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

Before
E.E. GEISER, R.G. KELLY, L.T. BOOKER
Appellate Military Judges

UNITED STATES OF AMERICA

v.

MARTIN M. RAFTERY
CHIEF PETTY OFFICER CRYPTOLOGIC TECHNICIAN (COLLECTION)(E-7)
U.S. NAVY

NMCCA 200800616
SPECIAL COURT-MARTIAL

Sentence Adjudged: 14 April 2008.
Military Judge: LtCol Raymond Beal, USMC.
Convening Authority: Commander, Navy Region Southeast, Naval Air Station, Jacksonville, FL.
Staff Judge Advocate's Recommendation: LCDR Z.S. Kugeares, JAGC, USN.
For Appellant: LT Sarah Harris, JAGC, USN.
For Appellee: Capt Mark Balfantz, USMC; 1st Lieutenant E.P. Winkofsky, USMC.

23 June 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

BOOKER, Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of one charge and one specification of violating a lawful general regulation in contravention of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892. The appellant's approved sentence extended to confinement for 90 days, reduction to pay grade E-3, forfeiture of $600.00 pay per month for six months, and a bad-conduct discharge from the Naval Service.

The appellant alleges two errors before us: first, that the military judge erred when he did not dismiss some charges and specifications due to unlawful command influence; and second, that his sentence is inappropriately severe. Finding no error, we affirm the findings and the approved sentence.

Background

The procedural history of this case traces a tortuous path, reflected in the fact that the record of this guilty plea on a single charge and specification spans six large volumes. Most of the volumes are dedicated to proceedings of two general courts-martial involving the appellant, and they are attached to the special court-martial as Appellate Exhibits VII (for proceedings of 21 September and 19 November 2007) and VIII (for proceedings of 13 and 14 March 2008). To complicate matters further, those two Appellate Exhibits, being records of trial, themselves contain discrete Appellate Exhibits which the parties refer to in their discussion of the case.[1]

We note that the appellant brought no motions at the special court-martial now before us. Record at 19. Because, however, a motion regarding unlawful command influence may be raised for the first time on appeal, *see, e.g., United States v. Blaylock*, 15 M.J. 190, 193 (C.M.A. 1983), we will treat the appellant's first assignment of error as if it were a fresh complaint of unlawful command influence. In such a case, we would ordinarily order a fact-finding hearing to assist us in resolving the assignment of error. *See, e.g., United States v. Cruz*, 25 M.J. 326, 328 n.1 (C.M.A. 1987)(citing *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967) as the "preferred method" for addressing such matters). The unique circumstances of this case, however, present us with a record of sufficient development that another hearing is unnecessary.[2]

Unlawful Command Influence

The appellant originally faced a charge of rape. The appellant waived his right to a pretrial investigation contingent

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[1] Before the special court-martial adjourned, the military judge addressed the contents of the record of the proceedings. After hearing the positions of the parties, the military judge ordered that records of the earlier general court-martial proceedings be prepared and "[a]ll sessions of all previous courts-martial will be appended to the record and the allied papers for the appellate authorities to review." Record at 178. One of the purposes of this ruling was to preserve the record of litigation on the unlawful command influence motion.

[2] In the general court-martial proceedings of 13 and 14 March, incorporated into AE VIII, the appellant moved to dismiss the charge and specification alleging an order violation on the basis of unlawful command influence. AE VIII at 400; AE XX to AE VIII. The military judge resolved that motion adversely to the appellant. AE XXV to AE VIII.

on the special court-martial convening authority's (SPCMCA) ordering a deposition of the complaining witness. We take this occasion to note that a pretrial investigation is a "substantial right" enjoyed by an accused service member, but that he may waive this right. RULE FOR COURTS-MARTIAL 405(k), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.); *see also United States v. Garcia*, 59 M.J. 447, 451 (C.A.A.F. 2004). As one of the purposes of a pretrial investigation is to serve as a means of discovery, *see* R.C.M. 405(a) Discussion, the appellant apparently believed that his rights would be well secured by the deposition. The deposition occurred, and the SPCMCA forwarded the rape charge to the staff judge advocate (SJA) for the area general court-martial convening authority (GCMCA) with a recommendation to refer the charge for trial by general court-martial.

The SJA reviewed the recommendation and the available evidence (including, among other things, the deposition) and, rather than forwarding the charge with a recommendation, returned it to the trial counsel for further consideration and consultation with the SPCMCA. After that further consideration, the SPCMCA ordered an Article 32, UCMJ, investigation on charges of rape, an orders violation, and a false official statement. After that investigation was completed, the SPCMCA forwarded another referral package to the GCMCA, this time recommending a general court-martial for three charges instead of the original one.[3]

The United States attempted to prosecute the appellant at a general court-martial that convened in September 2007.[4] The appellant challenged the qualifications of the accuser in that case, however, and the United States withdrew the charges. New charges (alleging only an order violation and a rape) were preferred and referred to a general court-martial that convened in March 2008.[5] At that proceeding, the appellant challenged the propriety of the earlier withdrawal and also raised the matter of unlawful command influence. The military judge resolved both motions adversely to the appellant. The ruling on the withdrawal is not now before us.

