IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

J.D. HARTY **R.G. KELLY** **W.M.FREDERICK**

UNITED STATES

v.

Dennis R. TOY
Sonar Technician (Submarine) First Class (E-6), U. S. Navy

NMCCA 200001418 Decided 21 December 2006

Sentence adjudged 28 September 2004. Military Judge: J. Schum. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Hawaii, Pearl Harbor, HI.

LT ANTHONY YIM, JAGC, USN, Appellate Defense Counsel
Maj WILBUR LEE, USMC, Appellate Government Counsel

HARTY, Senior Judge:

The appellant was tried by a general court-martial composed of officer and enlisted members. Contrary to his pleas, the appellant was convicted of one specification of forcible sodomy with a child between 12 and 16 years old, one specification of sodomy with a child between 12 and 16 years old, and five specifications of committing indecent acts with another (three specifications with a child under the age of 16 years), all with the same step-daughter-victim. The appellant's crimes violated Articles 125 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 925 and 934. The appellant was sentenced to confinement for 20 years, reduction to pay grade E-1, total forfeiture of pay and allowances, and a dishonorable discharge. The convening authority approved the adjudged sentence and, in an act of clemency, suspended the adjudged forfeitures for 20 years and waived automatic forfeitures for 6 months.

In a published decision, this court set aside one specification of forcible sodomy with a child and one specification of indecent acts with a child because prosecution of those specifications was barred by the statute of limitations, and we returned the record for a rehearing on sentence, if

practicable. Otherwise, we concluded that the findings were correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed, and we affirmed the remaining findings. *United States v. Toy*, 60 M.J. 598 (N.M.Ct.Crim.App. 2004).

On sentence rehearing, a military judge sitting as a general court-martial sentenced the appellant to confinement for 15 years, reduction to pay grade E-1, total forfeiture of pay and allowances, and a dishonorable discharge. The convening authority approved the adjudged sentence and, pursuant to a pretrial agreement, suspended confinement in excess of 10 years for 12 months from the date the appellant is released from confinement. The record is now before us following the appellant's rehearing on sentence.

We have examined the record of trial, the appellant's supplemental assignments of error,[1] and the Government's response. We again conclude that the findings already affirmed and the sentence on rehearing 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.

Background

The appellant married a woman who had two daughters by a previous marriage. One of the daughters, M, was 10 years old when the appellant began dating her mother, and she developed a crush on the appellant. The appellant married M's mother in 1995 when M was 13 years old, and the family transferred to Hawaii shortly thereafter. In 1997, when M was 15 years old, the appellant performed oral sex on her and had her perform oral sex on him. When M was 16 years old, the appellant engaged in sexual intercourse with her on two occasions. The appellant's wife found him in bed with M and gave him an ultimatum: the

[1] I. DOES MIL. R. EVID. 317 INCORPORATE STATE STATUTES WHEN DETERMINING AN UNLAWFUL INTERCEPTION OF AN ORAL OR WIRE COMMUNICATION?

II. INEFFECTIVE ASSISTANCE OF COUNSEL IS DEFICIENT PERFORMANCE THAT PREJUDICED THE APPELLANT. CIVILIAN DEFENSE COUNSEL FAILED TO OBJECT TO [THE] VIDEOTAPE THAT WAS NOT RELEVANT AND HIGHLY PREJUDICIAL TO THE MEMBERS. WAS APPELLANT'S REPRESENTATION EFFECTIVE?

III. THE SENTENCE WAS EXCESSIVE AND SHOULD BE REASSESSED. (Submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982)).

IV. THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE CONSIDERED UNCHARGED MISCONDUCT IN AGGRAVATION. (Submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982)).

appellant's wife would report him to the police unless he agreed to be secured to the headboard of the marital bed when there were no other adults in the house to protect the step-daughters from the appellant.

The appellant grew tired of being handcuffed to the bed and eventually verbal disagreements arose between the appellant and his wife. The appellant's wife secretly audio taped one of those arguments in which the appellant admitted, in part, what he had done with his step-daughter, M. The appellant's wife also placed a video camera at the foot of their marital bed, with the appellant's knowledge, and recorded a conversation between the appellant and herself and then left the room while the camera videotaped the appellant handcuffed to their bed.

