IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee v. Sergeant (E-5) **ANTHONY R. HALE** United States Army Appellant	**REPLY BRIEF ON BEHALF OF APPELLANT** Docket No. ARMY 20180407 Tried at Fort Campbell, Kentucky, on 21 November 2017, 15 February, 5 March, 5 April, and 8-10 August 2018 before a general court-martial appointed by the Commander, Headquarters, Fort Campbell, Lieutenant Colonel Matthew Calarco, Military Judge, presiding.

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

Assignments of Error

I.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO ILLEGAL SEARCHES CONDUCTED INSIDE APPELLANT'S HOME.

II.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION TO SUPPRESS STATEMENTS MADE TO CLARKSVILLE POLICE.

III.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION TO SUPPRESS STATEMENTS MADE TO CID.

IV.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED THROUGH THE ILLEGAL SEARCH AND SEIZURE OF APPELLANT'S CELL PHONE.

V.

WHETHER APPELLANT'S CONVICTION FOR OBSTRUCTION OF JUSTICE IS FACTUALLY SUFFICIENT.

VI.

WHETHER APPELLANT'S CONVICTION FOR FALSE OFFICIAL STATEMENT IS FACTUALLY SUFFICIENT.

VII.

WHETHER THE DILATORY POST-TRIAL PROCESSING OF APPELLANT'S CASE WARRANTS RELIEF WHERE THE GOVERNMENT TOOK 362 DAYS BETWEEN SENTENCE AND ACTION.

Statement of the Case

On 14 February 2020, appellant filed his Brief on Behalf of Appellant with this Court. On 13 July 2020, the government filed its Brief on Behalf of Appellee. This is appellant's reply.

Statement of Facts

Appellant relies on the statement of facts from his 14 February 2020 Brief on Behalf of Appellant.

Errors and Argument

I.
WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO ILLEGAL SEARCHES CONDUCTED INSIDE APPELLANT'S HOME.

Argument

On 23 December 2016, Officer [redacted] and two fellow officers from the Clarksville Police Department (CPD) entered appellant's apartment without a warrant, without consent, and without an excuse. Thus, CPD's actions in illegally entering and searching appellant's apartment clearly should have resulted in all of the evidence derived from this initial search being suppressed. In failing to suppress this highly prejudicial evidence, the military judge abused his discretion.

A. The initial entry of appellant's apartment was clearly illegal.

Appellee relies on the military judge's erroneous conclusion that the CPD's initial entry into appellant's apartment was justified based on some type of exigent circumstances. (Appellee's Br. 19) (citing App. Ex. XIII, p. 8). Despite Officer [redacted] testimony that this was merely standard procedure, the government claims he and his fellow officers were allowed to enter and search the apartment in order to "prevent imminent evidence destruction." (Appellee's Br. 20). In a circular argument based on hindsight, appellee asserts that, because appellant actually attempted to destroy some marijuana in order to avoid its detection, unbeknownst to any of the CPD officers on the scene, his unknown actions somehow justified the three officers' conduct in barging into the home and ordering appellant to sit on the couch while they searched the apartment. *See* (Appellee's Br. 20).[1]

Officer [redacted] provided no articulable facts, or even speculation for that matter, regarding any belief that destruction of evidence inside appellant's apartment was in any way imminent. *See Kentucky v. King*, 563 U.S. 452, 460 (2011) ("[T]he need to prevent the *imminent* destruction of evidence has long been recognized as a sufficient justification for a warrantless search.") (internal quotation omitted) (emphasis added). In fact, Officer [redacted] never suggested he believed the destruction

[1] The military judge made a similar observation regarding officer [redacted] "instincts." *See* (App. Ex. XIII, p. 8).

of evidence was even likely. (R. at 56-66). Regardless, just as the military judge did in his ruling on the defense motion to suppress, the appellee simply notes the legal standard articulated in *King* without citing anything in the record that would indicate the CPD officers had any basis to believe a search was necessary "to prevent *imminent* evidence destruction." *See* (App. Ex. XIII, p. 8; Appellee's Br. 19-21) (emphasis added).

This lack of further articulation or analysis is understandable given the evidence provided by Officer [redacted] during the suppression hearing. Contrary to the appellee's assessment of the potential exigent circumstances, Officer [redacted] never mentioned anything in his testimony about any belief that evidence would actually be destroyed. Instead, he simply justified his actions as standard procedure. (R. at 60) ("I mean, that's the *policy and practice* we use. Any time we are going to freeze a house for any type of suspicion of drugs, *we always do a protective sweep* of the residence."). The government offered this same rationale in *Keefauver* when officers conducted a similar "protective sweep" for drugs. *United States v. Keefauver*, 74 M.J. 230 (C.A.A.F. 2015). For the same reasons the Court rejected that argument in that case, it should reject it in this case. *Id.* at 236 ("[T]he presence or suspected presence of drugs without more does not justify a sweep.").

Instead of conducting a sweep for evidence that could potentially get destroyed at some unknown time in the future, the CPD officers should have

frozen the scene and obtained a search warrant. *See United States v. Barden*, 9 M.J. 621, 625-26 (A.C.M.R. 1980) ("As the circumstances did not require immediate action to prevent destruction or removal of the money, the entry and warrantless search cannot be justified on the basis of exigent circumstances. The appropriate procedure would have been to secure the premises to await the arrival of the search authorization…The problem, however, is that instead of securing, he searched. This was tantamount to a warrantless search without exigent circumstances and therefore illegal.").

B. Appellant did not freely and voluntarily consent to the search of his apartment.

1. The degree to which the suspect's liberty was restricted.

While the government concedes that the first *Wallace* factor "minimally favors appellant" (Appellee's Br. 22), the clear and convincing evidence shows appellant's liberty was completely restricted for the nearly two hours after police barged into his home uninvited, searched his apartment, and ordered him to sit on his couch under armed guard until more police arrived. (R. at 59-61). Appellant was undoubtedly in police custody from the moment they entered his home. Thus, this factor unequivocally weighs in appellant's favor.

2. The presence of coercion or intimidation.

Appellee claims the second *Wallace* factor "weighs heavily in favor of the government." (Appellee's Br. 22). In supporting this position, and downplaying what actually happened in this case, appellee states appellant is somehow arguing that armed police officers are inherently coercive or intimidating anytime they are doing their jobs. (Appellee's Br. 23) ("Moreover, a police officer conducting his *legitimate* law enforcement duties while carrying his service-issued equipment, *without more*, is not inherently coercive or intimidating.") (emphasis added).

