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

Before
R.Q. WARD, J.R. MCFARLANE, K.M. MCDONALD
Appellate Military Judges

UNITED STATES OF AMERICA

v.

RICHARD G. HAND
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS

NMCCA 201300064
GENERAL COURT-MARTIAL

Sentence Adjudged: 26 October 2012.
Military Judge: LtCol Chris Thielemann, USMC.
Convening Authority: Commanding General, 3d Marine Aircraft Wing, Marine Corps Air Station Miramar, San Diego, CA.
Staff Judge Advocate's Recommendation: LtCol K.C. Harris, USMC.
For Appellant: Capt David Peters, USMC.
For Appellee: LCDR Clayton Trivett, JAGC, USN; LT Philip Reutlinger, JAGC, USN.

31 December 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 panel of members with enlisted representation, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of one specification of attempted aggravated sexual abuse of a child and one specification of taking indecent liberties with a child, in violation of Articles 80 and 120, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 920. The appellant was sentenced to confinement for five years, reduction

to pay grade E-1, total forfeitures, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant submits the following assignments of error:

(1) Appellant was convicted of two specifications under Article 120 on the basis of a single act. The military judge merged the convictions for sentencing but allowed both convictions to stand, even after conceding they addressed the same act. Did the military judge abuse his discretion by failing to find an unreasonable multiplication of charges for findings?; and

(2) Did the military judge abuse his discretion by failing to suppress statements of appellant made to law enforcement absent a proper rights advisement?[1]

After consideration of the pleadings of the parties and the record of trial, 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 occurred. Arts. 59(a) and 66(c), UCMJ.

Background

In February of 2012, the appellant and his roommate were visiting an on-base apartment aboard the San Diego Naval Station leased by his roommate's childhood friend, Petty Officer L. Also visiting that evening was Petty Officer H and her five-year-old niece, A.H. After spending approximately one hour socializing at the apartment, the appellant and his roommate went into San Diego for a night of drinking. They later returned to the apartment, where they intended to spend the night.

After everyone else in the apartment was asleep, the appellant entered the bedroom where A.H. lay sleeping with her aunt. Because of an earlier accident that soiled her clothing, A.H. was sleeping in nothing more than a large adult T-shirt. The appellant rolled up the T-shirt to her collarbone, then

[1] This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

touched her stomach and pubic area. The victim's aunt woke up to find the appellant in the room, bent over the victim, with his hand poised two inches above the victim's genital area. When confronted, the appellant immediately left the room.

Later that day, the victim's aunt called the San Diego Police Department (SDPD) and reported the incident. A detective was assigned to the case and began investigating the incident. The appellant was initially interviewed over the telephone, during which he denied allegations that he improperly touched A.H. The detective then asked the appellant to come to police headquarters and take a polygraph examination to confirm his story. The appellant agreed. His command assigned a noncommissioned officer to escort him to the interview, but did not otherwise become involved in the investigation. No separate investigation was undertaken by the command, the Naval Criminal Investigative Service, or any other entity associated with the military at that time.

Pursuant to standard operating procedures, the SDPD detective informed the appellant that his participation in the interview process was strictly voluntary, that he was free to leave at any time he wished, that no matter what he said during the interview he would not be placed in custody that day, and that he would be free to go home at the end of the interview. The detective did not read the appellant his *Miranda* rights, or his rights under Article 31(b), UCMJ.

During the interview, the appellant initially denied having touched A.H., but eventually changed his story. The appellant stated that he had been molested as a child, that he wondered if he would be sexually aroused by touching children, and that he went into the bedroom, pushed up the victim's shirt, and touched her stomach in order to explore those feelings. He also said that it was "possible" that he touched her vaginal area. Record at 457.

During the course of her investigation, the SDPD detective learned that the incident occurred on property that was under exclusive Federal jurisdiction. As a result, the matter was then handed over to the military for prosecution.

Prior to trial, the appellant moved to suppress his statement to the SDPD detective based upon the detective's failure to read the appellant his Article 31(b) rights, and because his statement was "inextricably intertwined with the polygraph examination." Appellate Exhibit IV at 2. The

military judge denied the motion, but ordered the Government to redact all references to the polygraph examination.

Additional relevant facts are further developed below.

Unreasonable Multiplication of Charges

The appellant was charged with both aggravated sexual abuse of a child and taking indecent liberties with a child. The aggravated sexual abuse charge was based upon an allegation that he touched A.H.'s genitals with his hand. The indecent liberties charge was based on an allegation that he pulled up A.H.'s shirt above her pubic region, touched her stomach, and touched her pubic region. The members found the appellant guilty of taking indecent liberties with a child, not guilty of aggravated sexual abuse, but guilty of attempted aggravated sexual abuse. Prior to sentencing, the military judge instructed the members to consider the two offenses as one for sentencing purposes but did not hold that the findings returned by the members amounted to an unreasonable multiplication of charges.

"A military judge's decision to deny relief for unreasonable multiplication of charges is reviewed for an abuse of discretion." *United States v. Campbell*, 71 M.J. 19, 22 (C.A.A.F. 2012) (citing *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004) (additional citations omitted)).

What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges (UMC). R.C.M. 307(c)(4). In determining whether there is UMC, this court considers five factors: (1) Did the accused object at trial; (2) Are the charges aimed at distinctly separate criminal acts; (3) Do the charges misrepresent or exaggerate the appellant's criminality; (4) Do the charges unreasonably increase the appellant's punitive exposure; and, (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges and specifications? *United States v. Quiroz*, 57 M.J. 583, 585-86 (N.M.Ct.Crim.App. 2002) (*en banc*), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003) (summary disposition).

