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

Before
E.E. GEISER, V.S. COUCH, J.A. MAKSYM
Appellate Military Judges

UNITED STATES OF AMERICA

v.

MATTHEW M. DIAZ
LIEUTENANT COMMANDER (O-4), JAGC, U.S. NAVY

NMCCA 200700970
GENERAL COURT-MARTIAL

Sentence Adjudged: 18 May 2007.
Military Judge: CAPT Daniel O'Toole, JAGC, USN.
Convening Authority: Commander, Navy-Region, Mid-Atlantic, Norfolk, VA.
Staff Judge Advocate's Recommendation: CDR T. Riker, JAGC, USN.
For Appellant: Maj R.D. Belliss, USMC; Capt Kyle Kilian, USMC; LT Kathleen Kadlec, JAGC, USN; Ms. Kathleen J. Purcell; Mr. Robin B. Johansen.
For Appellee: LT Elliot Oxman, JAGC, USN; LT Derek D. Butler, JAGC, USN.

19 February 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A general court-martial with officer members convicted the appellant, contrary to his pleas, of violating a lawful general regulation, conduct unbecoming an officer, wrongfully communicating classified information, and the unauthorized removal of classified information, in violation of Articles 92, 133, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 933, and 934. The approved sentence included confinement for six months and a dismissal.

The appellant raises four assignments of error. First, he asserts that the military judge erred when he arbitrarily rejected the appellant's guilty plea to Charge II and its sole specification. Second, the appellant avers that the military judge abused his discretion when he excluded evidence of the appellant's specific intent, state of mind, and the circumstances surrounding the appellant's actions. Third, the appellant argues that the cumulative effect of the two errors enumerated above deprived the appellant of a fair trial. Finally, the appellant asserts that a sentence including six months confinement and a dismissal is unjustifiably severe.

We have examined the record of trial and the pleadings of the parties. We conclude that the findings and 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.[1]

Background

Between 6 July 2004 and 15 January 2005, the appellant was assigned as Deputy Staff Judge Advocate of Joint Task Force GTMO, Guantanamo Bay, Cuba. Among his duties was responsibility to act as liaison between his command and staff attorneys from the Department of Defense and the Department of Justice in connection with *habeas corpus* litigation involving Guantanamo detainees. Believing that the U.S. Government's repeated refusal to disclose the names of unrepresented detainees held in Guantanamo violated the spirit if not the letter of a recent United States Supreme Court decision,[2] the appellant took it upon himself to download classified identifying information relating to unrepresented detainees from a secure database in his office.[3] Specifically, the appellant downloaded and printed a document containing the names, nationality, and alpha-numeric coded data that potentially reflected classified source and method information regarding each individual detainee. The alpha-numeric information reflected on the print-out was properly classified SECRET, but was not marked as such.

Thirteen days later, having cut the classified printout into smaller pieces, the appellant placed the cut pieces of paper into an unsigned Valentine's Day card and mailed the classified data to an attorney working at the Center for Constitutional Rights (CCR) who had previously requested the names and nationalities of unrepresented Guantanamo detainees. The CCR attorney immediately contacted the federal judge handling the detainee litigation,

[1] The appellant's 25 July 2008 Motion for Oral Argument is denied.

[2] *Rasul v. Bush*, 542 U.S. 466 (2004)(upholding the right of Guantanamo detainees to file *habeas corpus* petitions in U.S. federal court).

[3] The data was downloaded from the appellant's classified SIPRNET computer which is authorized to contain classified material up to and including SECRET material.

disclosed receipt of the material, and arranged to turn the material over to the court for review. The appellant departed Guantanamo the same day he mailed the Valentine's Day card.

Attempted Guilty Plea

At trial, the appellant originally pled not guilty to all charges but, prior to trial, moved to amend his plea to the specification under Charge II (conduct unbecoming an officer) to guilty by exceptions and substitutions. The appellant's modified plea excepted the words "classified documents" and substituted therefore the words "government information not for release."[4] The defense team generally articulated the facts and circumstances the appellant believed constituted the offense in their written motion and in two discussions between counsel and the military judge in the record of trial. Appellate Exhibit LXVIII; Record at 417-21, 488-513.