In this case, the "more" that makes the actions of the CPD officers coercive and intimidating is the fact that (1) three police officers entered appellant's apartment in the middle of the night without permission, (2) these police officers were armed with their service-issued weapons, (3) they ordered the occupants to stay on the couch while they (4) searched the apartment without permission, and (5) did not tell the occupants what was going on. (R. at 56-66; 121) (Officer [redacted] testimony is corroborated by appellant's statement that the police officers would not allow him to move from the couch). Next, (6) after appellant had been forced to sit under armed guard for nearly two hours, (7) an additional armed officer (SGT [redacted] arrived and began questioning the appellant (R. at 69-70), after which (8) two homicide detectives (SGT [redacted] and SGT [redacted] escorted appellant alone to his bedroom where they ultimately convinced him to provide verbal consent (App. Ex.

VIII, encl. 2), although (9) they elected not to use the department's standard consent form to document this decision. (R. at 71). These are undisputed facts corroborated by the police and not, as appellee contends, a situation involving the appellant's word against those of the CPD officers. *See* (Appellee's Br. 23).

3. The suspect's awareness of his right to refuse based on inferences of the suspect's age, intelligence, and other factors.

Appellee asks this Court to infer that appellant knew his right to withhold consent because of his 25 years of age, high school diploma, and seven years of service as a corrections officer. (Appellee's Br. 24). Perhaps this factor would have weighed in the government's favor had Officer [redacted] been the one requesting consent to search appellant's apartment upon his initial encounter with appellant. For example, had Officer [redacted] calmly explained the situation to appellant, perhaps provided and explained the department's standard consent to search form, and then asked if it would be okay to look around the apartment prior to entry, the court could infer appellant knew he could have refused.

In this case, however, none of the police used the standard form to document appellant's knowledge and affirmative waiver of his right. (R. at 71). Furthermore, the police officers' actions in appellant's apartment prior to SGT [redacted] arrival already demonstrated the police were willing to do as they pleased that night. Even if appellant's experience in law enforcement had taught him the legal concepts about a suspect's right to refuse consent to search, the police actions

showed him those rights did not apply at this time. For example, in his law enforcement training, appellant was likely taught that police cannot enter a home without a warrant or consent. Upon opening his door, however, appellant quickly learned the police had no concerns about warrants or consent when they entered his home and ordered him onto his couch while they searched the apartment. Thus, in light of the preceding events of this particular night, there is clearly no basis to infer that appellant's correctional training should have suddenly kicked in and convinced him to start asserting his constitutional rights with SGT [redacted] and his colleagues, particularly after the police had already shown their lack of interest in those basic rights.

4. The suspect's mental state at the time.

Sergeant [redacted] testified that after he arrived at appellant's apartment that morning, he informed appellant his roommate had been murdered outside. (R. at 69). Naturally, throughout their conversation, appellant looked visibly upset and shaken. (R. at 79). While appellee asserts that anxiety, by itself, should not undermine consent, (Appellee's Br. 24) appellant was experiencing a much more difficult situation than the average suspect who is caught with a small amount of marijuana in their toilet.

5. The suspect's consultation, or lack thereof, with counsel.

Appellee concedes that this factor "slightly favors appellant because he neither requested nor consulted with counsel." (Appellee's Br. 25).

6. The coercive effects of any prior violations of the suspect's rights.

As indicated above, the coercive effects of the illegal entry and search of appellant's apartment by Officer [redacted] and his peers, followed by the equivalent of a custodial interrogation conducted by SGT [redacted] upon his arrival, significantly impaired appellant's ability to provide free and voluntary consent to search his apartment under the totality of the circumstances.

C. Any Alleged Consent Was Tainted by the Illegal Entry and Search.

1. The less than two-hour span was insufficient to break the causal chain between the consent and the constitutional violation.

While the CAAF has not set a minimum time span that is per se necessary to dissipate the taint of a constitutional violation, it has found that a less than three hour time span weighs in favor of the appellant. *United States v. Conklin*, 63 M.J. 333, 339 (C.A.A.F. 2006) ("First, in terms of the temporal proximity of the illegal conduct and the consent, less than three hours elapsed between the time that TSgt [redacted] began opening files on Appellant's computer and the time that Appellant consented to the search. Indeed, it appears that everything happened on a single day before lunch.").

Appellee misstates the findings of *United States v. Dease*, 71 M.J. 116, 123 (C.A.A.F. 2012), by claiming the illegal conduct at issue there occurred only "mere hours" before consent. (Appellee's Br. 27). Contrary to the appellee's assertion, the CAAF actually states "the military judge found that the time between the revocation of consent and subsequent consent for search was approximately two months. This significant amount of time contrasts with the facts of *Conklin*, in which only less than three hours had elapsed between the illegal search and the consent of the appellant." *Id.* at 122 (citing *Conklin*, 63 M.J. at 339). Thus, the Court found that this significant amount of time, encompassing months, weighed in the government's favor. *Id.* However, the Court clarified that this lengthy time gap did "not weigh *heavily* in favor of the Government" in light of "the fact that Appellant was not confronted with the results of the illegal conduct – the first urinalysis – until *mere hours* before giving consent...to the subsequent searches." *Id.* at 123 (emphasis added).

While the CAAF has yet to establish any per se limits on temporal proximity, it has clearly held that two hours between the constitutional violation and subsequent consent to search tips the scale in appellant's favor. *See Conklin*, 63 M.J. at 339. Thus, this Court should follow CAAF's precedent and find that the roughly 98 minutes appellant spent on his couch under armed police escort did not

attenuate the taint of the initial illegal entry and search. *See* (R. at 338, App. Ex. VIII, encl. 2).

2. The arrival of more police officers into appellant's apartment was not an intervening circumstance.

Appellee asserts that the arrival of SGT [redacted] at the appellant's apartment was a sufficient intervening circumstance that weighs in the government's favor. (Appellee's Br. 28-29). This argument was rejected in *Conklin*, and should be rejected here. *Id.* ("Yes, different agents were involved, but they were fully briefed by the MTLs who conducted the inspection/search…Simply stated, the AFOSI agents would not have been interested in talking to Appellant but for the information relayed to them as a direct result of the unlawful search that had just taken place. There were no intervening events or circumstances that would sever the causal connection between the two searches.").

In this case, SGT [redacted] was fully briefed by the "patrol officer and patrol supervisor" upon his arrival at appellant's apartment in order "to gain information about what had taken place." (R. at 68). Obviously, the patrol officers briefed SGT [redacted] on what evidence they had discovered up to that point, including the marijuana found in the toilet. Clearly, SGT [redacted] would not have been interested in questioning appellant about drugs found in the house at that point in time but for the information relayed to him by the patrol officers.

