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

Before
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN
Appellate Military Judges

UNITED STATES OF AMERICA

v.

DOMINIC P. ALTIER
GAS TURBINE SYSTEM MECHANICAL TECHNICIAN FIRST CLASS (E-6), U.S. NAVY

NMCCA 201000361
SPECIAL COURT-MARTIAL

Sentence Adjudged: 8 April 2010.
Military Judge: CAPT Ross Leuning, JAGC, USN.
Convening Authority: Commanding Officer, Training Support Center, Great Lakes, IL.
Staff Judge Advocate's Recommendation: LT R.T. Wright, JAGC, USN.
For Appellant: LT Michael Torrisi, JAGC, USN.
For Appellee: Capt Samuel Moore, USMC.

26 May 2011

OPINION OF THE COURT

IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PAYTON-O'BRIEN, Judge:

After a trial on the merits, members, consisting of officers with enlisted representation, convicted the appellant of one specification of fraternization and one specification of sexual harassment. The misconduct of which the appellant was found guilty violated Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892. The appellant was sentenced to a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

The appellant submitted two assignments of error: (1) his convictions for sexual harassment and fraternization are multiplicious and an unreasonable multiplication of charges; and (2) his sentence to a bad-conduct discharge is inappropriately severe. On 3 January 2011, we specified an issue regarding the failure of the court-martial to record the appellant's forum selection and plea. Additionally, on 3 March 2011, we ordered the Government to show cause why the court should not set aside the sentence in this case. The Government and the appellant filed their responses on 14 March 2011 and 16 March 2011, respectively.

After careful consideration of the parties' pleadings and the record of trial, we conclude that the findings are correct in law and fact, but the sentence must be set aside with a sentence rehearing authorized.

Factual Background

The record reflects that in the fall of 2009, the appellant was assigned to Training Support Center (TSC), Naval Station Great Lakes, Illinois, as an instructor. The victim, Boatswain's Mate Seaman (BMSN) S,[1] U.S. Navy, was a student at TSC. On the evening of 17 October 2009, BMSN S was assigned to the USS ESSEX, a barracks for certain "A" school students at the TSC, and she was on duty.

In the early morning hours of 18 October 2009, a fellow Sailor, Fireman (FN) A, sent a text message to BMSN S via cell phone indicating she was in trouble with the Great Lakes Police Department and wanted to kill herself. Since the appellant was then the roving student division commander, BMSN S decided to seek his assistance on how to handle FN A's situation. BMSN S went to the appellant's office located in a different barracks building, the USS PREBLE, which is adjacent to the USS ESSEX barracks. After appearing at the appellant's office, the appellant invited BMSN S into his office, closing the door behind her. When BMSN S attempted to acquire help from the appellant in response to FN A's frantic text message, the appellant reached into BMSN S's uniform pants pocket to remove her personal cell phone. The appellant then invited her to sit on the couch.

Rather than offer assistance with FN A's reported situation with the Great Lakes Police Department, the appellant commenced talking with BMSN S about his personal family and marital situations and his personal vehicle, which he referred to as a "chick magnet." BMSN S tried to change the subject of the conversation from these personal matters to a drug arrest that had occurred in the barracks earlier that day. While BMSN S was talking about the drug arrest, the appellant stood up from his

[1] We note that by the time the case went to trial, the victim had been re-designated as a BMSN, from a Fireman.

position on the couch and came over to where BMSN S was sitting on the couch. He sat down on her lap, straddling her, and attempted to kiss her. BMSN S attempted to resist the appellant's advances, and called him by his appropriate military rank, "Petty Officer." In response, the appellant told BMSN S to stand at attention, and she complied with his order. The appellant sat back down on the couch, while BMSN S remained at attention in front of him. The appellant grabbed BMSN S by the waist and pulled her down on top of him on the couch, pulled her shirt up, exposing her breast, and commented, "It's really not that bad of a scar," in relation to a recent breast surgery she had undergone.[2] The appellant attempted to unbutton BMSN S's uniform pants, but she was able to stop him and get up.

After this incident, the appellant laughed at BMSN S, and asked her "What are you going to do, call the SAVI?"[3] BMSN S ran out of the appellant's office and went back to the USS ESSEX barracks. Minutes later, the appellant appeared at the USS ESSEX barracks and demanded that BMSN S go with him on a "duty run" to the police station. In the vehicle, the appellant repeatedly asked BMSN S if she was going to call the SAVI, and even asked her if she thought they would believe her over him. He put his hand on her thigh, caressing it. BMSN S slapped his hand away, and cried during the encounter.

