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

Before
B.L. PAYTON-O'BRIEN, R.Q. WARD, J.R. MCFARLANE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JAY D. WYLIE
COMMANDER (O-5), U.S. NAVY

NMCCA 201200088
GENERAL COURT-MARTIAL

Sentence Adjudged: 28 October 2011.
Military Judge: CAPT Carole Gaasch, JAGC, USN.
Convening Authority: Commander, Navy Region Northwest, Silverdale, WA.
Staff Judge Advocate's Recommendation: LCDR D.E. Rieke, JAGC, USN.
For Appellant: Capt Bow Bottomly, USMC; Capt Michael Berry, USMC.
For Appellee: Maj Paul Ervasti, USMC.

30 November 2012

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

McFARLANE, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of one specification of rape, one specification of aggravated sexual assault, two specifications of abusive sexual contact, and three specifications of conduct unbecoming an officer, in violation of Articles 120 and 133, Uniform Code of Military Justice, 10

U.S.C. §§ 920 and 933. The military judge sentenced the appellant to confinement for 10 years, total forfeitures, and a dismissal. The convening authority (CA) approved the sentence as adjudged but, in accordance with the pretrial agreement, suspended all confinement in excess of 42 months, suspended adjudged forfeitures, deferred automatic forfeitures, and then waived automatic forfeitures for a period of six months from the date of the CA's action.

The appellant asserts three assignments of error: 1) that Commander, Pacific Fleet's message on sexual assault was unlawful command influence that prejudiced the appellant's clemency process; 2) that the CA was disqualified from taking post-trial action due to Commander, Pacific Fleet's message; and 3) that the appellant was prejudiced when the staff judge advocate (SJA) failed to respond to an allegation of legal error in the appellant's clemency request.

After carefully considering the record of trial and the submissions of the parties, we are convinced that the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant occurred. Art. 59(a), UCMJ.

Factual Background

The appellant became the Commanding Officer (CO) of the Destroyer USS MOMSEN (DDG 92) in July of 2010. While the ship was on deployment in January of 2011, the appellant visited a bar, where he became extremely intoxicated in front of members of his crew. The appellant then sexually assaulted Ensign (ENS) M, a female member of his crew, at the bar by pinning her against it, trying to kiss her, and using his fingers to penetrate her vagina. Although ENS M was extremely upset after this incident, she did not report the crime. In February of 2011, the appellant met with ENS M to discuss ship business and to apologize to her for the sexual assault. The appellant stated that he had a problem with alcohol and that nothing similar to the assault would happen again. ENS M told him she would not report the assault as long as the appellant did not commit any similar acts ever again.

On 25 April 2011, while attending an informal command gathering, the appellant again became extremely intoxicated in front of his crew. On the way back to the ship after the event, the appellant made unwanted advances on Engineman Fireman (ENFN) D while they were both riding in the duty van. Once back aboard

the ship, the appellant directed ENFN D into his stateroom; she felt she had no choice but to obey her CO. Once in the stateroom the appellant performed oral sex on ENFN D and penetrated her vagina and anus with his finger without her consent.

On 28 October 2011, at a general court-martial convened by Commander, Navy Region Northwest, the appellant pled guilty pursuant to a pretrial agreement (PTA) and was sentenced by the military judge to 10 years confinement, total forfeitures, and a dismissal. On 7 December 2011, Commander, Pacific Fleet released a message titled, "Leadership against Sexual Assault" to all commands in the Pacific Fleet area of responsibility. The two-page message stated that sexual assault is an ongoing problem in the Navy and focused on the importance of the role of leadership in preventing and responding to sexual assaults. The message mentioned the outcome of the appellant's court-martial briefly in one sentence, but mainly it included best practices, training opportunities, and general advice on how Commanders could create a command climate that prevents sexual assault.[1]

On 30 December 2011, the staff judge advocate (SJA) submitted the SJA Recommendation (SJAR), recommending that the CA approve the sentence as adjudged and execute it in accordance with the provisions of the PTA. On 16 February 2012, civilian defense counsel submitted a clemency request, asking that the CA not take action on the appellant's case due to unlawful command influence resulting from the 7 December message and requesting that either the Chief of Naval Operations or the Vice Chief of

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[1] The appellant alleges that the following language from the message is problematic:

> "[D]espite on-going training and prevention efforts, sexual assault continues to be a persistent problem in the Navy that demands our attention."
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> "[T]wo-thirds of all sexual assaults are blue-on-blue, to include seniors sexually assaulting juniors. It would be unwise for [us] to underestimate the impact that sexual violence has within the Navy."
>
> "One of the most recent examples includes the Commanding Officer of a destroyer who was found guilty at court-martial for sexual assault and sentenced to a lengthy period of confinement."
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> "It begins with leaders who . . . react forcefully and consistently when sexual misconduct occurs."