Appellee references *United States v. Angevine*, 16 M.J. 519 (A.C.M.R) for the proposition that a change of investigators, "among other factors," can sufficiently attenuate the taint of an earlier illegality. (Appellee's Br. 28). These "other factors" the court considered in finding attenuation of the taint of the illegally obtained evidence included: (1) the issuance of a "cleansing statement," (2) a time lapse of five hours, (3) a change of investigators, (4) a change of location, (5) the first investigator's absence during the subsequent interrogation, and, notably, (6) the fact that there were no briefings between the first and second investigators. *Id.* at 520. In this case, the only factor that corresponds to *Angevine* is a change of investigators. In contrast, this case involves no cleansing statements at any point in time, a time lapse of under two hours, no real change in location[2] prior to the alleged consent, and a thorough briefing from the patrol officers on the scene regarding what they had found.

Had SGT [redacted] actually used the department's standard consent form in requesting appellant's consent, that could have potentially been an intervening circumstance weighing in the government's favor. However, in *United States v. Khamsouk*, the CAAF held that this factor still arguably tipped in appellant's favor, where "the only 'intervening circumstances' between the apprehension and the

[2] Appellant was escorted from the living room to his bedroom by SGT [redacted] and SGT [redacted] prior to providing verbal consent to search. (App. Ex. VIII, encl. 2).

consent to search were (1) the administration of appellant's Article 31 rights, and (2) appellant's subsequent signed acknowledgment of the right to refuse consent." 57 M.J. 282, 292 (C.A.A.F. 2002).

3. The stated purpose of entering appellant's home without a warrant was to "conduct a protective sweep for evidence."

Officer [redacted] testified that his standard procedure is, whenever he goes to a residence, "if we smell the odor of marijuana or have some other reason to believe that there are narcotics or something in the residence, then we do the protective sweep to make sure that no evidence gets destroyed. After we do that, we would ask for consent. If consent isn't granted, we would apply for a search warrant, things along those lines." (R. at 59-60). However, the CAAF has already determined such automatic sweeps conducted pursuant to "standard procedure" are a clear violation of the Fourth Amendment. *See Keefauver*, 74 M.J. at 235 ("It is thus eminently clear both that a protective sweep of the home 'is decidedly not "automatic,"' and that the facts in this case fail the test laid out in *Buie*. A protective sweep of the home requires specific, articulable facts and rational inferences from those facts supporting two beliefs: (1) that the areas to be swept harbor one or more individuals and (2) that the individual or individuals pose a danger to the agents or others. The Government did not attempt to prove that the searching officer held either such belief, nor did it present facts and inferences that would objectively support either such belief.") (internal citations omitted).

Officer [redacted] entry into appellant's home was flagrant, and his purpose was improper. Appellee references *Khamsouk* to suggest the police conduct in question was somehow appropriate. (Appellee's Br. 29). However, in analyzing this factor, the court noted several facts that suggested "the absence of purposeful or flagrant conduct on the part of the NCIS agents." *Khamsouk*, 57 M.J. at 292. The first distinct fact in that case was that, "after apprehending appellant in the residence, [the agent] obtained written consent to search the appellant's bags before touching them. As noted earlier, this one-page form advised appellant that he had the right to refuse the search in the absence of a search warrant." *Id.* In contrast, the CPD officers provided no such advice, and sought no written or informed consent.

Another factor the CAAF considered in *Khamsouk* was the fact that the special agent testified "that part of his basis for entering the premises to apprehend appellant was his concern for officer safety." *Id.* While acknowledging that his concerns did not rise to the level of exigent circumstances, the CAAF found that the agent's concern for officer safety was not misplaced or flagrant. *Id.* at 293. In contrast, Officer [redacted] did not mention any concern for officer safety.

Finally, the CAAF noted that the special agent's testimony in *Khamsouk* also established that he erroneously believed the DD Form 553 was the functional equivalent of an arrest warrant, ultimately holding that the agent's "*three-foot intrusion across the threshold* under the genuine, albeit erroneous, belief in the

authority of the DD Form 553, does not suggest flagrant or purposeful conduct of the sort the Court in *Brown* was attempting to address." *Id.* (emphasis added). In comparison, Officer [redacted] did not enter appellant's apartment under the mistaken belief that he had the equivalent of a search warrant. Rather, he admitted he had nothing resembling a warrant, consent, or an excuse when entering the apartment. It was merely a standard procedure his department employed whenever they suspected drugs were present, apparently undertaken in the hope that something might turn up.

D. The Inevitable Discovery Doctrine Cannot Rescue the Government's Case.

This Court has previously determined the Government cannot simply invoke the inevitable discovery doctrine to rescue the case subsequent to an unlawful protective sweep for evidence. *See United States v. Keefauver*, ARMY 20121026, 2015 CCA LEXIS 553, at *8 (Army Ct. Crim. App. 25 Nov. 2015) (mem. op. on further review).[3] In that case, after conducting a controlled delivery of suspected narcotics to appellant's home, "the surveillance team moved in and entered the home to retrieve the box." *Id.* at *4. However, after locating the package in the hallway, approximately ten feet from the door, the agent "noticed a *strong odor of marijuana* in the house." *Keefauver*, 74 M.J. at 232 (emphasis added). The agent then "conducted what he characterized as a 'security sweep' of the entire house.

[3] A copy of this opinion is attached as Appendix A.

Id. This was done "to 'ensure that no one else…was inside the house' and that no one was 'destroying evidence.'" *Keefauver*, 2015 CCA LEXIS 553, at *8. The agent subsequently found drugs, paraphernalia, and firearms throughout the house during this search. *Id.* at *4-*5.

After the CAAF determined the agent's purported "protective sweep of the home was not warranted," this Court considered whether the doctrine of inevitable discovery was now inapplicable to the facts of the case. *Id.* at *6. In rejecting the government's position that inevitable discovery applied, this Court noted it could not "even say that 'the routine procedures of a law enforcement agency would inevitably find the same evidence.'" *Id.* at *9 (quoting *United States v. Owens*, 51 M.J. 204, 210 (C.A.A.F. 1999)). "In short, the inevitable discovery doctrine cannot rescue any evidence found in the house beyond the box, and the admission of such evidence violated appellant's Fourth Amendment rights." *Id.*

E. Enforcement of Appellant's Constitutional Rights is not a Windfall.

Appellee next urges this Court not to apply the exclusionary rule to the facts of this case because to do so "would grant appellant a windfall without any correspondent deterrent effect." (Appellee's Br. 34). Appellee seems to assert that, because suppression of the evidence in this case for the CPD's constitutional violations may have little to no deterrent effect on these state actors, the military

courts should be allowed to proceed with this illegally obtained evidence so as to avoid giving appellant the windfall of the exclusionary rule. (Appellee's Br. 34).