The military judge declined to accept the plea noting that the plea as proffered was "irregular in that it did not state an LIO (lesser included offense), but it changed the nature of the charge." Record at 873. Additionally, the military judge stated that he was not confident the specification, as excepted and substituted, even stated an offense. The military judge observed that, while the conduct charged under Article 133, UCMJ, "does not have to be a crime, the conduct must so seriously offend against the law as to expose the officer to disgrace and to bring disrepute upon the military profession which he represents." *Id*. at 516. In essence, the military judge ruled that, within the context of the appellant's factual proffer, the amended specification did not rise to a level above "slight infractions or breaches." *Id*.

Rule for Courts-Martial 910(a)(1)[5] authorizes an accused to plead guilty to a specification with exceptions and substitutions. R.C.M. 910(b), however, permits a military judge to reject such a plea if the exceptions and substitutions render it "irregular." The discussion under this rule defines an irregular plea to include "pleas such as guilty without criminality...." A military judge's decision to reject a proffered plea as "irregular" is reviewed for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

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[4] The original specification under Charge II read, in pertinent part, as follows:

> IN THAT LIEUTENANT COMMANDER MATTHEW M. DIAZ, JAGC, U.S. NAVY...DID, AT OR NEAR GUANTANAMO BAY, CUBA,...WRONGFULLY AND DISHONORABLY TRANSMIT CLASSIFIED DOCUMENTS TO AN UNAUTHORIZED INDIVIDUAL.

The appellant originally also excepted the word "dishonorably" but later determined to leave the word in the specification. Record at 488.

[5] RULE FOR COURTS-MARTIAL 910(a)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

The appellant argues that the military judge's decision to reject his plea without giving him the opportunity to at least try to provide a factual basis during a providence inquiry was arbitrary as it was driven by a misunderstanding of the law. Specifically, the appellant asserts that the military judge, in effect, determined without reference to the specific facts of the case, that a plea to a wrongful and dishonorable release of "government information not for release" could not so seriously offend against the law as to expose the officer to disgrace and to bring disrepute upon the military profession. Record at 516. The appellant argues that he was prejudiced by the military judge's error insofar as he was unable to obtain the benefit with the members of having pled guilty. Appellant's Brief and Assignment of Errors of 19 May 2008 at 27.

We agree with the appellant that the wrongful release of "government information not for release" could, under the right circumstances, constitute an act reflecting sufficient dishonor and lack of integrity to constitute an offense under Article 133, UCMJ. An officer who, for example, provided a base phone directory to terrorists with knowledge that they would use the information in the directory to target attacks on particular military personnel would, at the very least, be guilty of conduct unbecoming an officer. At issue is whether the facts and circumstances proffered by the appellant in connection with his motion to amend his plea were sufficient for the military judge to make a reasoned determination whether the proffered plea constituted such dishonorable conduct.

Appellate Exhibit LXVIII specifically articulates the facts and circumstances underlying the appellant's plea. The appellant specifically asserted that:

> Due to the requirements of his duties, LCDR Diaz was granted access to classified information and government information not for release pertaining to the detainees and JTF's mission and operations. LCDR Diaz' duties during this time period included serving as liaison for the JTF to attorneys who were pursuing habeas corpus litigation in U.S. federal district courts on behalf of the detainees. In December 2004 and January 2005, he was aware that the U.S. Supreme Court ruled on 28 June 2004 that Guantanamo detainees could pursue habeas corpus relief in U.S. federal district court, and he knew that the U.S. District Court for the District of Columbia had ruled in October 2004 that the detainees were entitled to assistance of counsel in pursuing this habeas corpus litigation. In December 2004 and January 2005, there were detainees in Guantanamo Bay who had not petitioned for habeas relief and who were not represented by counsel. LCDR Diaz was aware that attorneys who were pursuing habeas corpus relief for those detainees had requested the names of the detainees. On 14 January 2005, LCDR Diaz knew that it

was the Department of the Navy's and Department of Defense's intent to refuse to provide the names of the detainees to the attorneys pursuing habeas on behalf of detainees, specifically to Ms. Barbara Olshansky, an attorney employed by the Center for Constitutional Rights (CCR). Therefore, LCDR Diaz knew that the names of the detainees were U.S. Government information and that the aforementioned federal departments considered that this was government information not for release.

