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

BEFORE

C.L. CARVER **D.A. WAGNER** **R.W. REDCLIFF**

UNITED STATES

v.

Lewanna D. DENSON
Seaman Recruit (E-1), U.S. Navy

NMCCA 200400048 Decided 20 July 2005

Sentence adjudged 6 June 2003. Military Judge: J.A. Maksym. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Naval Air Station, Pensacola, FL.

COL K. S. GUNTHER, USMCR, Appellate Defense Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WAGNER, Judge:

The appellant was charged with desertion under Article 85, Uniform Code of Military Justice, 10 U.S.C. § 885. The appellant contested the sole charge before officer and enlisted members sitting as a special court-martial and was convicted of the lesser included offense of unauthorized absence terminated by apprehension, in violation of Article 86, UCMJ, 10 U.S.C. § 886. The members sentenced the appellant to a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant asserts the following assignments of error: (1) the military judge abandoned his fair and impartial role in that he exhibited prejudice toward the appellant and the defense team; (2) the specification under the charge misstates the inception date of the unauthorized absence in that the appellant was actually in an authorized liberty status when the absence is alleged to have commenced; (3) the punishment was inappropriately severe in that the appellant was sentenced to a bad-conduct discharge when she felt that she had no choice but to stay home and take care of her dying mother and aged grandmother; and (4)

the record of trial in the appellant's case is incomplete in that Defense Exhibit C is missing.

After carefully considering the record of trial, the appellant's assignments of error, and the Government's response, 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.

Facts

The appellant returned from deployment in May 1998 and was given two weeks of extended liberty, along with the rest of her command. She traveled home to see her family and discovered her mother, a cancer patient, in the terminal stages of her disease. In addition, the appellant's grandmother, who was wheelchair-bound, was not getting the assistance the appellant felt was necessary for her health and well-being. The appellant decided not to return from liberty, remaining instead in her grandmother's home caring for her mother until her mother's death in December 1998 and thereafter caring for her grandmother, who was still living at the time of trial.

The appellant was apprehended by local authorities on a deserter warrant on 4 April 2003 and returned to military control. She testified at trial that she had decided not to return to the Navy because of a number of factors. One was the recurrence of a childhood phobia regarding water that had been exacerbated by her cousin's death, in her presence, by drowning, and by being lowered over the side of a U.S. Naval vessel to paint. She also testified that she failed to return from liberty in order to safeguard her mother during her terminal months and to provide necessary assistance to her grandmother.

On 3 June 1998, the appellant was placed in an unauthorized absence status as of 0700, 1 June 1998, by the filing of an Administrative Remarks document in her service record. Prosecution Exhibit 4. The appellant's belongings left behind in her barracks room were inventoried and secured on 10 June 1998. Prosecution Exhibit 7.

The appellant testified that she began her authorized two-week liberty period on 1 June 1998. Also, a service record document completed on 2 May 2003 listed 1 June 1998 as both the commencement of the unauthorized absence and the commencement of authorized liberty. The appellant, as well as other command members, testified that it was common practice for the command to issue two weeks of extended liberty immediately following a return from any deployment. Additionally, the command member who conducted the inventory on 10 June 1998 testified that it was conducted approximately two weeks after the appellant had been placed in an unauthorized absence status.

Before trial, the appellant successfully convinced the military judge to deny the Government's Motion in Limine seeking to preclude the defense from asserting the defense of necessity. The military judge then ordered that a videotape of the grandmother and her dwelling be made and produced as evidence and ordered five family members produced at Government expense to testify as to the grandmother's condition and their inability to provide the required assistance. Following the presentation of evidence, the military judge instructed the members on the defense of necessity. As noted above, the court members found her not guilty of desertion, but guilty of unauthorized absence terminated by apprehension.

The Role of the Military Judge

In her first allegation of error, the appellant asserts that the military judge denied her a fair trial by abandoning his fair and impartial role. We disagree and find no merit in this contention.

The Supreme Court has held that the remarks of a judge do not amount to bias or lack of impartiality unless they demonstrate a "deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994). The Court of Appeals for the Armed Forces has likewise held that there is a strong presumption that a judge is impartial and that a party seeking to rebut this presumption must "overcome a high hurdle." *United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001).