Based on the argument presented, it appears the government is attempting to resurrect the silver platter doctrine, despite the fact the Supreme Court rejected this concept over sixty years ago. *Elkins v. United States*, 364 U.S. 206, 224 (1960) (holding "that evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial.").

While the government considers the exclusionary rule to be a windfall, the Court has explained the rule is designed to protect, not only the criminal, but the innocent "through the medium of excluding evidence against those who frequently are guilty." *Id.* at 218 (internal quotation omitted). "If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear." *Id.* at 217-18 (internal quotation omitted).

While the Court acknowledged the exclusionary rule was controversial, it provided the eloquent reminder that "what has been said in opposition to the rule was distilled in a single Cardozo sentence – 'The criminal is to go free because the constable has blundered.'" *Id.* at 216 (internal quotation omitted). "Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else." *Id.* at 217 (internal quotation omitted).

II.
WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION TO SUPPRESS STATEMENTS MADE TO CLARKSVILLE POLICE OFFICERS.

Argument

A. Appellant was subject to custodial interrogation from the time he was deprived of his freedom of action in his apartment.

While appellee asserts that appellant was never "in police custody," the government does not explain why the questioning that began in appellant's apartment did not rise to the level of a custodial interrogation. (Appellee's Br. 37). Clearly, the circumstances surrounding the questioning showed appellant "could reasonably believe himself…to be in custody, or [was] otherwise deprived of his freedom of action in any significant way." Mil. R. Evid. 305(b)(3). Appellant was ordered to sit on his couch and not allowed to move for nearly two hours prior to the beginning of SGT [redacted] questioning. (R. at 64). Certainly, his freedom of action was limited in a significant way.

While appellant acquiesced to the detective's directive to go downtown, the evidence does not show appellant's mere compliance was a voluntary appearance on his part. (App. Ex. XIII, p. 10) ("There is insufficient evidence to make a distinct finding about voluntary appearance."). Furthermore, the fact appellant was asked to sit in an unlocked interrogation room without handcuffs does not transform the interrogation room into a "peaceful and permissive" environment. (Appellee's Br. 38). Appellant was asked to wait in the room and he complied. Anyone in his situation would have concluded they were not free to leave as they pleased, particularly when the appellant had no transportation available at the time. He had been driven by the police to the station so, even if he wanted to leave, his freedom of action was significantly limited once again.

B. Appellant's Confession Was Unlawfully Induced by SGT [redacted]

Contrary to appellee's assertion, appellant did not waive this theory of suppression, as he filed a motion to suppress all statements he made to law enforcement prior to his entry of plea. (Appellee's Br. 41; App. Ex. VI); Mil. R. Evid. 304(f)(1). Furthermore, appellee incorrectly claims that SGT EE kept his word when he promised appellant that "nobody's going to jail." (App. Ex. XIII, p. 4). Appellant not only ended up going to jail as a result of this statement, but he was ultimately adjudged a bad-conduct discharge on top of the felony convictions that resulted from this conversation. (R. at 774). Even if this Court determines

SGT [redacted] action did not equate to unlawful inducement under Article 31(d), it should still weigh this broken promise in appellant's favor to find his confession was not freely and voluntarily made.

III.
WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION TO SUPPRESS STATEMENTS MADE TO CID.

Argument

One distinction the appellee fails to identify in comparing appellant to petitioner Wong Sun (Appellee's Br. 44) (citing *Wong Sun v. United States*, 371 U.S. 471 (1963)), is the fact that, while Wong Sun returned to the police station voluntarily, SGT Hale did not voluntarily show up at the CID office to meet with SGT [redacted] but was forced to by his superiors. (R. at 86) ("So we will have the unit escort the service member to our office. I will bring them around and have them place all their items in a locker, bring them into one of our interviewing rooms."). When asked to clarify, SGT [redacted] stated the frisk he conducted of appellant upon his arrival was not for officer safety, but was "subsequent to an *apprehension*." (R. at 100) (emphasis added) ("In this case, it would have been subsequent to an apprehension, sir. He was found in possession of marijuana. I did intend to charge him with an Article 112a of the UCMJ."). While it is unclear why SGT [redacted]

believed he had such charging authority, it is quite clear this conversation was not the voluntary chat portrayed by appellee, but an interrogation subsequent to arrest.

Furthermore, while the *Miranda* warnings "are an important factor in determining whether the confession is obtained by exploitation of an illegal arrest," search or prior illegal confession, "they are not the only factor to be considered." *Brown*, 422 U.S. at 603. Appellee analogizes this case to *Angevine*, claiming that appellant "provided his statement to a different investigator, in a different location, who worked for a different agency, about an *entirely different crime*." (Appellee's Br. 45) (emphasis added). This is partially correct, in that SGT [redacted] was certainly a different investigator, and the CID office is a different location than the CPD office. However, this interrogation was clearly regarding the same crimes appellant was concerned about when talking with SGT [redacted] the month prior to this conversation, which included marijuana possession and obstruction of justice as a result of throwing the marijuana in the toilet. *See* (R. at 100) ("He was found in possession of marijuana. I did intend to charge him with an Article 112a of the UCMJ.").

There are glaring distinctions between SGT Hale and the appellant in *Angevine*. First, this Court placed great emphasis on the fact that, unlike SGT Hale, Private Angevine "was given a 'cleansing statement' which she acknowledged understanding." 16 M.J. at 520. "Although that *cleansing*

statement alone might not have been sufficient, *that coupled with* the time lapse, change of investigators, change of location, the absence of investigator Crosby, and the absence of any discussions between Crosby and Likengood regarding prior developments convinces us that appellant's confession was not the 'poisoned fruit' of illegally obtained evidence." *Id.*

Furthermore, while there may not have been actual "discussions" between SGT [redacted] and SGT [redacted] or the other CPD police officers, SGT [redacted] was fully aware of all of the "prior developments" in the case since he reviewed the CPD investigation prior to having the unit escort appellant to CID. (R. at 85) ("In this case I reviewed Specialist Freeman's statement that she provided as well as the preliminary report that we received from CPD."). But for the illegal search of appellant's apartment, followed by the illegal confession obtained by SGT [redacted] SGT [redacted] would never have obtained the subsequent confession from appellant.

IV.
WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED THROUGH THE ILLEGAL SEARCH AND SEIZURE OF APPELLANT'S CELL PHONE.

