

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

APPELLANT’S REPLY BRIEF

v.

Docket No. ARMY 20200391

Staff Sergeant (E-6)

LADONIES P. STRONG,

United States Army,

Appellant

Tried at Fort Stewart, Georgia, on 16 December 2019, 14-18 July 2020, and 20 July 2020, before a general court-martial appointed by the Commander, Fort Stewart, Georgia, Colonel G. Bret Batdorff, military judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignment of Error

**APPELLANT’S CONVICTIONS FOR NEGLIGENT
HOMICIDE AND PREVENTION OF AN AUTHORIZED
SEIZURE OF PROPERTY ARE LEGALLY AND FACTUALLY
INSUFFICIENT.**

Statement of the Case

Appellant, Staff Sergeant (SSG) LaDonies P. Strong, filed her brief on 26 July 2021. The government filed its response on 22 November 2021. Appellant now submits her reply.

Law and Argument

A. No reasonable person could foresee the collapse of the shoulder on Firebreak #20 and the resulting rollover.

Because “the test for foreseeability is ‘whether a reasonable person, in view of all the circumstances, would have realized the *substantial and unjustifiable danger* created by [her] acts[,]’” it is necessary to identify the particular “substantial and unjustifiable danger” appellant “created” by allegedly using her Apple watch while driving, and whether a reasonable person would have “realized” that danger. *United States v. Oxendine*, 55 M.J. 323, 325 (C.A.A.F. 2001) (quoting *United States v. Henderson*, 23 M.J. 77, 80 (C.M.A. 1986)).

Nonetheless, the government urges this court to use a different standard for foreseeability – a standard from a seemingly forgotten opinion from this court’s predecessor, one that has never been adopted by CAAF or cited in any published military opinion for two decades. (Appellee Br. 19-20). Specifically, the government refers to a quote from *United States v. Perez*, where this court’s predecessor stated:

The essence of proximate cause is foreseeability. It is not essential to the existence of a causal relationship that the ultimate harm which has resulted was foreseen or intended by the actor. It is sufficient that the ultimate harm is one which a reasonable man would foresee as being reasonably related to the acts of the defendant.

15 M.J. 585, 587 (A.C.M. R. 1983). It is hardly surprising the government prefers this overly broad definition because it shifts the focus to a *mere relationship* between two events rather than analyzing whether an accused's negligence created any particular risk of harm. Even in civil tort law – where a defendant's liberty is not at stake – courts generally limit an actor's liability “to those harms that *result from the risks* that made the actor's conduct tortious.” Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 29 (emphasis added). Accordingly, the proper focus should be whether “a reasonable person would have *realized the risk*” created by an accused's negligence – not simply whether an accused's negligence is reasonably related to the ultimate harm. *United States v. Brown*, 22 M.J. 448, 450 (C.M.A. 1986) (citations omitted) (emphasis added).

Here, Cadet (CDT) [REDACTED] death did not result from any risk created by appellant's negligence. Appellant's alleged use of her Apple watch did not create a “substantial or unjustifiable risk” of the accident that occurred. Appellant does not argue that her alleged actions were wise or even safe. Certainly, a person who is distracted by an electronic device creates a substantial risk of striking an obstacle or another vehicle, or even driving straight off a cliff. But that's not what happened here. The vehicle appellant drove sank like a “ship” as the shoulder of Firebreak #20 crumbled and fell away. (R. at 355). Appellant's vehicle only departed the traveled portion of Firebreak #20 by approximately eighteen inches,

which is just two inches wider than the width of an LMTV's tire. (R. at 398).

These facts are obvious from photos from the scene: the vehicle is nearly parallel with the road and the shoulder has crumbled.

Prosecution Exhibit 5, page 2:



Although the shoulder had a steeper grade than the traveled portion of the road, *that alone did not cause the vehicle to become unstable*; the government's own expert testified the "wet soil" was one of two factors that led to the vehicle becoming "unbalanced." (R. at 424). Moreover, the government ignores the testimony from multiple witnesses who described the regular occurrence of two-way traffic on Firebreak #20. As can be seen from the image above, Firebreak #20

is a one-way road – even the government’s own expert described it as such. (R. at 397). Despite the limited space, appellant’s company commander testified “the SOP was just to put [sic] one vehicle—pull over to the side and then let the other vehicle pass.” (R. at 920-21). It is inconceivable that two vehicles could pass on Firebreak #20 without protruding onto the “untraveled” portion of the road, including the shoulder. Consequently, a brief departure of the “traveled” portion of Firebreak #20 cannot be considered a substantial and unjustifiable danger because it was a regular occurrence and endorsed as the “SOP” by those who had the most familiarity with the route.