Prior Findings

The appellant moved to exclude the audio tape and the video tape at trial claiming that MILITARY RULE OF EVIDENCE 317(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.) prohibits the admission of intercepted oral communications if they must be excluded under a statute applicable to members of the armed forces, to wit: 18 U.S.C. § 2515. That federal statute prohibits the admission of intercepted communications if they were obtained in violation of 18 U.S.C. §§ 2510 *et seq*. That chapter, however, has exceptions, including 18 U.S.C. § 2511(2)(d). That exception provides, in part, that recordings made by a person, not acting under color of law, of an oral communication, when that person is a party to the recorded communication, is not a violation of 18 U.S.C. §§ 2510 *et seq*, "unless such communication is intercepted *for the purpose of committing any criminal or tortious act in violation of the Constitution or law of the United States or any State*." 18 U.S.C. § 2511(2)(d)(emphasis added). Paraphrased, the federal statute's exception creates a one-party consent rule for individuals who are not acting for law enforcement and are not intercepting the communication with the intent to commit a crime or tort. The federal statute does not impose a two-party consent rule.

The appellant claimed the federal exemption did not apply in his case, because his wife violated Hawaii Revised Statutes § 803-42 (1998) which makes it a criminal act to intercept oral communications. The Hawaii statue, however, provides for the identical exception contained in 18 U.S.C. § 2511(2)(d) for interceptions made by a party to the communication, not acting under color of law, including the proviso that the exception does not apply if the person intercepts the communication "for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this State." However, in addition, the Hawaii statute states that the one-party consent exception does not apply when the recording device is installed in a private place. Thus, it appears that Hawaii applies a two-party consent rule in private places even if the interception is not made for the purpose of committing a criminal or tortious act. Hawaii Revised Statutes § 803-42(b)(3).

The military judge ruled that the recordings were admissible because the appellant failed to establish that his wife made the recordings for the purpose of committing a criminal or tortious act, and applied the exception contained in 18 U.S.C. § 2511(2)(d). Even though the military judge concluded that the appellant's wife violated the Hawaii two-party consent statute by intercepting an oral communication in a private area without the appellant's consent, he concluded that he was not bound by Hawaii's statutory law in determining the application of Title 18, United States Code, to the Military Rules of Evidence. Original Record at 391. In that context, this Court also discussed the Hawaii electronic privacy statute in considerable detail and we affirmed the military judge's ruling. *Toy*, 60 M.J. at 604-05.

Military Rule of Evidence 317(a)

For his first supplemental assignment of error, the appellant again challenges the admissibility of the audio and video recordings made by his wife.[2] He now "modifies his argument from 19 November 2002 and argues that MIL. R. EVID. 317 prohibits interception of wire and oral communications when the respective state's statute prohibits such an action." Appellant's Brief and [Supplemental] Assignments of Error of 27 Dec 2005 at 3. He now argues that because the appellant's wife recorded him in a private place without his consent, she violated Hawaii state law, thus providing an independent basis for exclusion under MIL. R. EVID. 317(a) regardless of whether the recording violated the corresponding federal statute.

During our initial review of this case, in *dicta*, we agreed with the military judge that the appellant's wife violated Hawaii law.[3] However, because federal law governs the admissibility of evidence in a federal criminal trial, we made clear in our published decision that state law cannot make inadmissible at court-martial that which federal law says is admissible. *Toy*, 60 M.J. at 604-05 (citing *United States v. Morrison*, 153 F.3d 34, 71 (2d Cir. 1998); *United States v. Horton*, 601 F.2d 319, 323 (7th Cir. 1979); *United States v. Felton*, 592 F. Supp. 172, 193 (W.D.

[2] We note that the appellant did not appeal our earlier decision on that issue, making that decision the law of the case and binding upon the parties. *United States v. Lewis*, 63 M.J. 405, 412 (C.A.A.F. 2006)(ruling that where neither party appeals a ruling of the Service Courts of Criminal Appeals, the ruling will normally be regarded as law of the case and binding upon the parties); *United States v. Parker*, 62 M.J. 459, 464 (C.A.A.F. 2006)(citing *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002)); *see also United States v. Grooters*, 39 M.J. 269, 272-73 (C.M.A. 1994); *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986).

