours in handcuffs in a hot open van where he was gawked at by all those passing by and was forced to eat his dinner while still in handcuffs. . . . [and these conditions] provide additional justification for a reduction in sentence.

Clemency Request of 1 Nov 2012 at 2-3. Similarly, the FJA did not submit an addendum to his recommendation addressing these matters.

We review claims of post-trial processing error *de novo*. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000). Where an accused asserts legal error in his post-trial submissions, the SJA must state, at a minimum, "a statement of agreement or disagreement with the matter raised by the accused." R.C.M. 1106(d)(4). Where an appellant fails to object to errors in the staff judge advocate's recommendation, we test for plain error. *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005).

We disagree with the appellant that his post-trial matters included a claim of legal error, and accordingly we find that the FJA had no obligation to comment. *United States v. Hutchinson,* 56 M.J. 756 (Army Ct.Crim.App. 2002). A plain reading reveals that the appellant's post-trial complaints of his conditions before and after trial are simply matters for the CA's consideration in clemency, vice any perceived legal error. *Cf*. *United States v. Williams-Oatman*, 38 M.J. 602, 605 (A.C.M.R. 1993) (finding that a "plain reading" of post-trial matters raised legal error where TDC cited a case for proposition asserted and titled the paragraph in the post-trial submission "Consideration of Inadmissible Evidence").

As stated in TDC's letters, these claims were made as additional justification for a reduction in sentence. We also note the absence of any cited rule, regulation or legal standard from which the appellant's conditions departed. Additionally, TDC made no reference in either letter to an actual legal error affecting either the findings or sentence. Last, we note that at trial TDC disavowed any issue of unlawful pretrial punishment or restraint when asked by the military judge. Record at 155; *Hutchinson,* 56 M.J. at 759.

2. Cruel and Unusual Punishment Resulting from Pretrial and Post-Trial Accommodations

As to the appellant's claim of "cruel and unusual" punishment stemming from his pretrial and post-trial treatment, we are not persuaded. To be viable, an Eighth Amendment/Article 55, UCMJ, claim must satisfy both an objective and subjective component. *United States v. White*, 54 M.J. 469, 474 (C.A.A.F. 2001). "First, there is an objective component, where an act or omission must result in the denial of necessities and is 'objectively, sufficiently serious.'" *Id. (*quoting *Farmer v. Brennan*, 511 U.S. 825, 832 (1994)). Second, there must exist subjectively a "culpable state of mind" on behalf of a government agent. This culpable state of mind is a "'deliberate indifference to inmate health or safety.'" *Id.* (quoting *Farmer,*

511 U.S. at 832). Government actors' indifference is evidenced by continuing to act despite the harm or risk of harm to the inmate. *United States v. Sanchez*, 53 M.J. 393, 396 (C.A.A.F. 2000). We review *de novo* whether the treatment asserted by the appellant constitutes "cruel and unusual treatment" under the Eighth Amendment and Article 55, UCMJ. *White*, 54 M.J. at 471.

Undertaking an objective analysis, we find that none of the complained of treatment, if true, denied the appellant any necessities.[2] Nor is there any evidence that any Government actor disregarded a risk to the health and safety of the appellant. As such, we find no violation of the appellant's rights under the Eighth Amendment or Article 55, UCMJ.

3. Waiver of Motion to Suppress[3]

Prior to his guilty plea, the military judge denied the appellant's motion to suppress the child pornography images found on his iPad. Appellate Exhibits IV and XI. The appellant now asks us to find an abuse of discretion by the military judge in denying his motion to suppress. However, we find this issue waived by the appellant's unconditional guilty plea. R.C.M. 910(j); *see also United States v. Bradley*, 68 M.J. 279, 281 (C.A.A.F. 2010) (holding that an unconditional guilty plea waives all nonjurisdictional defects at earlier stages of the proceedings). Here, the images of child pornography seized from the appellant's iPad clearly "relate to the factual issue of guilt." R.C.M. 910(j). The motion to suppress was fully litigated prior to the appellant's plea. AE XI; Record at 6-85. Therefore, the appellant's plea waived appellate review of the military judge's ruling.[4]

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[2] *Cf. generally Hope v. Pelzer*, 536 U.S. 730 (2002) (finding that handcuffing a shirtless inmate outside to a hitching post while denying him adequate water and causing a severe sunburn resulted in an Eighth Amendment violation); *Foster v. Runnels*, 554 F. 3d 807 (9th Cir. 2009) (denial of meals); *Mandel v. Doe*, 888 F.2d 783, 789-90 (11th Cir. 1989) (denial of medical attention); *Washington v. Dugger*, 860 F.2d 1018, 1021 (11th Cir. 1988) (denial of medical attention).

[3] This assignment of error was submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[4] Although we are not bound by the waiver doctrine due to our plenary powers of review under Article 66(c), UCMJ, *United States v. Nerad*, 69 M.J. 138, 144 (C.A.A.F. 2010), we find this an appropriate case to apply waiver.

Conclusion

The findings and the sentence as approved by the convening authority are affirmed.

For the Court

R.H. TROIDL
Clerk of Court