Appellee once again invokes the inevitable discovery doctrine, claiming that even if the magistrate erred, the government would have been able to obtain the digital copy of appellant's phone that was obtained by SGT [redacted] (Appellee's Br. 53). There are several problems with this analysis. First and foremost, SGT [redacted]

digital copy of appellant's phone was obtained after the illegal searches of appellant's apartment, and over the course of an illegal custodial interrogation that was, even if not per se illegal, still the poisonous fruit of the previous misconduct. Appellant did not voluntarily consent to examination of his cell phone. Rather, he initially gave consent and then withdrew that consent as soon as he realized that SGT [redacted] intended to download all of the contents of his cell phone. (App. Ex. XIII, p. 4). It was not until SGT EE threatened to hold appellant's cell phone that he eventually acquiesced. (App. Ex. XIII, p. 4). Sergeant [redacted] had no authorization, or even probable cause, to search or seize appellant's cell phone at this time, as there was no evidence to suggest appellant was a suspect in his roommate's murder.

Furthermore, there was nothing preventing appellant from withdrawing his consent to search the digital copy of his phone. *See* Mil. R. Evid. 314(e)(3). There is no evidence to suggest anyone from CPD ever searched the digital copy or found any incriminating information. It is therefore reasonable to believe that appellant could have, and would have, withdrawn his consent before anyone from CPD ever examined it or turned it over to CID. The fact that it was a digital copy instead of the actual phone has no bearing on the appellant's privacy interest in the information contained therein. *See Dease*, 71 M.J. at 120 (finding that, while appellant's "urine by itself may be of negligible intrinsic value to either Appellant

or the Government, Appellant retains a privacy interest in the sample, due to its nature and its evidentiary value.").

The government has certainly not proven "by a preponderance of the evidence, 'that when the illegality occurred, the government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence and that the evidence would inevitably have been discovered in a lawful manner had not the illegality occurred.'" *United States v. Hoffmann*, 75 M.J. 120, 124-25 (C.A.A.F. 2016) (quoting *Dease*, 71 M.J. at 122).

V.
WHETHER APPELLANT'S CONVICTION FOR OBSTRUCTION OF JUSTICE IS FACTUALLY SUFFICIENT.

Statement of Additional Facts

On the morning of trial, the government moved to amend "The Specification of Charge III, specifically to strike the words 'and Joseph Roberts.'"[4] (R. at 212). The military judge granted the motion over defense objection. (R. at 228-29). The flyer was then updated to reflect the specification as amended. (App. Ex. XVIII).[5] The military judge instructed the members accordingly. (R. at 630).

[4] It appears the government realized on the eve of trial that [redacted] did not exist.

[5] Appellant notes that both the promulgating order and "corrected copy" of the report of result of trial incorrectly include the stricken language. It appears the government did not utilize the 382 days of post-trial processing to thoroughly review the post-trial documents.

Argument

Appellee asserts that, because police were outside his apartment in the middle of the night, appellant "knew or should have known that he, Mr. [redacted] or SPC [redacted] would soon face criminal proceedings." (Appellee's Br. 56). First, based on the amended specification, the government was required to prove that appellant had reason to believe there were or would be criminal proceedings against *himself*. His knowledge about potential proceedings against his roommate or SPC [redacted] is irrelevant. Furthermore, police presence is insufficient to satisfy the elements of this offense. The police were not standing outside with a search warrant demanding entrance. Any reasonable person would not expect the police to barge into their apartment in the middle of the night for no reason. The fact appellant chose not to leave his roommate's marijuana out in plain view does not mean he committed a crime.

While appellee notes that this Court has previously affirmed cases where appellants flush marijuana when the police arrive, (Appellee's Br. 56) the cases cited to support this position involve a key distinction. In both of the referenced cases, the appellants had already been caught red-handed before they tried to destroy the evidence.

In *Clayton*, a noncommissioned officer (NCO) from the appellant's unit "observed marijuana in a plastic bag in a bathroom shared between his room and

appellant's room." *United States v. Clayton*, ARMY 20040903, 2009 CCA LEXIS 365, at *3 (Army Ct. Crim. App. 18 May 2009) (mem. op.) *aff'd* at 28 M.J. 225 (C.A.A.F. 2009).[6] Believing the marijuana belonged to appellant, the NCO locked the bathroom door and alerted appellant's chain of command. *Id.* "An inquiry commenced, including coordination with the military police (MP), into possible drug possession by appellant. Before the MP arrived, appellant gained access to the bathroom and unsuccessfully attempted to dispose of the plastic baggie and marijuana therein, as well as other contraband, such as marijuana joint butts, by flushing the evidence down the toilet and throwing it out his window." *Id.* at *3-*4.

In *Ridgeway*, a staff duty officer had already entered appellant's room and seized marijuana. *United States v. Ridgeway*, 13 M.J. 742, 745 (A.C.M.R. 1982). "While the seized marihuana was bagged and lying on a bed, appellant said, 'He turned his back and I panicked and whatnot and I threw it out the window.'" *Id.* In this case, appellant had not been caught with any drugs in his home and he intended to keep it that way by ensuring his roommate's marijuana was not left out in plain view when he went to his door to find out what the police were doing there. Appellant had no reason to believe police would be barging into his house

[6] A copy of this opinion is attached as Appendix B.

to conduct a warrantless, nonconsensual search. Had he suspected that, he probably would have flushed.

VI.
WHETHER APPELLANT'S CONVICTION FOR FALSE OFFICIAL STATEMENT IS FACTUALLY SUFFICIENT.

Argument

"Appellant's wistful reading of the evidence aside," (Appellee's Br. 64) the government fails to find any evidence admitted at trial to prove appellant ever told SGT [redacted] "I never assisted [redacted] [redacted] with distributing marijuana at any time," or any words to that effect. Despite trial counsel's painstaking efforts, SGT [redacted] would simply not follow his lead. *See* (R. at 536).

VII.
WHETHER THE DILATORY POST-TRIAL PROCESSING OF APPELLANT'S CASE WARRANTS RELIEF WHERE THE GOVERNMENT TOOK 362 DAYS BETWEEN SENTENCE AND ACTION.

Argument

"Once more, [this Court] face[s] the issue of deciding whether any relief is warranted due to the inefficiency of the Fort Campbell Staff Judge Advocate Office's post-trial processing of a court-martial." *United States v. Gilliam*, ARMY 20180209, at *2, n. 1 (Army Ct. Crim. App. 15 Jul. 2020) (mem. op.).[7] Appellee

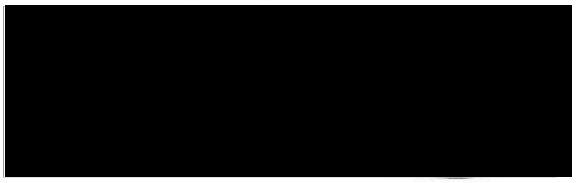
[7] A copy of this opinion is attached as Appendix C.

acknowledges the numerous recent opinions from this Court granting relief for excessive post-trial delay arising out of Fort Campbell, yet argues the delay does not warrant similar relief in this case. (Appellee's Br. 68, n. 24). Appellant contends that the 362 days attributable to the government in this case warrant significantly more relief, particularly when considering the length of the delay and other circumstances of this case.