After returning from the trip to the police station, BMSN S returned to the barracks. She appeared emotionally upset to the other Sailors on duty, and looked as if she had been crying. Moments later, the appellant appeared again at the USS ESSEX barracks, requesting BMSN S's presence to accompany him on another "duty run" to pick up some duty Sailors from a different part of the base. Another Sailor who was also on duty, FN S, witnessing the tension between BMSN S and the appellant, volunteered to go on the duty run with the appellant instead.

Unreasonable Multiplication of Charges & Multiplicity

The appellant's first assignment of error is that his convictions for both sexual harassment and fraternization are multiplicious and an unreasonable multiplication of charges. Multiplicity and unreasonable multiplication of charges are distinct concepts. Multiplicity is a constitutional violation under the double jeopardy clause, which occurs if, contrary to the intent of Congress, a court imposes multiple convictions and punishments under different statutes for the same act or course of conduct. *United States v. Paxton*, 64 M.J. 484, 490 (C.A.A.F. 2007)(quoting *United States v. Teters*, 37 M.J. 370, 373 (C.M.A. 1993)). Even if offenses are not multiplicious, the prohibition against unreasonable multiplication of charges allows courts-

[2] Record at 338.

[3] Record at 339; a reference to a "Sexual Assault Victim Intervention Program" advocate.

martial and reviewing authorities to address prosecutorial overreaching by imposing standards of reasonableness. *Id.* (citing *United States v. Roderick*, 62 M.J. 425, 433 (C.A.A.F. 2006)).

The first question is whether the sexual harassment and fraternization committed by the appellant amount to the same act or course of conduct, or whether they are separate, distinct and discrete acts allowing separate convictions. Under the facts of this case, we conclude that for the purposes of determining criminal liability, the conduct involved several distinct acts. The criminal act of committing sexual harassment of BMSN S is legally separate from the criminal act of having committing fraternization with her. We hold that these offenses are not multiplicious as a matter of law.

The second question is whether the Government unreasonably multiplied the charges. Applying the multipronged test for unreasonable multiplication of charges, we find the charges were not unreasonably multiplied against the appellant. *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001). We are convinced that the specifications were aimed at two distinctly separate criminal acts, being too familiar with her as her senior in a senior-subordinate relationship, and creating a hostile work environment through his acts of unwanted sexual advances, each of which victimized BMSN S. The charges did not exaggerate or misrepresent the appellant's criminality, nor did they unreasonably increase the appellant's punitive exposure. Finally, the elements of the two subject specifications differ, suggesting no evidence of prosecutorial overreaching or abuse, but we recognize that this one transaction has been parsed into component parts in order to allege two offenses. Accordingly, we find that Specifications 1 and 2 of Charge II do not represent an unreasonable multiplication of charges.

Failure of the Military Judge to Have the Appellant Enter Pleas and Forum Selection on the Record

At the appellant's arraignment on 23 February 2010, pleas and forum selection were reserved.[4] At arraignment, the

[4] The military judge who handled the arraignment and pretrial motions stage of the case had the following exchange with the appellant concerning his forum rights:

> MJ: Petty Officer Altier, you have a right to be tried by a court-martial composed of members, including, if you request, at least one-third enlisted members. If you are found guilty of any offense, the members will also determine a sentence. Do you understand that?
> ACC: Yes, sir.
>
> MJ: You are also advised you may request to be tried by military judge alone, and if the request is approved the military judge would determine your guilt or innocence, and if you are convicted

convening order included only officer members. It was modified for the first time on 2 March 2010 to add seven enlisted members. It was modified an additional three times before the next session of court, leaving a pool of five officer and five enlisted members. Questionnaires from the seven enlisted members assigned by the first modification, Appellate Exhibits X-XVI, were all completed after arraignment and before the next session of court.

On 5 April 2010, the next Article 39(a), UCMJ, session began with a newly detailed military judge. The judge initially summarized various RULE FOR COURTS-MARTIAL 802, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), conferences he had had with counsel prior to this session of court. Record at 97-99. After summarizing those conferences, the military judge then discussed various administrative matters with the counsel pertaining to the trial, such as witness lists, *voir dire*, members' questionnaires, draft instructions, and exhibits. *Id.* at 99-115. The military judge next entertained a defense motion to dismiss for an unreasonable multiplication of charges. The military judge heard argument on the defense motion, during which the trial counsel and defense counsel, as well as the military judge, referred to what the "members," the "panel" or "they" (a reference to the members) could do with regard to findings.[5] Court then recessed. *Id.* at 135. No election had yet been made on the record by the appellant as to his choice of forum, nor had pleas been entered or discussed with the new military judge. However, it appears

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of any offense, the military judge would determine an appropriate sentence. Do you understand that?
ACC: Yes, sir.