In this case, the first *Quiroz* factor weighs against the appellant since no motion was made at trial to treat the two specifications as an unreasonable multiplication of charges for findings.

The second and third factors weigh neither for nor against the appellant. The appellant argues that both convictions are

based on "the same, and only, act constituting misconduct." Appellant's Brief of 6 Jun 2013 at 13. That argument assumes that his conviction for attempted aggravated sexual abuse of a child is based upon the same acts charged under the taking indecent liberties with a child specification: "pulling up her shirt above her pubic region, touching her stomach, and touching her pubic region . . . ." Charge Sheet. However, we find this argument unconvincing. Although those acts could have formed the basis for the required substantial step towards committing the offense, there was other evidence, separate and apart from those acts, that also could have met that requirement. The child's aunt testified that she awoke to find the appellant bent over A.H., leaning across the bed, with his hand two inches above her genital area. Record 381, 394-95. That act, in and of itself, could have formed the substantial step necessary for the appellant's conviction for attempted aggravated sexual abuse of a child. Accordingly, because we cannot tell from the record what act or acts formed the basis for the attempt offense, we give no weight to these factors for either party.

The fourth factor weighs against the appellant in that the military judge merged the two specifications for sentencing.

The fifth factor also weights against the appellant. The specifications, as drafted by the Government, were aimed at different criminal acts, and evidenced no prosecutorial overreaching or abuse. The first specification sought to punish the appellant for touching A.H's genitalia, whereas the second specification was aimed at the separate acts of rolling up the victim's shirt, touching her stomach, and touching the public area above her genitalia. Moreover, even if one were to assume *arguendo* that it would have been UMC for the appellant to stand convicted of both offenses originally charged in this case, the charging scheme employed by the Government would still have been prudent and proper given the necessity of dealing with contingencies of proof.

In sum, all of the *Quiroz* factors are either neutral, or weigh against the appellant. Accordingly, we hold that the military judge did not abuse his discretion by merging the specifications for sentencing, but allowing the separate convictions to stand.

Motion to Suppress

We review a military judge's denial of a motion to suppress a confession for an abuse of discretion. *United States v. Chatfield,* 67 M.J. 432, 437 (C.A.A.F. 2009). We will not disturb a military judge's findings of fact unless they are clearly erroneous or unsupported by the record. *Id.* (citing *United States v. Leedy,* 65 M.J. 208, 213 (C.A.A.F. 2007)). We review *de novo* any conclusions of law supporting the suppression ruling. *Id.*

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself[.]" U.S. CONST. amend. V. For servicemembers, this right is protected in two different ways. First, the United States Supreme Court has ruled that the Government may not use statements, "stemming from custodial interrogation" of the accused unless it demonstrates that a proper rights advisement was given. *Miranda v. Arizona,* 384 U.S. 436, 444 (1966). Custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* Second, in Article 31(b) of the Uniform Code of Military Justice, Congress provided that:

> No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

10 U.S.C. § 831(b).

Civilian law enforcement officials are not required to advise a military member of his rights under Article 31(b) and MILITARY RULE OF EVIDENCE 305(C), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) unless they are "acting as a knowing agent of a military unit or of a person subject to the code." MIL. R. EVID. 305(b)(1); *see also United States v. Oakley*, 33 M.J. 27, 31 (C.M.A. 1991); *United States v. Penn*, 39 C.M.R. 194 (C.M.A. 1969); *United States v. Mayhugh*, 41 M.J. 657, 662 (N.M.Ct.Crim.App. 1994), *aff'd*, 44 M.J. 189 (C.A.A.F. 1996). The Court of Appeals for the Armed Forces has clarified this by holding that "civilian investigators working in conjunction with military officials must comply with Article 31: "(1) When the scope and character of the cooperative efforts demonstrate that

the two investigations merged into an indivisible entity, and (2) when the civilian investigator acts in furtherance of any military investigation, or in any sense as an instrument of the military." *United States v. Rodriguez*, 60 M.J. 239, 252 (C.A.A.F. 2004) (citations and internal quotation marks omitted).

Although the appellant argued that "1) the scope and character of the cooperative efforts between the San Diego Police Department and United States Marine Corps demonstrate[d] that the two investigations merged into an indivisible entity; or (2) the SDPD investigator acted in furtherance of a military investigation or in any sense was an instrument of the military," AE IV at 1, the record of trial simply fails to bear that out. When the SDPD detective interviewed the appellant, there was no Marine Corps investigation for the civilian investigation to merge with. Nor had anyone contacted, let alone directed, the civilian investigator, so any claim that the detective acted as "an instrument of the military" is without merit. Based upon these facts, we find that the military judge did not abuse his discretion by denying the motion to suppress.

Lastly, the appellant, for the first time on appeal, argues that his statement should have been suppressed because the SDPD detective did not advise him of his *Miranda* rights. Where no objection is raised at trial, an appellant may prevail on appeal only if he can show plain error. MILITARY RULE OF EVIDENCE 103, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). To establish plain error, the appellant must demonstrate: (1) that there was error, (2) that the error was plain or obvious, and (3) that the error materially prejudiced one of his substantial rights. *United States v. Olano*, 507 U.S. 725, 732-35 (1993).

As noted above, the evidence at trial clearly showed that the appellant was not in custody at the time his statements were made. Since *Miranda* only applies to custodial interrogations, the SDPD detective was not required to read the appellant his rights. *See Miranda,* 384 U.S. at 444. Accordingly, no error occurred, and this claim is without merit.

Conclusion

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

For the Court

R.H. TROIDL
Clerk of Court