Conclusion

WHEREFORE, the appellant respectfully requests this honorable court grant the relief requested.

KYLE C. SPRAGUE
MAJ, JA
Branch Chief
Defense Appellate Division



LTC, JA
Deputy Chief
Defense Appellate Division

JONATHAN F. POTTER
Senior Capital Appellate Counsel
Defense Appellate Division

APPENDIX A

United States v. Keefauver

United States Army Court of Criminal Appeals

November 25, 2015, Decided

ARMY 20121026

Reporter
2015 CCA LEXIS 553 *

UNITED STATES, Appellee v. Specialist LEVI A. KEEFAUVER, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, 101st Airborne Division (Air Assault) and Fort Campbell (convened). Headquarters, Fort Campbell (action). Timothy Grammel, Military Judge (arraignment and motion hearing), Steven E. Walburn, Military Judge (trial), Lieutenant Colonel Jeff A. Bovarnick, Staff Judge Advocate.

United States v. Keefauver, 74 M.J. 230, 2015 CAAF LEXIS 547 (C.A.A.F., 2015)

Outcome
The findings of guilty and the sentence were set aside.

Core Terms

box, marijuana, inside, discovery, military, alerted, sweep, bag, harmless, package, team

Case Summary

Overview

HOLDINGS: [1]-In light of a ruling on appeal that a protective sweep of the servicemember's house was not warranted, the court had to determine whether there was any other basis upon which the bulk of the evidence against him could be considered; [2]-Inevitable discovery exception did not apply to any evidence found in the servicemember's house except for a box containing marijuana and thus, admission of the other evidence discovered in the protective sweep violated his *Fourth Amendment* rights; [3]-Error was not harmless, as there was a reasonable possibility that the erroneously admitted evidence might have contributed to his convictions for violating a lawful general regulation by wrongfully possessing drug paraphernalia and unregistered weapons on-post, wrongful possession of marijuana with intent to distribute, and child endangerment, in violation of UCMJ arts. 92, 112a, and 134.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Inevitable Discovery

Military & Veterans Law > Military Justice > Search & Seizure > Unlawful Search & Seizure

Evidence > Burdens of Proof > Preponderance of Evidence

HN1 **Exceptions to Exclusionary Rule, Inevitable Discovery**

The doctrine of inevitable discovery is an exception to the exclusionary rule allowing for the admission of evidence that, although obtained improperly, would have been properly obtained by other means. Mil. R. Evid. 311(b)(2), Manual Courts-Martial provides that evidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made. For the inevitable discovery exception to apply, the government has to demonstrate by a preponderance of the evidence that when the illegality occurred, the government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence in a lawful manner.

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Inevitable Discovery

HN2 **Exceptions to Exclusionary Rule, Inevitable Discovery**

The inevitable discovery doctrine requires a court to determine, viewing affairs as they existed at the instant before the unlawful search, what would have happened had the unlawful search never occurred.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Constitutional Rights

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN3 **Harmless & Invited Error, Constitutional Rights**

A military court of criminal appeals reviews constitutional errors under the harmless beyond a reasonable doubt standard found in the United States Supreme Court's decision in Chapman. Whether a constitutional error in admitting evidence is harmless beyond a reasonable doubt is a question of law that the court reviews de novo.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Constitutional Rights

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN4 **Harmless & Invited Error, Constitutional Rights**

In assessing harmlessness in the constitutional context, the question is not whether the evidence is legally sufficient to uphold a servicemember's conviction without the erroneously admitted evidence. Rather, the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. Further, to say that an error did not "contribute" to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous. It is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

HN5 **Judicial Review, Courts of Criminal Appeals**

A military court of criminal appeals' determination of whether or not there is a reasonable possibility that the evidence admitted erroneously in a case might have contributed to a conviction is made on the basis of the entire record.

Military & Veterans Law > Military Offenses > Controlled Substances

HN6 **Military Offenses, Controlled Substances**

To convict a servicemember of wrongful possession (with the intent to distribute), the government is required to prove, inter alia, that the servicemember knowingly and intentionally possessed the controlled substance. Manual Courts-Martial pt. IV, para. 37.b.(6)(a), c.(2) (2008).

Evidence > Types of Evidence > Circumstantial Evidence

Military & Veterans Law > Military Offenses > Controlled Substances

HN7[] **Types of Evidence, Circumstantial Evidence**

Manual Courts-Martial pt. IV, para. 37.c.(2) (2008) provides that an accused may not be convicted of possession of a controlled substance if the accused did not know that the substance was present under the accused's control. Possession may be established by circumstantial as well as by direct evidence.

Counsel: For Appellant: Colonel Kevin Boyle, JA; Lieutenant Colonel Jonathan A. Potter, JA; Major Amy E. Nieman, JA; Captain Patrick J. Scudieri, JA (on brief); Colonel Kevin Boyle, JA; Lieutenant Colonel Jonathan F. Potter, JA; Captain Patrick J. Scudieri, JA (on reply brief).

For Appellee: Colonel Mark H. Sydenham, JA; Major A.G. Courie III, JA; Major Steven J. Collins, JA; Captain Anne C. Hsieh, JA (on brief).

Judges: Before MULLIGAN, BURTON, and BORGERDING[1], Appellate Military Judges. Senior Judge MULLIGAN and Judge BURTON concur.

Opinion by: BORGERDING

[1] Judge BORGERDING took final action in this case while on active duty.

Opinion

MEMORANDUM OPINION ON FURTHER REVIEW

BORGERDING, Judge:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of violating a lawful general regulation by wrongfully possessing drug paraphernalia and unregistered weapons on-post, one specification of wrongful **[*2]** possession of marijuana with intent to distribute, and one specification of child endangerment, in violation of Articles 92, 112a, and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 892*, *912a*, *934 (2006)* [hereinafter UCMJ]. The military judge sentenced appellant to a bad-conduct discharge, confinement for four years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the adjudged sentence.