An accused service member who alleges unlawful command influence must initially show some evidence of the influence. *E.g., United States v. Johnson*, 54 M.J. 32, 34 (C.A.A.F. 2000). If the issue is litigated at trial, we are bound by the military judge's findings of fact unless they are clearly erroneous; however, we review his conclusions of law *de novo*. *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994). The appearance or existence of unlawful command influence creates a rebuttable presumption of prejudice. *Id.* The Government must rebut this

[3] The false official statement charge was later dropped.

[4] The record of these proceedings is attached as AE VII.

[5] AE VIII.

presumption beyond a reasonable doubt. *E.g., United States v. Biagase*, 50 M.J. 143, 151 (C.A.A.F. 1999).

The findings that the military judge compiled, *see* AE XXV (08 April 2008) to AE VIII, are amply supported by the 13 and 14 March record and we adopt them as our own. We disagree with the military judge's conclusion that the SJA's communications with the trial counsel and the SPCMCA amounted to any sort of influence; rather, we see them as an effort to present the GCMCA with "completed staff work," a thorough set of facts and conclusions for the GCMCA's consideration.

The appellant's argument is apparently that he would have faced only a charge of rape at a general court-martial had the GCMCA's SJA not noted other potentially viable charges in the materials presented to her. He argues that her action in asking the trial counsel and the SPCMCA to give further thought to the offenses alleged represents arm-twisting by the GCMCA that resulted in the addition of two relatively minor offenses.

We reject this argument from the appellant. The GCMCA would have been free in any event to order a pretrial investigation into other charges apparent from the deposition and other materials available. *See* R.C.M. 301, 306, 406.[6] The appellant was afforded two opportunities to challenge the charges in pretrial investigations. The appellant elected to plead guilty to one of the "new" charges in return for a forum reduction and some protection as to the maximum sentence.

In rejecting the appellant's claim that referral of the order charge for trial was the product of unlawful command influence, we note as well that it was not the original SPMCA who referred the charge; rather, the GCMCA who had the entire report of investigation decided on charges and forum (as noted above, a special court-martial). We find no evidence of either actual or apparent unlawful command influence that led to this disposition.

Even if we were to accept the appellant's argument that preferring a charge that was supported by the investigatory materials constituted some sort of error, the Government has shown beyond a reasonable doubt that there was no prejudicial impact on the appellant[7] or on his court-martial. He pleaded guilty to an offense at a special court-martial that, had it been referred to a general court-martial, carried only two years'

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[6] Additionally, as the appellant apparently saw the deposition of the complaining witness as the functional equivalent of the pretrial investigation, it is arguable at least that no further investigation into charges apparent from the deposition would be required. *See* Art. 32(c), UCMJ; R.C.M. 405(b).

[7] The offense to which he pleaded guilty does not carry any of the registration requirements that a rape conviction would (*see* Department of Defense Instruction 1325.7 of 17 July 2001, encl. 27).

confinement instead of life without parole. The order violation stood alone at the special court-martial and was not used to enhance the sentence for any other offense, as there was no other charge on which a guilty finding could be entered.

Sentence Severity

We also find the appellant's allegation that the sentence is inappropriately severe to be without merit. The appellant's sexual harassment was not limited to words directed toward his victim, Cryptologic Technician (Maintenance) Third Class (CTM3) E. Immediately after noting that some harm could come to her career if a scurrilous video of CTM3 E and another service member were to be further circulated, the appellant engaged in unprotected sexual intercourse with CTM3 E. This intercourse occurred after he had convinced her, a Sailor in his division several pay grades junior to him, to accompany him to an isolated space in the ship's superstructure, and it occurred while they were moored in a foreign port during a deployment. He further noted that the two could continue their intimate relations during the remainder of the deployment. Record at 39, 42, 103, 113.

The victim's career was placed in shambles by the appellant's actions. She was a quick achiever in the service, leaving her initial apprenticeship training as a petty officer. *Id.* at 98. While she was not a "careerist" when she initially entered, she was at least amenable to the idea of a lengthy time of service, but the appellant's actions soured her on the Navy. *Id.* at 116-18. The victim found it hard to be sociable, and she lost respect for the chief petty officers' mess. *Id.* at 118.

We appreciate the burdens that Sailors and their families bear due to the member's service: long hours, dangerous locations, lengthy separations from family and friends. We note that this appellant bore many of those sacrifices himself, and willingly, during his time in service, which amounted nearly to 20 years. We recognize, as well, the level of security that a retirement (or, in the case of enlisted members, transfer to the Fleet Reserve) can provide to a member and his family after so many years. Most important, though, we recognize that it is our duty to determine whether a sentence is correct in law and fact, and whether it should be approved; it is not our place to exercise clemency. *See United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). We are satisfied that the approved sentence is appropriate for this offender and for his offense, *see United States v. Baier*, 60 M.J. 382-83 (C.A.A.F. 2005).

Conclusion

The findings and the approved sentence are affirmed.

Senior Judge GEISER and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court