MJ: Have you discussed these choices with your counsel:
ACC: Yes, sir.

MJ: Do you wish to be tried by a court composed of members, a court composed of members with enlisted representation, or by military judge alone?

At this point in the proceeding, the detailed defense counsel indicated, without objection from the trial counsel, that the defense wished to reserve forum selection. The military judge granted the defense request to defer forum election, but the record is silent as to whether a date was set when the election must be made. Record at 7-8.

The military judge then had this exchange with the defense concerning pleas:

MJ: Does the defense wish to reserve pleas at this time?
DC: Yes, sir, we do.

MJ: All right, very well. Please be seated.

Record at 10. The record is silent as to whether a date was set when the pleas must be entered.

[5] Record at 120, 121, 122, 128, 129, 130, 131, 133.

from the record as of 5 April 2010, that the military judge and the parties were preparing for a contested enlisted members case.

On 6 April 2010, the court-martial proceeded as if the appellant had pled not guilty to all charges and specifications. In fact, in the presence of counsel and the appellant, the military judge advised the members that at an earlier session of court the appellant "had pled not guilty to all the charges and specifications." Record at 149. This was in full accordance with the appellant's legal presumption. *See United States v. Jackson*, No. 200900427, 2010 CCA LEXIS 65, n.1 unpublished op. (N.M.Ct.Crim.App. 25 May 2010)(finding no error where pleas and forum selection were reserved at arraignment but never entered onto the record by the appellant); *see also United States v. Gilchrist*, 61 M.J. 785, 787 n.2 (Army Ct.Crim.App. 2005)(finding no error where the court-martial proceeded as if not guilty plea had been entered).

The remaining question then is whether the lack of formal election of forum by the appellant, either on the record or in writing, constitutes more than procedural error. Based upon the record as a whole, we are confident the court-martial proceeded as the appellant desired with a panel of officer and enlisted members.

The record reveals that the original court-martial convening order of 7 January 2010 was amended on four occasions.[6] The first amendment detailed enlisted members to the panel. The subsequent three amendments either detailed or relieved particular members (officer and enlisted members) from the panel. Additionally, shortly after arraignment member questionnaires were completed by all seven of the enlisted individuals assigned to the court-martial in the first modification.

During the Article 39(a) session on 5 April 2010, the military judge conducted discussions with the parties, in the presence of the appellant, concerning his *voir dire* procedures and additional *voir dire* questions the defense desired to ask. Record at 100-02. No objection was registered by the appellant at that time to any of these *voir dire* procedures. The original members' questionnaires and the supplemental members' questionnaires responding to *voir dire* questions submitted by the parties included those questionnaires of the enlisted members of the panel. AE IV-XXXI.

[6] The first amendment to the convening order occurred on 2 March 2010, which was subsequent to the appellant's arraignment. The second, third, and fourth amendments occurred on 22 March 2010, 26 March 2010, and 1 April 2010, respectively. The amendments to the convening orders contain the language, "for the trial of Gas Turbine System Mechanical Technician First Class (SW) Dominic P. Altier, U.S. Navy," (although amendment 1A is missing the language "(SW)."

As of the Article 39(a) session on 6 April 2010, right before trial on the merits began, the court had not yet been assembled. The military judge discussed various housekeeping matters with the counsel in the presence of the appellant prior to calling the members into the courtroom. It is clear from the record that members were present in the courthouse, and the parties were preparing for a panel of members. Record at 136-39. *Voir dire* was conducted by the military judge, trial counsel and defense counsel, in the presence of the appellant. *Id.* at 153-204. No objection was registered by the appellant, who was present during the proceedings, to the enlisted panel of members or to the *voir dire* process. The defense counsel concurred with the trial counsel's sole challenge for cause, and then registered two defense challenges for cause, which the military judge granted. Certainly, if there was a surprise as to the enlisted panel being impaneled in the courtroom, we would have expected the defense counsel to have strenuously objected if his client did not want such a panel. The appellant had been previously advised as to his forum options by the motions judge, and he acknowledged these options but deferred election. And, although no official election was made, he proceeded through *voir dire* and trial, to include findings instructions and sentencing without objection. The appellant had many opportunities to voice his objection to having enlisted members on his panel, and none was made, even on appeal.