To avoid the conclusion that the shoulder collapse was the intervening cause of the accident, the government heavily relies on the fact that other vehicles safely traveled Firebreak #20 “without any issues.” (Appellee Br. 16, 18). On the contrary, the absence of prior accidents on the route or at the location of the accident in this case actually *decreases* the likelihood that a reasonable person would foresee the hidden dangers appellant encountered. Indeed, evidence showing an absence of prior accidents is often used in civil negligence cases to show a *lack of foreseeability* and vice versa. *See, e.g. Wood v. Wal-Mart Stores E., LP*, 576 F. App’x 470, 473 (6th Cir. 2014) (in a civil “slip and fall” claim, defendant properly admitted evidence concerning the lack of prior accidents at the spot where plaintiff fell to show a lack of foreseeability); *cf. Restatement (Third)*

of Torts: Liability for Physical and Emotional Harm, § 29 (“[i]n a negligence action, prior incidents or other facts evidencing risks may make certain risks foreseeable that otherwise were not, thereby changing the scope-of-liability analysis.”).

B. Law enforcement agents had already seized appellant’s iPhone, and the data within it, at the time appellant allegedly deleted the data.

The government concedes that Army Criminal Investigation Command (CID) agents seized appellant’s phone prior to her allegedly erasing the data within it. (Appellee Br. 22). However, the government splits hairs by arguing that CID had not seized the digital content of appellant’s phone at the time it was erased. (Appellee Br. 22). According to the government, the term “seize” as used in Article 131e should be given a different meaning than the way it is traditionally understood in the Fourth Amendment context. (Appellee Br. 23). The government’s argument fails for multiple reasons.

First, the plain meaning of the word “seize” is consistent with the definition used in the context of the Fourth Amendment. *See United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007) (“[t]he plain language will control, unless use of the plain language would lead to an absurd result.”). As the government acknowledges, the ordinary meaning of the word seize is “[t]o forcibly take possession (of a person or property)” and “[t]o be in possession (of property).” *Black’s Law Dictionary* (9th ed. 2009); (Appellee Br. 23). Here, CID agents took possession of appellant’s

phone and the data within it at the time they forcibly took the phone from her hands. Notably, the data was in *physical form* on the phone – not on a separate remote server commonly referred to as the “cloud.” The ordinary meaning of the word “possession” is “[t]he fact of having or holding property in one’s power; the exercise of dominion over property.” *Black’s Law Dictionary* (9th ed. 2009).

When CID agents seized appellant’s cell phone, they exercised power and dominion over the data within it. Indeed, the agents placed the phone into what they believed to be a “Faraday bag” to exclude all others from the phone or the data within it. (R. at 1011-12). Without citing any legal authority, the government claims CID could not have taken possession of the data until they “downloaded that content from the phone.” (Appellee Br. 23). Such an interpretation is inconsistent with the ordinary meaning of the words “seize” and “possession.” The agents certainly controlled the *physical* data on appellant’s cell phone even if they had not manipulated it, searched it, or made additional copies by downloading it to a separate device.

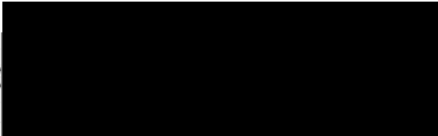
Second, it makes no sense to ignore the definition of the term “seize” as used in Fourth Amendment cases because alleged violations of Article 131e *will only occur in the context of a seizure pursuant to the Fourth Amendment*. Consequently, the existence of two competing definitions will create absurd results. For example, consider the absurdity that would occur had appellant

consented to the seizure of her phone and data instead of it being seized pursuant to a search authorization. Appellant would be unable to revoke her consent because, for Fourth Amendment purposes, the seizure was complete at the moment CID agents interfered with her possessory interest in the property. *See United States v. Hoffman*, 75 M.J. 120, 124 (C.A.A.F. 2016) (accused lawfully revoked consent to seizure of his property because law enforcement had not meaningfully interfered with his property). However, at the same time, appellant could also be convicted under Article 131e because, under the government's theory, the data had never been seized.

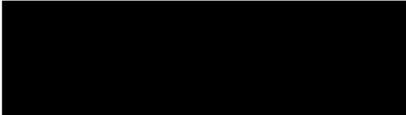
Finally, to the extent there is any ambiguity in the meaning of the word seize, it should be resolved in appellant's favor. "Under the rule of lenity, 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *United States v. McPherson*, 81 M.J. 372, 382, n.3 (C.A.A.F. 2021) (citing *Rewis v. United States*, 401 U.S. 808, 812 (1971)).

Conclusion


Based on the foregoing, appellant respectfully requests this court set aside her convictions and the sentence.




Joseph A. Seaton, Jr.
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division



Jonathan F. Potter
Senior Capital Defense Counsel
Defense Appellate Division



Joyce C. Liu
Major, Judge Advocate
Branch Chief
Defense Appellate Division



Michael C. Friess
Colonel, Judge Advocate
Chief
Defense Appellate Division

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the
Army Court and Government Appellate Division on 6 December 2021.



JOSEPH A. SEATON, JR.
CPT, JA
Appellate Defense Counsel
Defense Appellate Division