On 29 July 2014, this court issued an opinion of the court in appellant's case, affirming the findings of guilty and the sentence as approved by the convening authority. *United States v. Keefauver, 73 M.J. 846 (Army Ct. Crim. App. 2014)*. On 12 June 2015, our superior court reversed that decision, finding error in our upholding of a "protective sweep" conducted in this case. *United States v. Keefauver, 74 M.J. 230, 237 (C.A.A.F. 2015)*. Our superior court then returned the record of trial to The Judge Advocate General of the Army for remand to this court for further action consistent with their resolution of the granted issue. *Id.*

FACTS

On 8 December 2011, Kentucky postal inspectors intercepted a suspicious box that smelled of marijuana and was addressed to a residential address on Fort Campbell, Kentucky belonging to appellant. Upon further inspection of the box, inspectors observed that **[*3]** it was a heavily taped, approximately eight-pound "Ready-Post" priority box, with delivery confirmation and insurance stickers. The return address was a hand-written label showing a "B. Samuelson" mailed it from an address in northern California. While there was no record of a "B. Samuelson" at that return address, investigators did learn that appellant and his wife had claimed that address as their own in years past. These facts, coupled with the odor of marijuana

emanating from the box, indicated to the postal inspectors that the box was being used for drug trafficking.

Since the box was addressed to a house located on Fort Campbell, the postal inspectors contacted the Drug Suppression Team Chief at the Fort Campbell Criminal Investigation Command (CID) office, Special Agent (SA) SR, in hopes of conducting a "controlled delivery."[2]

Special Agent SR then obtained a verbal authorization from **[*4]** the military magistrate, Captain (CPT) MR, to conduct a controlled delivery of the package and to conduct a search limited to the box itself.

Special Agent SR and his team conducted surveillance in the front and the rear of appellant's house and watched as a member of the postal inspection team delivered the box. When no one answered the door, the agent put the box on the front doorstep and the team waited outside for approximately an hour until an individual later identified as appellant's sixteen-year-old stepson, TC-D, arrived home and took the box inside.

Once the package was inside the house, the surveillance team moved in and entered the home to retrieve the box. Special Agent SR immediately located the package right inside the home in the hallway, about ten feet from the front door.

Once the package was located, SA SR conducted a "security sweep" of the home to "ensure that no one else [other than TC-D] was inside the house" and that no one was "destroying evidence."

Special Agent SR began this sweep in the downstairs area where he saw a "marijuana-type smoking device" on the kitchen counter. He then continued upstairs where he observed a bag of what appeared to be marijuana laying **[*5]** in plain view on the bed in TC-D's room as well as at least two items of drug paraphernalia, also in plain view, in the room. He also saw "a couple rifles" in an unlocked walk-in closet in the hallway. In the master bedroom, also in plain view, he saw more boxes with similar characteristics to the one that had just been delivered, all of which bore similar indicia of drug trafficking.

After the protective sweep was completed and the home was cleared, law enforcement brought in a military working dog (MWD) which conducted a search and alerted on multiple areas within the house. Upon entry into the house, several of the law enforcement agents noted there was a very strong smell of marijuana emanating from the house in general and not just from the box.

The MWD alerted as soon as it entered TC-D's room. In addition to the items seen in plain view by SA SR, investigators found more marijuana throughout the room, both loose and in small Ziploc bags. Next, although SA SR did not recall seeing any items in plain view in the room later determined to belong to appellant's thirteen-year-old biological son, EK, the MWD alerted on a container found in plain view on the floor in the middle of the **[*6]** room. In addition, the MWD alerted on a dresser drawer where investigators found more marijuana, rolling papers, and a pipe.

In the master bedroom, the MWD alerted to additional bags of marijuana located in a dresser. The investigators also found a vaporizer which appeared to be used to smoke marijuana, a scale which could be used to weigh drugs, and a large sum of money in a dresser drawer.

In the downstairs area of the home, the MWD alerted on a black duffel bag found inside a closet under the stairs. It contained no marijuana but did contain $4,000 in cash. Investigators also found an amount of cash inside a teapot in the dining room. In a closet immediately inside the residence, investigators found two handguns stored in a locked container and a bag of marijuana inside a bin of toy cars. Finally, investigators searched garbage cans outside the house and found plastic bags similar to ones found inside the house that had $1,000, $2,000, $8,000, and $8,300 written on them. All items, including those SA SR saw in plain view during his protective sweep, were seized and admitted into evidence at trial.

Following their search, investigators opened the box originally delivered to the home **[*7]** while it was still inside the residence. The box contained approximately three to four pounds of "high grade" marijuana packaged in a manner consistent with drug trafficking.

Later, at the CID office, investigators searched both appellant and EK "for officer safety in accordance with . . . standard operating procedures." During these searches, they found $900 in cash consisting of nine $100 bills in appellant's pockets and $692 in EK's

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[2] The postal inspector testified that a "controlled delivery" is a delivery controlled by law enforcement personnel whereby they mimic what a regular letter carrier would normally do every day in the event that the individuals expecting the package are conducting surveillance and tracking the package.

pockets. After seeing his sons at the CID office, appellant told the investigators "all the stuff you found in the house is mine, I don't want my family getting in trouble," or words to that effect.

LAW AND DISCUSSION

Inevitable Discovery

In light of our superior court's decision that SA SR's protective sweep of the home was not warranted, we must first determine if there is any other basis upon which the bulk of the evidence against appellant (besides the delivered box) can be considered. We find that there is not. Specifically, the doctrine of inevitable discovery is now inapplicable to the facts of this case.

HN1[] The doctrine of inevitable discovery is an exception to the exclusionary rule allowing for the admission of evidence that, although obtained improperly, **[*8]** would have been properly obtained by other means. *United States v. Wallace, 66 M.J. 5, 10 (C.A.A.F. 2008)* (citing *Nix v. Williams, 467 U.S. 431, 444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984)*); *see also* Military Rule of Evidence [hereinafter Mil. R. Evid.] 311(b)(2) ("Evidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made.").

For the inevitable discovery exception to apply, the government had to demonstrate by a preponderance of the evidence that "when the illegality occurred, the government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence . . . in a lawful manner . . . ." *United States v. Dease, 71 M.J. 116, 122 (C.A.A.F. 2012)* (quoting *United States v. Kozak, 12 M.J. 389, 394 (C.M.A. 1982)*); *see also United States v. Wicks, 73 M.J. 93, 103 (C.A.A.F. 2014)*.