[3] Our earlier agreement with the military judge's findings on this issue was *dicta*, because the resolution of the ultimate issue did not rely on whether the appellant's wife violated Hawaii law. A violation of state law would not render the recordings inadmissible in a federal criminal trial. *See On Lee v. United States*, 343 U.S. 747, 754 (1952); *see also*, *United States v. Proctor*, 526 F.Supp. 1198 (D. Haw. 1981))(finding that 18 U.S.C. Section 2511(2)(c) permitted the use in federal court of wiretaps without a warrant when one party consented, even though they violated Hawaiian state law).

Pa. 1984), *rev'd on other grounds*, 753 F.2d 256 (3d Cir. 1985)). We have, therefore, already considered and rejected the appellant's supplemental assignment of error.[4]

Sentence Severity

In his third supplemental assignment of error, the appellant asserts that a sentence including 15 years of confinement is inappropriately severe for the offenses and the offender, particularly when the appellant had already served five years of confinement. We disagree.

Our mandate under Article 66(c), UCMJ, requires that we affirm only such part or amount of the sentence as we determine, on the basis of the entire record, "should be approved." We do not enter the realm of clemency, an area reserved for the convening authority. However, we are compelled to act when we find inappropriate severity within an adjudged and approved sentence. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

The appellant's crimes of child sex abuse against his step-daughter are reprehensible and warrant a substantial period of confinement. The appellant took advantage of a confused young girl who thought she was in love with him, and did so over the course of an extended period of time. He betrayed the trust of both his wife and step-daughter, and continued the abuse even after his wife confronted him about it. His step-daughter went from honor roll student to high school drop-out in a matter of months after the offenses came to light. Taking into account all the facts and circumstances, including the appellant's 18 years of naval service, and mindful of our responsibility to maintain general sentence uniformity among cases under our cognizance, *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999), we find the imposition of 15 years of confinement, combined with reduction to pay grade E-1, total forfeiture of pay and allowances, and a dishonorable discharge to be appropriate for this offender and these offenses. Accordingly, we affirm the sentence as adjudged and approved below on rehearing.

[4] We have also considered the appellant's second supplemental assignment of error, claiming that his civilian defense counsel provided ineffective assistance by not objecting to the audio and video recordings on grounds other than MIL. R. EVID. 317. The objections appellant now claims should have been raised (relevance, cumulativeness, inflammatory, hearsay, prejudicial, and uncharged misconduct) are without merit. Failure to raise a meritless basis for exclusion of evidence is not ineffective assistance of counsel. *See United States v. Napoleon*, 46 M.J. 279, 284 (C.A.A.F. 1997)(citing *United States v. Loving*, 41 M.J. 213, 246 (1994), *aff'd on other grounds*, 517 U.S. 748 (1996)).

Evidence in Aggravation

For his final supplemental assignment of error, the appellant claims that the military judge erred by considering uncharged misconduct as aggravation evidence in sentencing. Specifically, the appellant challenges the military judge's consideration of "grooming" evidence that occurred outside the statute of limitations for prosecution. The appellant requests this court to order a rehearing on sentence. We disagree.

First, as part of a pretrial agreement, the appellant agreed not to object to, and did not object to, the victim's prior testimony that contains the evidence of grooming, including acts that occurred outside the statute of limitations for prosecution. Rehearing record at 56; Appellate Exhibit LXXI at ¶ 16(e). Second, the appellant did not object to the Government's expert witness' testimony about how the appellant groomed the victim for sexual activity. *Id.* at 63-103; *see* MIL. R. EVID. 103(a)(1). Third, we conclude that evidence of grooming a child victim for sexual activity, including acts that occurred outside the statute of limitations for prosecution, is proper sentencing aggravation evidence for convictions of indecent acts and sodomy with the same child. RULE FOR COURTS-MARTIAL 1001(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.); *see United States v. Patterson*, 54 M.J. 74, 78 (C.A.A.F. 2000). This assignment of error is without merit.

Conclusion

The sentence as approved below on rehearing is affirmed, and the findings, as previously affirmed by this court, are affirmed, again.

Judge KELLY and Judge FREDERICK concur.

For the Court

R.H. TROIDL
Clerk of Court