On 2 January 2005, LCDR Diaz, while still serving with JTF-GTMO, printed out a list from the Joint Detention Information Management System (JDIMS), an electronic database to which he had access. That list included the names of the detainees currently being held by JTF-GTMO. The JDIMS database contained government information not for release. On 2 January 2005, LCDR Diaz knew that the list he printed out contained government information not for release, specifically, the names of the detainees.

On 14 January 2005, LCDR Diaz transmitted this list containing government information not for release to Ms. Barbara Olshansky by placing this list in an envelope and mailing it from the U.S. Postal Service mail facility at Guantanamo Bay. The envelope was addressed to Ms. Olshansky at her office at the CCR in New York City, New York. Ms. Olshansky was not authorized to receive, or be in possession of this information. Lieutenant Commander Diaz knew that it was the Department of the Navy and Department of Defense's decision to refuse to provide the names of the detainees to Ms. Olshansky.

Under the circumstances, LCDR Diaz' conduct as described above, was unbecoming an officer and a gentleman. By mailing this list to Ms. Olshansky, LCDR Diaz conducted himself, in his official capacity as a U.S. Naval officer, in a disgraceful manner.

It appears from the appellant's written motion that he was willing to plead guilty only to providing the *names* of detainees to CCR, but not to providing the nationalities and the alpha-numeric coded data. During motion practice, however, the defense implied that they would plead guilty to providing all the information reflected on the printout mailed to CCR, but that they intended to litigate and argue that none of the information provided was properly classified. Record at 490.

We find that the military judge accurately understood the breadth and scope of Article 133, UCMJ. He did not act in an arbitrary manner or otherwise abuse his discretion. We agree with him that the essence of the Government's charge and specification was that the appellant knowingly provided

classified information to CCR and that the appellant's proffered plea substituting "government information not for release" was qualitatively distinct from the charged offense. Further, we find that the factual proffer in the appellant's motion coupled with the two extended discussions on the record gave the military judge a reasonable sense of what the appellant intended to say during providence obviating the need to go through the motions of a formal providence inquiry.

Even assuming *arguendo* that the military judge erred by not permitting the appellant to at least attempt to providently plead guilty to conduct unbecoming an officer, he suffered no measurable prejudice. We observe that the defense focus at trial was to specifically dispute the classified nature of the material provided to CCR. At no time either during cross-examination or during the defense merits case did the defense argue or otherwise imply that the appellant had not, in fact, copied and forwarded the database material as alleged by the Government. We further note that following findings the military judge consolidated Charge II and the specification thereunder with Specification 2 of Charge III (communication of classified material) ensuring that the appellant faced no additional punishment for the Article 133, UCMJ, charge. Record at 1755. While arguably an instruction during sentencing regarding rehabilitative potential would have been of some benefit to the appellant, we find any such benefit to be minimal at best given the facts and circumstances of this case.[6]

Exclusion of Motive Evidence

The appellant next argues that the military judge violated the appellant's statutory and constitutional rights when he "excluded evidence of the appellant's specific intent, state of mind and the circumstances surrounding his actions."[7] Appellant's Brief at 37. Specifically, the military judge granted a Government *motion in limine* to exclude, inter alia, any defense evidence relating to:

> 1) whether or not the release of the information was consistent with the sworn oath of a commissioned officer;
>
> 2) the ethical obligations of a judge advocate or a practicing attorney;
>
> 3) the United States Supreme Court decision in *Rasul v. Bush*; and

[6] *See* Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9, at instruction 8-3-35 (15 Sept 2002).

