IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Major (O-4)
DAVID J. RUDOMETKIN
United States Army,
Appellant

BRIEF ON BEHALF OF APPELLANT ON REMAND FOR FURTHER REVIEW

Docket No. ARMY 20180058

Tried at Redstone Arsenal, Alabama, on 8 November and 20 December 2016; 3 February, 31 May, 10 August, and 15 September 2017; and 29–31 January, 1–2 February, 12 March, 22 June, and 6 September 2018; before a general court-martial appointed by the Commander, U.S. Army Aviation and Missile Command, Lieutenant Colonel Richard Henry, Colonel Jeffrey R. Nance, and Colonel Douglas K. Watkins, military judges, presiding.

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

Additional Assignment of Error

WHETHER APPELLANT'S WAIVER OF HIS RIGHT TO TRIAL BY MEMBERS WAS KNOWING AND VOLUNTARY.[1]

[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided to this court pursuant to appellant's contemporaneously filed Motion for Leave to file Appellant's *Grostefon* Matters under Seal.

Panel No. 4

Statement of the Case

Appellant incorporates the statement of the case from his prior briefs, and supplements with the following:

On 9 November 2021, this court set aside the findings and sentence.[2] On 15 August 2022, the Court of Appeals for the Armed Forces (CAAF) reversed this court's decision and remanded the case for further review under Article 66, UCMJ.

Statement of Facts

Appellant incorporates the statement of facts from his prior briefs, and supplements with the following:

Lieutenant Colonel (LTC) [redacted] presided over appellant's court-martial, including at findings, at sentencing, and at a post-trial hearing during (at which he denied appellant his motion for a mistrial). Prior to appellant's court-martial, in October 2016, Judge [redacted] met the wife of a trial counsel who appeared before Judge [redacted].

Appellant initially appeared in front of Judge [redacted] on 8 November 2016. (R. at 5-6). At that initial hearing, Judge [redacted] said he was "not aware of any matter that might be a ground for challenge against" him. (R. at 5). Based on Judge Henry's representation, appellant did not further voir dire Judge [redacted]. (R.

[2] As a result of this relief, this court did not address appellant's fifth assignment of error from his original brief. Appellant requests this court consider this issue as presented in the prior briefs.

at 5). Appellant was charged with, among other things, conduct unbecoming an officer for having sexual relations with a woman not his wife. (Charge Sheet). The record does not indicate how soon after this initial meeting Judge [redacted] relationship with the trial counsel's wife moved beyond the appropriate to the inappropriate, but it is clear that improprieties started long before appellant's court-martial.

Based on Judge [redacted] earlier representation, on 30 January 2018, appellant elected to be tried by Judge [redacted]. (R. at 379). At that time, Judge [redacted] did not inform appellant he was committing the same type of conduct for which appellant was being tried.

On 2 February 2018, Judge [redacted] convicted appellant, among other things, of conduct unbecoming an officer for engaging in a sexual relationship with a woman not his wife. (R. at 1229). That same day, Judge [redacted] sentenced appellant to twenty-five years confinement and a dismissal. (R. at 1309).

On 12 March 2018, appellant moved for a mistrial because, based on the Court of Appeals for the Armed Forces (CAAF) opinion in *United States v. Mangahas*, 77 M.J. 220 (C.A.A.F. 2018), which placed two of appellant's convictions beyond the statute of limitations. (R. at 1330). Judge [redacted] dismissed the two charges. (R. at 1331). He denied appellant's motion for a mistrial. (R. at

1335). He sentenced appellant to seventeen years confinement and a dismissal. (R. at 1348).

At the post-trial hearing, Judge [redacted] again failed to disclose he too was engaging in conduct unbecoming an officer.

Upon discovery that Judge [redacted] engaged in inappropriate conduct, appellant again moved for a mistrial, claiming that appellant was denied a fair and impartial trial because of "the fraud" committed by Judge [redacted]. (R. at 1352). The new military judge, Colonel [redacted], denied the motion without taking any evidence. (App. Ex. LXXII). After a post-trial session, the new military judge, Colonel [redacted], denied appellant's motion for a mistrial. (App. Ex. LXXIX).

On 4 September 2021, Judge [redacted] married the trial counsel's wife. (Def. App. Ex. A).