Clemency Request of 16 Feb 2012, Encl. (1).

Naval Operations serve as substitute CA. Alternatively, the clemency request asked the CA to reduce the appellant's confinement to 30 months and reduce his rape conviction to a finding of guilty for aggravated sexual assault. The SJA did not submit an SJAR addendum after receiving the clemency request.

On 21 February 2012, the CA took action on the appellant's case. Although the action did not grant the requested clemency, it did specifically note the appellant's request and also addressed the alleged unlawful command influence by stating that the CA had not considered the message when taking his action.[2]

Unlawful Command Influence

The appellant asserts that Commander, Pacific Fleet's message was unlawful command influence that prejudiced the clemency process. We review unlawful command influence *de novo*. *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994).

Article 37(a), UCMJ, states, "No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence . . . the action of any convening, approving, or reviewing authority with respect to his judicial acts." The appellant has the initial burden of producing sufficient evidence to raise unlawful command influence. *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A. 1994). This threshold is low, but it must be more than "a bare allegation or mere speculation." *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994).

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[2] The relevant portion of the CA's action reads as follows:

> The defense counsel submitted a petition for clemency under R.C.M. 1105 on 16 February 2012, requesting that I recuse myself from taking action, or alternatively reduced [sic] the period of confinement to 30 months and substitute a guilty finding for Aggravated Sexual Assault instead of Rape under UCMJ Article 120 in Specification 1 of Charge III.
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> In taking this action, I have considered *only* the record of trial, the Staff Judge Advocate's recommendations under R.C.M. 1106, and all matters submitted by the accused through detailed defense counsel on 16 February 2012 under R.C.M. 1105. *I have not considered any messages, comments or outside opinions in taking action on this matter*.

CA's Action at 6 (emphasis added).

To raise the issue on appeal, the appellant must show: (1) facts which, if true, constitute unlawful command influence; (2) that the proceedings were unfair; and (3) that unlawful command influence was the cause of the unfairness. *Stombaugh*, 40 M.J. at 213. The appellant must meet this initial burden before the burden shifts to the Government to demonstrate beyond a reasonable doubt either that there was no unlawful command influence or that the proceedings were untainted. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999).

In this case, the appellant has not met his initial burden, as he does not show any facts which, if true, constitute unlawful command influence. While there is no question that Commander, Pacific Fleet sent the message at issue here, the substance of the message is not unlawful because it is a proper exercise of Commander, Pacific Fleet's authority. Taken as a whole, the message is nothing more than direction to leaders in the Pacific Fleet area of responsibility[3] to take sexual assaults seriously, and a listing of some best practices to help commands prevent and respond to sexual assault allegations. The message does not attempt to direct a particular disposition in sexual assault cases and does not give a suggestion of appropriate punishment for offenders. In short, the message is an instance of *lawful* command influence, and does not meet the first prong of the *Stombaugh* test.

Having found that Commander, Pacific Fleet's message does not, as a general matter, raise an issue of unlawful command influence, we now consider whether the fact that the appellant's court-martial was specifically mentioned in the message serves to meet the appellant's low burden with respect to raising the issue of unlawful command influence. While this court believes that it is advisable for senior leadership to avoiding make comments on cases that have not yet been through final appellate review, discussing an ongoing case does not automatically constitute unlawful command influence. In this case it is clear that Commander, Pacific Fleet was not expressing a desire to see a certain outcome in the appellant's case, but rather was merely

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[3] The appellant references Pacific Fleet's website at http://www.cpf.navy.mil/about/commands/ as it appeared on 19 June 2012 as support that the CA is a command under the authority of Commander, Pacific Fleet. Appellant's Brief of 26 Jun 2012 at 12. This court's review of that website in October 2012 does not show Commander, Navy Region Northwest listed as a subordinate command. However, as the Government did not contest the appellant's assertion, we will assume that there was a command relationship between Commander, Pacific Fleet and Commander, Navy Region Northwest. We leave for another day an examination of how the lack of a direct chain-of-command relationship might affect a claim of unlawful command influence.

trying to illustrate his point that sexual assaults occur within all ranks and is not a problem confined to junior Sailors. The full quote of the paragraph in question states:

> Given the data that suggests the majority of sexual assaults go unreported, you should not assume this behavior only occurs at other commands or is someone else's problem. *Nor can it be dismissed as typical adolescent behavior* or a combination of alcohol and hormones. One of the most recent examples includes the Commanding Officer of a Destroyer who was found guilty at court-martial for sexual assault and sentenced to a lengthy period of confinement.

Clemency Request of 16 Feb 2012, Encl. (1) at 1 (emphasis added). Accordingly, we again find that this language does not meet the first prong of the *Stombaugh* test.