In determining whether the military judge was impartial, we ask ourselves whether, considering the whole trial, the legality, fairness, or impartiality of the court-martial was placed in doubt by the military judge's actions. *United States v. Burton*, 52 M.J. 223 (C.A.A.F. 2000). In doing so, we view those actions as would a reasonable person observing the court-martial. *Id.*

This court recently addressed this issue in *United States v. Barnes*, 60 M.J. 950 (N.M.Ct.Crim.App. 2005), where we cautioned military judges to refrain from unnecessary banter in the courtroom in order to safeguard the basic requirement of due process under the Fifth Amendment, citing *United States v. Wright*, 52 M.J. 136 (C.A.A.F. 1999). We also repeated the warning of our superior court that military judges must "'scrupulously avoid even the slightest appearance of partiality.'" *Barnes*, 60 M.J. at 958 (quoting *United States v. Watt*, 50 M.J. 102, 105 (C.A.A.F. 1999).

While much can and should be said regarding the military judge's role in this court-martial, bias or prejudice toward one side or the other is nowhere to be found. The military judge displayed condescending, ill-tempered, and, at times, inappropriate behavior toward both the trial counsel and the trial defense counsel throughout the trial. Fortunately, the one

person in the courtroom toward whom the military judge acted with decorum and compassion was the appellant.

The military judge berated the trial counsel because the appellant was not in a complete uniform for trial, threatening contempt proceedings against the officer-in-charge of the restricted barracks if his order to have the appellant in a complete uniform was ignored. While it is understandable that military judges may become frustrated if they see repeated uniform problems in their courtrooms, this court cannot and does not condone the manner in which this judge handled the issue. It was demeaning and not indicative of judicial temperament. The judge's actions were not, however, directed at, or prejudicial toward, the appellant.

The military judge also raised, *sua sponte*, the issue of discrepancies between male and female accused with regard to the imposition of pretrial confinement for long-term absence offenses terminated by apprehension. Essentially, he opined that males were uniformly placed in pretrial confinement, while females were not, because of the great distance to the nearest facility authorized to confine females. While this court is perplexed over why the military judge thought it necessary to express his opinion on a subject irrelevant to this case, we can discern no possible prejudice suffered by the appellant. This is especially so where, as in this case, the comments of the military judge were made in an Article 39(a), UCMJ, session, outside of the hearing of the members who decided guilt or innocence and arrived at a sentence that did not include confinement.

The appellant also asserts that the military judge abandoned his impartial role and denied her a fair trial by interrupting the trial defense counsel throughout the trial. The appellant is correct that the military judge showed little patience during the motion practice; however, he displayed his impatience equally to all counsel. It must be noted, also, that the military judge ruled in favor of the defense on a number of motions, as well as on a number of objections throughout the trial. Again, this court can find no bias or prejudice toward the appellant from the military judge's actions.

The appellant argues that the military judge displayed anger toward trial defense counsel by demanding more complete proffers of evidence regarding the necessity defense. While the record does disclose the judge's frustration over what he characterizes as "meager defense proffers," it should be noted that he ruled in favor of the defense in allowing the defense of necessity to be raised, ordered witnesses produced at Government expense on the necessity defense, and instructed the members to consider the defense of necessity in their deliberations on guilt or innocence.

Finally, the appellant states that the military judge displayed his anger toward trial defense counsel when he called

an Article 39(a), UCMJ, session and questioned the trial defense counsel as to why Defense Exhibit E, the appellant's military identification card, had not been mentioned during earlier discussions of evidence to be presented. The military judge clearly wanted an explanation, which the trial defense counsel provided. The military judge immediately accepted the explanation and admitted the exhibit into evidence. While the initial reaction of the military judge may have displayed an apparent lack of judicial temperament (a common theme in this court-martial), it did not in any discernable way display bias against the appellant or result in prejudice to the appellant.

Despite the concerns noted above regarding the military judge's judicial temperament, we conclude that the military judge's decisions were correct in both law and fact and the members heard and considered all the evidence, were properly instructed, returned a verdict supported beyond a reasonable doubt by the evidence, and adjudged an appropriate sentence for the offense.

Inception Date of the Unauthorized Absence

In her second allegation of error, the appellant claims that the specification misstates the inception date of the unauthorized absence and asks this court to modify the findings and return the record of trial for a rehearing on sentence. The court interprets this allegation of error as a claim that there was insufficient evidence to support a finding of guilty with an inception date of 1 June 1998. We disagree and decline to grant relief.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ.

In this case, there is overwhelming evidence that the appellant commenced her period of unauthorized absence on or about 1 June 1998, as alleged in the specification. Prosecution Exhibit 4, entered into the appellant's service record on 3 June 1998, established the inception date of her absence as 1 June 1998. Additionally, the command member who inventoried her belongings on 10 June 1998 testified that he recalled doing so approximately two weeks after the appellant was declared an absentee. The appellant herself testified that she returned from a deployment in mid to late May and that it was the command's common practice to immediately place command members on two week's of extended liberty following any deployment.

