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.

JASON D. SCHOLZ
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 200800512
GENERAL COURT-MARTIAL

Sentence Adjudged: 18 October 2007.
Military Judge: Maj Brian Kasprzyk, USMC.
Convening Authority: Commanding General, Marine Corps Recruit Depot/Western Recruiting Region, San Diego, CA.
Staff Judge Advocate's Recommendation: Maj S.E. Jackson, USMC.
For Appellant: Capt Kyle Kilian, USMC.
For Appellee: Capt Mark Balfantz, USMC.

10 February 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

BOOKER, Judge:

At a general court-martial, the appellant entered mixed pleas to orders violations, dereliction, carnal knowledge, sodomy with a child, adultery, and indecent acts with a child; specifically, he pleaded guilty to one orders violation for having sexual relations with a Seattle-area student; adultery with that same student; sodomy with that student; and indecent acts with that student, violations respectively of Articles 92, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 925, and 934. The Government went forward on all offenses, including the more aggravated form of sodomy and indecent acts, and officer and enlisted members returned guilty findings. The

convening authority (CA) approved the adjudged sentence of confinement for two years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge from the U.S. Marine Corps.

Before us, the appellant assigns six errors, three of them having to do with the post-trial processing of his case and addressed later in this opinion. The appellant's remaining assignments of error have to do with events at his trial. He alleges that the military judge erred in admitting two statements that the appellant made to the Naval Criminal Investigative Service; that the evidence is legally and factually insufficient to support guilty findings to orders violations; and that he suffered from an unreasonable multiplication of charges (Specification 2 of Charge I; the specification of Charge II; and Specification 1 of Charge IV) related to sexual intercourse with a teenager.

Admission of Two Statements to Law Enforcement

The suppression matter was extensively litigated at trial, and the military judge provided his findings of fact and conclusions of law at Appellate Exhibit XLI. The military judge's findings of fact are supported by the record and we adopt them as our own.

The appellant approached his immediate supervisor, and then his sergeant major, in December 2006 to report that he had been having intercourse with a teenager in the Seattle area. His report was spurred, in part, by his concern that the teenager was pregnant. (At the time he made his report, the appellant believed the girl to be 16 or 17 years old; it turns out that she was 14 and a 9th grade student in a local junior high school.) The sergeant major informed the appellant of his rights under Article 31(b), UCMJ, advising him that he was suspected of adultery. The appellant waived his rights and made an incriminating statement. Record at 40, 91-94. The appellant's executive officer, assigned by the command to investigate the incidents, again advised the appellant of his Article 31(b) rights, and the appellant made another incriminating statement. Record at 52, 103. The Government later introduced those statements into evidence. The appellant was provided information regarding attorneys in the area who would be able to assist him, Record at 50-51. This information was provided at the initiative of his sergeant major, Record at 96. The appellant never invoked his right to the assistance of counsel, although at one point he asked his executive officer

whether that officer thought he should get one, and the executive officer responded "yes". Record at 105. The appellant conducted what can only be described as a perfunctory effort to engage a civilian attorney, calling "at least 15" offices but not making any appointments or divulging any facts, and he never did seek the assistance from a judge advocate during the investigation stage. Record at 58-60.

The appellant further argues that his executive officer, who also conducted the preliminary investigation into the allegations, somehow took on the role of legal advisor to the appellant, thus convincing the appellant to waive his right to an attorney and to make incriminating statements. We find no basis in the record other than the appellant's uncorroborated post-trial assertion for reaching that conclusion ourselves; rather, the executive officer properly advised the appellant to seek qualified counsel to assist him. Record at 105.

On 1 February 2007, having been informed that the Naval Criminal Investigative Service (NCIS) agents investigating the case wished to speak with him, the appellant drove himself to the NCIS office in Everett, Washington, and was met by Special Agents Thurlow and Brown. The Naval Station was a short distance from the appellant's home, although on the morning of the interview he first reported to work in Seattle, thus lengthening his trip. At the NCIS office, the appellant was again advised of his rights under Article 31(b), UCMJ, again waived them, and made another lengthy incriminating statement which was introduced at trial. Record at 70, 109. The appellant provided a second incriminating statement to NCIS on 5 February 2007, again following a thorough rights advisement and waiver of those rights. Record at 85, 111-12.

Despite his claims to the contrary, we do not find that the appellant was in custody during any of these interviews with his chain of command or with law enforcement. The appellant does not assert, and the record is devoid of any evidence of, restraint or restriction of movement. The appellant's reliance at trial upon *Edwards v. Arizona*, 451 U.S. 477 (1981), was therefore misplaced.

The appellant now invites us to apply *United States v. Freeman*, 65 M.J. 451 (C.A.A.F. 2008), asserting that his statements were involuntary and should therefore have been excluded from trial. We disagree.