Additionally, we find that the appellant has also failed to meet the second and third prongs of the *Stombaugh* test. Even if we were to assume that this message was composed of "facts which, if true, constitute unlawful command influence," the appellant still has not met his burden to show: 1) that the proceedings were unfair; and 2) that unlawful command influence was the cause of the unfairness. *Stombaugh*, 40 M.J. at 213. In the case at bar, the alleged unlawful command influence did not occur until after the trial was completed. Accordingly, to prevail on these prongs the appellant must show that the CA's decision to not grant clemency was unfair and that the unfairness was caused by Commander, Pacific Fleet's message.

At sentencing, the Government asked for nine years confinement and a dismissal for the appellant. The military judge, having just accepted guilty pleas to rape and other sexual offenses of young crew members under the appellant's command, declined to follow the Government's request and instead awarded the appellant 10 years confinement and a dismissal. However, pursuant to the pretrial agreement that the accused entered into with the CA, 78 months of that confinement, or nearly two-thirds of the adjudged sentence, was suspended. It was against this backdrop that the appellant asked the convening authority to further reduce his confinement to 30 months and to reduce his rape conviction to a finding of guilty for aggravated sexual assault. The bases for this request, as set forth in the clemency letter, were that: 1) the appellant had taken full responsibility for his actions; 2) he was active in a number of rehabilitation programs in the brig; 3) his 19 years of service

were impeccable before he committed his crimes; and 4) his subsequent incarceration was hard on his family. While these are reasonable points to bring up when seeking clemency, none of them, either individually or when considered as a group, are sufficiently compelling - especially in light of the serious nature of the appellant's crimes and highly favorable deal that he had already negotiated - for this court to find that the CA's decision to not grant clemency was "unfair." Accordingly, the appellant has failed to meet the second prong of the *Stombaugh* test.

Disqualification of the Convening Authority

The appellant's next assignment of error asserts that the CA should have been disqualified from acting on his clemency request because the CA had a personal interest in following the orders of a superior officer, as set forth in Commander, Pacific Fleet's message, and therefore was not impartial. We review whether a CA was disqualified from acting on post-trial matters *de novo*. *United States v. Davis*, 58 M.J. 100, 102 (C.A.A.F. 2003).

A CA acts in a "role . . . similar to that of a judicial officer" when completing his post-trial duties. *United States v. Fernandez*, 24 M.J. 77, 78 (C.M.A. 1987) (citing *United States v. Boatner*, 43 C.M.R. 216 (C.M.A. 1971)). During the post-trial process, "each accused is entitled to an individualized, legally appropriate, and careful review of his sentence by the convening authority." *Id*. A CA is disqualified from taking action on a court-martial if he cannot be impartial during this post-trial review. *Davis*, 58 M.J. at 102. One way a CA can be found to not be impartial is if he has a personal interest in the outcome of the case. *United States v. Voorhees*, 50 M.J. 494, 499 (C.A.A.F. 1999).

As stated above, there was no unlawful command influence during the clemency process, therefore there was no "order" that the CA may have felt compelled to follow from a superior officer relating to the outcome of this court-martial. There also is no evidence that the CA was trying to advance his career by not granting clemency to the appellant. Accordingly, we find that the CA did not have a personal interest in the outcome of this case and acted impartially in appellant's post-trial action. This assignment of error is without merit.

Remand for an SJAR Addendum

In his last assignment of error, the appellant asserts that it was prejudicial error for the SJA not to submit an addendum to the SJAR in response to the defense's clemency submission that alleged unlawful command influence. We agree that the SJA's failure to prepare an addendum was error, but we find that the error was not prejudicial to a substantial right of the accused.

When the defense raises an allegation of legal error in a clemency submission, the SJA must advise the CA whether corrective action is required. RULE FOR COURTS-MARTIAL 1106(d)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.); *see also United States v. Hill*, 27 M.J. 293, 296 (C.M.A. 1988). In most instances it is prejudicial for the SJA to fail to prepare a recommendation with the contents required by R.C.M. 1106(d) and this court will remand the record to the CA. *Hill*, 27 M.J. at 296. However, if the alleged legal error has no merit and would not have led to a favorable recommendation by the SJA or corrective action by the CA, then there is no prejudice to the appellant and remand is unnecessary. *Id*. at 296-97.

Because we found that the unlawful command issue is without merit, there was no prejudice to the appellant by the SJA's failure to submit an SJAR addendum. An SJAR addendum would not have led to a favorable recommendation by the SJA or corrective action by the CA in this case. Because the appellant was not prejudiced, returning this court-martial to the CA is not necessary. Accordingly, we resolve this assignment of error against the appellant.

Conclusion

Accordingly, the findings of guilty and the sentence are affirmed.

Senior Judge PAYTON-O'BRIEN and Judge WARD concur.

For the Court

R.H. TROIDL
Clerk of Court