[7] The military judge granted the Government *motion in limine* at Appellate Exhibit XXXVII by incorporating his findings of fact in Appellate Exhibit L (Ruling on Defense Motion to Compel Witness Production).

4) the legality or the illegality of United States Government policies on detainee *habeas corpus* petitions.

Appellate Exhibit XXXVII; Record at 338-47, 386-87.

The defense argues that it sought to present this evidence of the appellant's state of mind as relevant to the specific intent element of Specification 2 of Charge III (communicating classified information in violation of 18 U.S.C. § 793)[8] and the dishonor element of the specification under Charge II (conduct unbecoming an officer).

We review the military judge's evidentiary decision for an abuse of discretion. *United States v. Osburn*, 31 M.J. 182, 187 (C.M.A. 1990). An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making findings of fact. *United States v. Humpherys*, 57 M.J. 83, 90 (C.A.A.F. 2002).

After taking evidence, the military judge made findings of fact that were consistent with the record. We adopt them as our own. The military judge correctly observes that criminal intent and motive are "separate and distinct" issues that may or may not have a logical or causal connection. "Intent" in this context reflects "a mental resolution or determination to do [an act]."[9] By contrast, "motive" is a "desire that leads one to act."[10] While there are cases in which motive or purpose could arguably be relevant to a specific intent such as fact patterns involving possible insanity, duress, or justification; the instant case does not include any of these issues.[11]

As noted by the military judge, the essence of the defense's logic is that a laudable motive makes it less likely that the appellant intended to harm the U.S. Government or advantage a foreign power. We disagree. The appellant's intent was to copy classified material and provide it to an unauthorized person. He did so with the understanding that such classified material *could* be used to the detriment of the United States or to advantage a foreign power. Whether he thought CCR *would*, in fact, use the material for such purposes is irrelevant to his intent. Further, whether he provided the material to CCR for laudable reasons or otherwise is also irrelevant for purposes of findings.

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[8] 18 U.S.C. § 793 requires a specific intent that the disclosure of information relating to the national defense be done with reason to believe such disclosure could cause injury to the United States or be used to the advantage of a foreign nation.

[9] BLACK'S LAW DICTIONARY – 825 (8th ed. 2004).

[10] *Id*. at 1039.

[11] The military judge rejected a defense motion to mount a justification defense noting that neither the *Rasul* case, the oath taken by a commissioned officer, nor the ethical obligations of a judge advocate or attorney mandated the appellant's conduct. Record at 327-58.

The appellant's argument that taking action for arguably pure and good motives excuses his knowing violation of the law is nonsensical and dangerous. The Government, quoting an opinion by Justice Stevens when he was serving in the 7th Circuit, succinctly summarized the flaw in the appellant's logic. Justice Stevens observed that "[o]ne who elects to serve mankind by taking the law into his own hands thereby demonstrates his conviction that his own ability to determine policy is superior to democratic decision making.... [a]n unselfish motive affords no assurance that a crime will produce the result its perpetrator intends."[12]

Sentence Severity

The appellant argues that six months confinement and a dismissal is inappropriately severe for offenses involving the knowing provision of classified material to an unauthorized person. We have considered the record of trial to include the appellant's prior military record. We have also considered the negative impact of the appellant's acts. The appellant's actions not only degraded the military chain of command, brought into question civilian control of the military, and negatively impacted public trust in the fidelity of our military personnel but, more fundamentally, the appellant's conduct strikes directly at core democratic processes. After reviewing the entire record, we conclude that the sentence is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982).

Conclusion

The appellant's remaining assignment of error is without merit. The findings and approved sentence are affirmed.

Senior Judge COUCH and Judge MAKSYM concur.

For the Court

R.H. TROIDL
Clerk of Court

[12] *United States v. Cullen*, 454 F.2d 386, 392 (7th Cir. 1971).