Evidence produced at the suppression hearing is summarized in AE XLI, and in pertinent part it reveals a sergeant of Marines with an associate's degree and lengthy service. From AE XLI and the Record of Trial, we note that the appellant was 24 at the time of the interrogation; he got himself to and from the NCIS offices; he was not under any physical distress; he was not compelled to participate in any interviews; he was properly advised of his rights; the interrogations were not inordinately long (perhaps 10 hours on one occasion, less than four on the other); and he received neither threats nor promises during the course of the interviews. Considering the characteristics of the appellant and the characteristics of the interviews, *Freeman,* 65 M.J. at 454, we conclude that the military judge did not err when he admitted the appellant's two statements to the NCIS. We also note that the appellant argued the voluntariness before the members. The military judge correctly advised the members, Record at 515-16, of their responsibility in assessing the weight of the statements.

Guilty Findings to Orders Violations

Moving to the next assignment of error, we agree that the military judge abused his discretion in denying a motion for a finding of not guilty with regard to Specification 1 of Charge I. The parties contested Specification 1, alleging a violation of a general order by furnishing alcohol to a "prospective recruit applicant." At trial, there was no dispute that the appellant had engaged in behavior proscribed by the general order: he had furnished alcohol to AA, a ninth grade student, and he had had sexual relations with AA.

The central issue for this assignment is the following definition, set out in Paragraph 4b(2) of Prosecution Exhibit 2:

> Prospective Recruit Applicants: High school students; people who have expressed, to Marine Corps recruiting personnel, a desire to begin the process of joining the United States Marine Corps; people who Marine Corps personnel are attempting to recruit, but have not expressed a desire to begin the process of joining the United States Marine Corps; and people who have expressed a desire to join the Marines, but are not qualified.

The question is whether AA was part of the "protected class" of "prospective recruit applicants" established by the order; we hold that the evidence on Specification 1 was

insufficient to establish that she was. The evidence submitted to the members was that she had never expressed an interest to recruiting personnel about joining the Marine Corps; she had not been contacted by recruiting personnel as a "lead"; and she was not, at the time of the offenses, a "high school student."

AA was enrolled in the 9th grade at a local junior high school at the time of the offenses. Record at 332-33; *see also* Record at 448, 467. The members and the litigants both were alert to this fact and how it might not square with the order's protection of "high school" students. Record at 477-78; 538-39. Despite this gap in coverage, the military judge allowed the question of the alcohol violations, Specification 1 of Charge I, to go to the members, and they returned a guilty finding.

In response to this assignment of error, the Government points to the appellant's statements during the plea colloquy on Specification 2, Record at 207, as evidence that the order should encompass all persons between the ages of 14 and 29, and the Government further cautions against an absurd result that may protect students in one school district where the break between middle (or junior high) school and high school is at one grade level, yet deny that protection in another district where the break is at a different grade level. We note in this regard that the State of Washington (or any other state of the union) may protect this class of persons against some of the supposed absurd results.

The United States, in the form of the Recruit Depot/Western Recruiting Region, chose the language now at issue. The Recruit Depot could have written its order more broadly -- for example, "minors"; "all persons between the ages of 14 and 29" -- yet it chose specifically the term "high school." Where, as here, there is evidence specifically that AA was not in high school, we must conclude that the conviction may not stand. Additionally, we note in passing that the plea colloquy regarding Specification 2 was not before the members (it had not been included in Prosecution Exhibit 11, for example), so the appellant's expansive reading of the term during his guilty-plea colloquy should not be considered when we review the evidence with respect to Specification 1.

The conviction for Specification 1 of Charge I is therefore set aside.

With regard to Specification 2, alleging sexual relations with a "prospective recruit applicant," we note that the

military judge may not arbitrarily reject a guilty plea, but he likewise may not accept the plea if there is a substantial basis in law or in fact for questioning the plea. *E.g., United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). During the plea colloquy regarding Specification 2, the appellant admitted to the military judge that AA had expressed a desire to join the service one day, Record at 174, and for purposes of the guilty plea that statement is sufficient to invoke the protections of the order.

Findings and Sentencing Considerations

We now address the appellant's contention that three of the charges -- the orders violation regarding sexual relations; the adultery; and the carnal knowledge -- represent an unreasonable multiplication of charges. We analyze this claim in light of *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001).

We note that the period involved for all three offenses was identical, and we note furthermore that all three offenses required proof of sexual intercourse. There was no objection at trial -- indeed, the appellant pleaded guilty to two of the offenses. We also note that different interests are served by each statute involved. For the orders violation, the important point is to maintain the image of the Marine Corps recruiting force; PE 2 ¶ 1. For adultery, it is the institution of marriage, the reputation of the service, and good order and discipline that are sought to be protected. For carnal knowledge, the aim is to protect children. We can state, therefore, that each charge and specification is aimed at distinctly separate criminal acts. Prosecuting and punishing a married Marine recruiter for the orders violation and the adultery in addition to the carnal knowledge does not unreasonably increase his punitive exposure, as the maximum punishments for the two "lesser" offenses total only three years as compared to the twenty that could be imposed for carnal knowledge. The prosecutor did not overreach, furthermore, as the record of trial demonstrated a viable, although ultimately unsuccessful, mistake of fact defense regarding the carnal knowledge. We conclude, therefore, that there was no unreasonable multiplication of charges for findings purposes. We further find, given the frequent and repeated nature of the various offenses, that these offenses are not multiplicious for sentencing purposes.