Based upon this record, we find that the appellant chose this forum of officer and enlisted members. While it is true there is no explicit oral or written election by the appellant on the record concerning his desires on forum selection prior to assembly, the record as a whole supports an inference that the appellant was tried by a panel of his choosing, and the error in this case in not capturing the personal election on the record or in writing under Article 25, UCMJ, was no more than a procedural error which did not materially prejudice the substantial rights of the appellant. *See United States v. Alexander*, 61 M.J. 266, 270 (C.A.A.F. 2005); *see also United States v. Morgan*. 57 M.J. 119 (C.A.A.F. 2002).

The case at hand is factually strikingly similar to *Alexander*, in that the military judge in *Alexander* stated in an Article 39(a) session, "On Monday, I intend to impanel--I believe I was told—an enlisted panel in this case, and we're going forward with trial." And, both the defense counsel and accused remained silent. 61 M.J. at 270. In the present case, on 5 April 2010, the military judge discussed with counsel, in the presence of the appellant, that court-martial member questionnaires were being collected and provided; that he wanted a list of witnesses to be able to identify names for the members; that he had a procedure for the sensitive nature of some of the *voir dire* questions; and the time line for the court-martial proceedings so that the members would not lose focus or concentration. Record at 99-102, 136-38. Similar to *Alexander*, the defense counsel and the appellant in the present case did not

offer any opposition to these procedures. This was more than "mere acquiescence" by the appellant to a forum being foisted upon him by the military judge and counsel, this case involves an "informed, personal choice" of forum, as indicated by the entire record.

Accordingly, while we find that the failure to record his forum selection as prescribed under the circumstances of this case to be error, such error is procedural and not jurisdictional. Indeed, the appellant does not cite any prejudice in his filings with this court or in his R.C.M. 1105 filings. We find neither prejudice to the appellant nor reason to question the findings.

Sentencing Instructions

The sentencing instructions given in this case, coupled with the sentencing worksheet, provided ambiguous guidance to the members as to the maximum punishment the appellant faced. Since improper oral and written instructions were given to the members, and the sentencing worksheet contained even further mistakes, we are not confident the members were cognizant of the maximum punishment. We therefore set aside the sentence.

In an Article 39(a) session prior to the sentencing phase of the court-martial, the parties agreed with the military judge that the maximum punishment was that which was provided under the special court-martial jurisdictional maximum. Record at 599. During sentencing argument, the trial counsel told members, "[T]he judge will tell you shortly that the maximum sentence facing GSM1 Altier is a year of confinement, reduction to E-1, two-thirds' forfeitures, and a punitive discharge from the U.S. Navy with a bad conduct [sic] discharge." *Id.* at 640. During defense sentencing argument, the defense counsel said, "As you all are aware, a BCD is available here . . . ." *Id.* at 647. The military judge did not advise the members during his sentencing instructions, orally or in writing, that the maximum punishment included a bad-conduct discharge.[7] We do note that later, when describing the nature of the various punishments, the military judge advised the members that "[t]his court may adjudge a punitive discharge in the form of a bad conduct [sic]," and then he described the ramifications of a bad-conduct discharge. *Id.* at 653-54. However, the sentencing worksheet, Appellate Exhibit LI, did not add clarity to the military judge's sentencing instructions, as it includes numerous punishments which were not authorized at a special court-martial, such as a dishonorable discharge, total forfeitures, and confinement for multiple years. After the members returned following sentencing

[7] The military judge orally stated to the members: "The maximum sentence for the offenses for which the accused has been found guilty is confinement for up to 1 year; reduction to pay grade E-1; forfeiture of two-thirds' pay per month for 12 months." Record at 648. The written instructions indicate: "The maximum sentence for the offenses of which the accused has been found guilty is confinement for up to 1 year, reduction to pay grade E1 and forfeiture of 2/3 pay per month for 12 months. AE LII.

deliberations, and the military judge reviewed the sentence worksheet, no further modifications were made to the worksheet, despite the members failing to follow the judge's instructions to line out the inapplicable portions of the worksheet once the sentence had been agreed upon.

"In the absence of evidence to the contrary, the members are presumed to follow the military judge's instructions." *United States v. Holt*, 33 M.J. 400, 408 (C.M.A. 1991)(citation omitted). We recognize that when trial defense counsel fails to object to a sentencing instruction at the time of trial, such failure "constitutes waiver of the objection in the absence of plain error." R.C.M. 1005(f). But, the waiver rule is inapplicable to failure to object to this mandatory instruction. *United States v. Miller*, 58 M.J. 266, 270 (C.A.A.F. 2003); R.C.M. 1005(e)(1).