There is sufficient evidence to show that a trier of fact could have established the inception date of the unauthorized absence as 1 June 1998 beyond a reasonable doubt. We are ourselves convinced beyond a reasonable doubt of the guilt of the appellant to the unauthorized absence as alleged.

Severe Punishment

The appellant, in her third allegation of error, contends that her sentence of a bad-conduct discharge is inappropriately severe under the circumstances of this case. We disagree and decline to grant relief.

The appellant, without significant effort to find viable alternatives, remained away from her unit for almost five years. She was returned to military control only when apprehended. In spite of the mitigating aspects involving her fear of water, the death of her mother, and the needs of her ailing grandmother, the seriousness of her offense clearly warranted a punitive discharge.

After reviewing the entire record, we find that the sentence is appropriate for this offender and her offense. *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).

Record of Trial

In her final allegation of error, the appellant asserts that the record of trial is incomplete because Defense Exhibit C is missing. We disagree.

Initially we note that Defense Exhibit C is not missing from the record of trial. Defense Exhibit C is a photograph of a VHS tape of the appellant's grandmother and her living conditions that was admitted into evidence at trial and played for the members during trial. The record of trial was served on the trial defense counsel prior to the convening authority taking action in this case. The appellant waived submission of any clemency matters or corrections to the staff judge advocate's recommendation.

The appellant erroneously applies RULE FOR COURTS-MARTIAL 1103(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), dealing with a verbatim transcript. There is no issue in this case that the record was verbatim and, therefore, meets the R.C.M. 1103(f) requirement for a case involving a bad-conduct discharge. An issue involving whether the form of an exhibit attached to the record renders the record of trial incomplete falls under R.C.M. 1103(b)(2)(D). Under that rule, photocopies or photographs may be substituted for the evidence with the permission of the military judge. In this case, the military judge authenticated the record with the existing exhibit, and the trial defense counsel failed to comment on the substitution during his review

of the record. Under these circumstances, we cannot term the record of trial as incomplete. *United States v. Stoffer,* 53 M.J. 26 (C.A.A.F. 2000).

The facts of this case are distinguished from the facts in *United States v. Seal,* 38 M.J. 659 (A.C.M.R. 1993). In *Seal*, two videotapes showing the appellant and his unit in combat were played during the sentencing proceedings. The videotapes were not admitted into evidence, nor were they otherwise included in the record of trial. Additionally, the contents of the videotapes were not transcribed in the record or otherwise adequately described by other evidence. *Id.* at 661-63.

Assuming *arguendo* that the use of a photograph of the videotape in lieu of the original renders the record of trial incomplete, we still would not grant relief. Failure to include an exhibit in a record of trial results in an issue as to whether the record is complete requiring further analysis as to whether the omission was substantial. *United States v. McCullah*, 11 M.J. 234, 236-37 (C.M.A. 1981). A substantial omission from the record of trial raises a presumption of prejudice. *United States v. Gray*, 7 M.J. 296, 298 (C.M.A. 1979).

In the case before us, the video footage showed the physical condition of the appellant's grandmother and her living conditions. The evidence was offered by the appellant to support her affirmative defense of duress to the desertion charge. The appellant's case rested largely on her need to remain in her grandmother's home as primary caregiver, rather than returning to her military duties. The appellant's grandmother's physical and living conditions are described in the testimony of five defense witnesses, a stipulation of expected testimony of her grandmother that was read to the members, and the testimony of the appellant. Whereas the *Seal* court noted that the appellant's testimony in extenuation and mitigation was not "sufficiently duplicative of the contents of the videotapes to minimize the omission of the tapes." *Id.* at 663.

Here, any omission is deemed not to be substantial. There is ample discussion of the condition of the grandmother and her needs in the testimony of the many defense witnesses sufficient to establish an accurate description of the situation that the appellant faced. There is no indication that the contents of the videotape in any way contradicted that testimony. The appellant has failed to demonstrate how the contents of the videotape contributed additional facts not already disclosed by the witnesses. In fact, the physical conditions and living conditions of the appellant's grandmother were not in issue during the trial, as the Government made no effort to contest the defense evidence. Finding no prejudice from the substitution in

the record for the videotape, we decline to grant relief based on this allegation of error.[1]

Conclusion

Accordingly, the findings of guilty and sentence, as approved by the convening authority, are affirmed.

Senior Judge CARVER and Judge REDCLIFF concur.

For the Court

R.H. TROIDL
Clerk of Court

[1] We urge military judges to follow the better practice of including videotapes, audiotapes, and other similar exhibits in the record of trial.