Law and Argument

The right to trial by members can be waived, but only if the waiver is knowing and voluntary. *United States v. St. Blanc*, 70 M.J. 424, 427 (C.A.A.F. 2012). For an accused to make an informed decision whether to waive his right to trial by members, Article 16, UCMJ, expressly requires that the accused consult with counsel about the choice. Article 16(1)(B), UCMJ. As noted in the discussion accompanying R.C.M. 903(c)(2)(A):

> to ensure that the accused's waiver of the right to trial by members is knowing and understanding . . . . Failure to do so is not error, however, where such knowledge and understanding otherwise appear on the record.

In *St. Blanc*, the accused claimed he was denied a knowing and intelligent waiver of his right to a panel because his trial defense counsel, as a result of a change in the law, failed to properly inform him of the maximum punishment he was facing. 70 M.J. at 428. The CAAF refused to find for St. Blanc because the military judge did not have a duty to "inquire into any non-enumerated factors or collateral matters that may have influenced [St. Blanc]'s election." 70 M.J. at 429-30. The court determined the appropriate legal vehicle for St. Blanc to employ was to claim he received ineffective assistance of counsel. *Id.* at 430.

But the principle discussed in *St. Blanc* applies here. In appellant's case, the military judge had full knowledge of his own conduct—conduct he did not divulge to appellant. The AR 15-6 investigation found Judge [redacted] engaged in "an inappropriate relationship with the wife of a trial defense counsel" and Colonel [redacted] found the improper relationship to be "pervasive, personal, secretive, and intimate." (App. Ex. LXXIX). While neither went as far to conclude the relationship was adulterous, Judge [redacted] subsequent marriage to the trial counsel's wife establishes the relationship was also adulterous. *See United States v. Berman*, 28 M.J. 615, 618 (A.F.C.M.R. 1989) (finding sexual involvement of trial judge and trial counsel on a specific date is relevant to assessment of their

relationship prior to that date). Because Judge [redacted] did not divulge that he was engaging in an inappropriate relationship, was which any reasonable person would deem to be conduct unbecoming an officer, appellant was denied a meaningful opportunity to voir dire the military judge in order to make an informed decision about his appropriate forum.

In fact, the record reflects that Judge [redacted] deceived appellant. The record contains an assurance by Judge [redacted] that he was "properly certified and sworn" and that he was not "aware of any matter that might be a ground for challenge against me." The routine inquiry of the accused by Judge [redacted] regarding the voluntariness of the request for a military judge-alone trial and consultation with counsel provided no indication that Judge [redacted] had something to hide.

Because the pertinent information that would have caused a reasonable person to question the morality and fitness of a judge was not provided to appellant and counsel when contemplating whether to request trial by military judge alone, it necessarily follows that appellant's choice of forum was arrived at without an informed decision about waiving a fundamental right. Because Judge [redacted] deceived appellant about the true facts and circumstances of his own situation, and was hypocritically standing in judgment of appellant while he himself was committing similar misconduct to that which appellant was accused, the risk of material prejudice to the substantial rights of the accused requires remedial action

in the form of a rehearing on both the findings and the sentence. *See* Article 59(a), UCMJ, 10 U.S.C. § 859(a) (2012).

Indeed, the conduct Judge [redacted] engaged in is analogous to that the CAAF addressed in *United States v. Albaaj*, 65 M.J. 167 (C.A.A.F. 2007). [redacted] was convicted of both military crimes and various sexual offenses. 65 M.J. at 167. A lieutenant colonel panel-member who served on the panel trying [redacted] was asked during voir dire if he knew of any reason why he should not serve on [redacted] court-martial, and specifically asked if he knew [redacted] brother. *Id.* at 168. The lieutenant colonel said he did not know any reason he should not serve, and also did not know Albaaj's brother. *Id.* Both statements were untrue. *Id.* at 169.

The CAAF found that [redacted] must be granted a rehearing. *Id.* at 171. The CAAF determined that, as a result of the panel-member's lack of candor, both Albaaj and his counsel were unable to challenge the panel-member. *Id.*

The same is true here. Because of Judge [redacted] lack of candor, appellant was unable to make an informed choice regarding forum, and his waiver of his right to have a panel determine his fate was waived without appellant being fully informed of all the facts necessary to make that choice.

Conclusion

WHEREFORE, the appellant respectfully requests this honorable court set aside the findings and sentence.

[redacted]
FOR: PHILIP D. CAVE
Cave & Freeburg, LLP

[redacted]
JONATHAN F. POTTER
Senior Capital Defense Counsel
Defense Appellate Division

[redacted]

[redacted]
ANDREW R. BRITT
Captain, Judge Advocate
Appellate Defense Counsel
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 18 January 2023.

[redacted]

Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division