In this case, the military judge's instructions were ambiguous, as he omitted the bad-conduct discharge when citing to the maximum allowable punishment, and the sentencing worksheet did not clarify his ambiguous instructions or provide clear guidance to the members. We cannot be confident the members understood the range of punishments available to them. The Government urges us to trust that the members were aware that a bad-conduct discharge was an available punishment due to the numerous references to a "BCD" by counsel during sentencing arguments. However, the members are informed by the military judge that if a conflict exists between what counsel say about instructions and the instructions given by the military judge, the members are required to accept the judge's statements as correct. And, in this case, the instructions, followed by the worksheet, were not clear.

Based upon the record as a whole, we are not convinced the members were cognizant as to the maximum punishment, and therefore set aside the sentence.

Conclusion

The findings are affirmed. The sentence is set aside, and the record is returned to the Judge Advocate General of the Navy for transmission to an appropriate CA who may order a rehearing on the sentence. However, the CA shall approve no sentence in excess or more severe than a bad-conduct discharge.[8] Due to our action relative to the sentence, the appellant's assignment of error relating to sentence severity is presently moot.

Senior Judge MAKSYM concurs.

[8] *See United States v. Smith*, 31 C.M.R. 181 (C.M.A. 1961); *United States v. Kelley*, 17 C.M.R. 259 (C.M.A. 1954). *See also* Art. 63, UCMJ, and R.C.M. 810(d).

PERLAK, Judge (dissenting):

"Courts created by statute can have no jurisdiction but such as the statute confers." *Sheldon v. Sill*, 49 U.S. (8 How) 441, 449 (1850). As a matter of law, jurisdiction is reviewed *de novo*. *Cf. United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000). This record contains no affirmative personal request for or election of trial by members with enlisted representation as required by Article 25(c)(1), Uniform Code of Military Justice, 10 U.S.C. § 825(c)(1). Nor is there any objection to the presence of enlisted members or claim of prejudice for their service. In the absence of an apparent affirmative personal election, the Court of Appeals for the Armed Forces (CAAF) has instructed us to determine whether the deficit is procedural, in which case we can assess for prejudice, or jurisdictional, in which event the error may prove fatal. *See United States v. Alexander*, 61 M.J. 266 (C.A.A.F. 2005). Specifically, ". . . where the record reflects that the servicemember, in fact, elected the forum by which he was tried, the error in recording that selection is procedural, not jurisdictional." *Id.* at 270.

The majority has done a creditable job in dovetailing the facts of this case with the CAAF holding in *Alexander.* However, I respectfully dissent from the conclusion that, on the facts of this case as they now stand, the failure of affirmative forum election can be deemed clearly procedural and not jurisdictional.

The enigmatic manner in which enlisted members appeared at this court-martial cannot be squared with the statutory requirements of Article 25, UCMJ. The record reveals no extant personal request from the appellant for enlisted representation, orally or in writing. *See* RULE FOR COURTS-MARTIAL 903(b)(1) , MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). The convening authority was not at liberty to detail enlisted members in the absence of a request. Once detailed, clearly there is acquiescence and perhaps satisfaction on the part of the defense, but that is not the equal of a statutorily-based, affirmative election. It is entirely logical on the facts we have to infer such a request was made. But the statute does not operate on inferences. It requires a request from the accused, which in turn creates a substantive right to one-third minimum enlisted representation which must be honored by the convening authority, absent extraordinary circumstances.

I note that we have a post-trial memorandum from the trial defense counsel, stating, "It was GSM1 Altier's free, voluntary and independent decision to have a trial by members with enlisted representation." (LT Myers' memo of 21 Jan 2011). We thus have an intransitive formulation of words indicating the appellant made a decision. The fact that a decision may have been made brings us no closer to the existence of an oral or written request for enlisted members, prior to assembly, per R.C.M. 903(a)(1). It likewise brings us no closer to concluding, ". . .

the accused personally has requested orally on the record or in writing that enlisted members serve on it." *See* Art. 25(c)(1).

I would remand the case for an evidentiary hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), to ascertain the facts surrounding the selection of forum. With or without prejudice to the appellant, this court should not view a jurisdictional statute, requiring a manifest request, as satisfied by the conspicuous lack of a request followed by various periods of silence.

For the Court

R.H. TROIDL
Clerk of Court