Having set aside one guilty finding, we must now decide whether to reassess the sentence or to set it aside and

authorize a rehearing on sentence. Given the relative severity of the charges that remain, we are confident that we can apply the principles of *United States v. Sales,* 22 M.J. 305 (C.M.A. 1986), and state that the appellant's sentence would have been at least of the same severity as that awarded by the members had the error not occurred. The appellant remains convicted of offenses whose maximum punishment extends to 50 years' confinement, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge. His actual sentence of confinement for 2 years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge is appropriate for him and for his offenses.

Post-Trial Errors Alleged

The appellant complains that he has been denied a speedy post-trial review of his case as required by *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), and related cases. He submitted a post-trial statement claiming that the delay has injured his ability to mount an effective appeal, and further that the delay has caused considerable stress to his spouse. His statement, dated 29 September 2008 and attached to the record, contains only generalized statements and suppositions.

The Government responds that the slow post-trial processing of this case is not facially unreasonable, pointing to a presumed "bright line" set out by this Court in *United States v. Brown,* 62 M.J. 602, 607 (N.M. Ct. Crim. App. 2005)(*en banc*). The Government notes that less than a year elapsed between completion of the trial (18 October 2007) and the record's being docketed for review (10 July 2008). The Government offers no explanation for the delay attending completion of trial, authentication (14 February 2008), CA's action (16 June 2008), and its receipt here.

When we consider the test in either *Moreno* or *Brown*, we conclude that the appellant has suffered no due-process violations in the post-trial progress of his case. His post-trial clemency petition of 18 March 2008 makes no demand for speedy review; rather, his brief of 08 October 2008 appears to be his first assertion of the right, and this weighs against the appellant. The record of trial is not particularly long or complex, and the potential appellate issues were largely presaged by the motion practice at trial; we assess these factors as neutral. As we stated, the Government gave no explanation for the delay, instead relying on the presumed

"bright line" established by *Brown*. This factor weighs against the Government.

We do not believe that *Brown* establishes a threshold below which a delay will never be "facially unreasonable". The time consumed during the post-trial processing of this case, however, has caused no discrete harm that we can identify. We appreciate the appellant's concern about the seven months' "dead time" when he and his defense counsel could have been crafting an appeal, but we find no prejudice. We reach this conclusion based in part on our disposition of the remainder of the appellant's issues, and we also observe that anxiety pending the outcome of any criminal proceeding, whether at the trial level or the appellate level, is normal. *See Moreno*, 63 M.J. at 139-40.

We have considered the appellant's request to exercise our Article 66(c), UCMJ, authority to hold that only a lesser sentence should be approved. Having reviewed the entire record, including the post-trial processing aspects, we decline to do so. *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002).

We do agree with the appellant, however, that the court-martial promulgating order (CMO) in this case contains errors and must be corrected. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). Specifically, the military judge entered findings of not guilty to Specifications 3 and 4 of Charge I pursuant to RULE FOR COURTS-MARTIAL 917, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Record at 475, 479, yet the CMO action incorrectly notes that the appellant was found guilty of those two specifications. A supplemental CMO will be required in any event based on our resolution of other assignments of error.

Conclusion

The finding of guilty to Specification 1 of Charge I is set aside and that specification is dismissed. The remaining guilty findings and the approved sentence are affirmed.

Judge KELLY concurs.

GEISER, Senior Judge, concurring in part and dissenting in part:

I concur with the majority's decision regarding the appropriateness of the appellant's sentence. I respectfully dissent, however, from the majority's decision to set aside the

appellant's conviction for Specification 1 of Charge I. The clear intent of the regulation at issue is to broadly protect prospective military recruits from dishonorable acts by their recruiters. While I agree with the majority that the Government must and should be bound by the clear import of language they choose to use in punitive regulations, it is less clear to me that the term “high school students” was intended or should reasonably be read in the narrow and restrictive sense adopted by the majority. I interpret the term in light of the remainder of the definition of “prospective Recruit applicants” which includes virtually any young person who comes into contact with recruiters in anything remotely resembling an official capacity. The victim was a 9th grade student at a junior high school. In my mind, she was clearly within the ambit of the regulation’s protections and the appellant was clearly on notice that the regulation prohibited furnishing alcohol to such an individual.

For the Court

R.H. TROIDL
Clerk of Court