In this case, the "illegality occurred" as soon as SA SR left the area in the immediate vicinity of the box. There is no evidence at this point that the agents possessed, or were pursuing, evidence or leads that would have inevitably led to the discovery of any other items in the home. *Wicks, 73 M.J. at 103*; *see also United States v. Alexander, 540 F.3d 494, 502 (6th Cir. 2008)* (***HN2***[] "The inevitable discovery doctrine 'requires [a] court to determine, viewing affairs as they existed at the instant before the unlawful search, what would have happened had the unlawful search never occurred.'") (quoting *United States v. Kennedy, 61 F.3d 494, 498 (6th Cir. 1995)*). At this particular point **[*9]** in time, investigators had no further evidence to support a finding of probable cause to search than when they originally made the search request.[3] Thus, given that the investigators had, at this point, found only what they expected to find—the box—and nothing more, we cannot even say that "the routine procedures of a law enforcement agency would inevitably find the same evidence." *United States v. Owens, 51 M.J. 204, 210 (C.A.A.F. 1999)*. In short, the inevitable discovery doctrine cannot rescue any evidence found in the house beyond the box, and the admission of such evidence violated appellant's *Fourth Amendment* rights.

HN3[] We review constitutional errors under the harmless beyond a reasonable doubt standard found in *Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)*. *See United States v. Mott, 72 M.J. 319, 332 (C.A.A.F. 2013)*; *United States v. Paige, 67 M.J. 442, 449 (C.A.A.F. 2009)*; *see also United States v. Simmons, 59 M.J. 485, 489 (C.A.A.F. 2004)*. "Whether a constitutional error in admitting evidence is harmless beyond a reasonable doubt is a question of law that we review *de novo*." *United States v. Crudup, 67 M.J. 92, 94 (C.A.A.F. 2008)*; *see also United States v. Gardinier, 67 M.J. 304, 306 (C.A.A.F. 2009))*.

HN4[] "In assessing harmlessness **[*10]** in the constitutional context, the question is not whether the evidence is legally sufficient to uphold [appellant's] conviction without the erroneously admitted evidence. Rather, the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Gardinier, 67 M.J. at 306* (quoting *Chapman, 386 U.S. at 23*) (internal citations and quotation marks omitted). Further, as our superior court noted in *United States v. Moran*,

> "To say that an error did not 'contribute' to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous. It is, rather, "to find

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[3] Even if the mere smell of the marijuana then constituted probable cause, the inevitable discovery doctrine "cannot rescue evidence obtained via an unlawful search simply because probable cause existed to obtain a warrant when the government presents *no* evidence that the police would have obtained a warrant." *Wicks, 73 M.J. at 103* (citations and internal quotation marks omitted).

> that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record."

65 M.J. 178, 187 (C.A.A.F. 2007) (quoting Yates v. Evatt, 500 U.S. 391, 403, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991), *overruled on other grounds by* Estelle v. McGuire, 502 U.S. 62, 72 n.4, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)).

Thus, ***HN5***[↑] our determination of whether or not there is a "reasonable possibility" that the evidence admitted erroneously in this case "might have contributed to the conviction," *Chapman, 386 U.S. at 24* (citing *Fahy v. Connecticut, 375 U.S. 85, 86-87, 84 S. Ct. 229, 11 L. Ed. 2d 171 (1963)*, is "made on the basis of the entire record . . . ." *Mott, 72 M.J. at 332* (quoting *United States v. Sweeney, 70 M.J. 296, 306 (C.A.A.F. 2011)*.

After a review of the entire record, we find there is a reasonable possibility that the erroneously admitted evidence might have contributed **[*11]** to appellant's convictions for all charges and specifications. With respect to the Specification of Charge II (wrongful possession of unregistered firearms) and the Specification of Additional Charge I (wrongful possession of drug paraphernalia), the only[4] evidence supporting the convictions was found during the illegal search of appellant's home. Further, although there was some testimony about appellant's 13-year-old son's drug use that was arguably not tainted by the illegal search, the bulk of the evidence supporting the conviction for child endangerment (Specification 1 of Additional Charge II) was discovered in the child's bedroom during the illegal search.

We also find that despite the fact that the box containing the majority of the marijuana appellant was charged with wrongfully possessing was properly admitted into evidence, there is still a "reasonable possibility" that the sheer volume of evidence illegally admitted "might have contributed to the conviction" for wrongful possession with the intent to distribute. *Chapman, 386 U.S. at 24* (citing *Fahy v. Connecticut, 375 U.S. 85, 86-87, 84 S. Ct. 229, 11 L. Ed. 2d 171 (1963)*. ***HN6***[↑] To convict appellant of wrongful possession (with the intent to distribute), the government was required to prove, *inter alia*, that appellant knowingly and intentionally possessed the controlled substance. *See United States v. Wilson, 7 M.J. 290 (C.M.A. 1979)*; *Manual for Courts-Martial, United States* (2008 ed.) [hereinafter *MCM*], pt. IV, ¶ 37.b.(6)(a), c.(2). Under the facts of this case, appellant's alleged possession of the marijuana was constructive, requiring the government to prove appellant "was knowingly in a position or had the right to exercise dominion and control over it either directly or through others." *Wilson, 7 M.J. at 293* (citations and internal **[*13]** quotation marks omitted); *see also* ***HN7***[↑] *MCM*, pt. IV, ¶ 37.c.(2) ("An accused may not be convicted of possession of a controlled substance if the accused did not know that the substance was present under the accused's control."). "[P]ossession may be established by circumstantial as well as by direct evidence." *Wilson, 7 M.J. at 293* (citation omitted); *see also MCM*, pt. IV, ¶ 37.c.(2).

We recognize that besides the box and its contents, there are additional, untainted pieces of evidence which *may* be sufficient to prove beyond a reasonable doubt appellant had constructive possession of the marijuana. These include: a return address on the box previously connected to appellant; the smell of marijuana in the home from the front door; the large amount of cash found on appellant's person at CID; appellant's admission that "all the stuff you found in the house is mine, I don't want my family getting in trouble;" and the baggies found in the outside garbage cans. However, the sheer mass of inadmissible evidence found in the house eliminates any possibility the error was harmless beyond a reasonable doubt. *See Gardinier, 67 M.J. at 306*; *see also Chapman, 386 U.S. at 23*. Without the illegally obtained items, the defense claim that the drugs belonged to appellant's wife and that **[*14]** appellant had no idea they were delivered to his house may have succeeded given that the evidence showed only one box delivered at a time when appellant was not home. However, since the military judge also considered the fact that there were multiple, similar boxes found in the home, along with a significant amount of cash and

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[4] In his trial testimony, appellant did admit to possessing unregistered firearms in his home. However, "[u]nder the circumstances of this case, we are not convinced that the defense strategy of having [appellant] testify at trial [in an attempt to explain the vast amount of incriminating evidence found in his home], would have been the same in the absence of the improperly admitted evidence." *Simmons, 59 M.J. at 489-90* (citing *United States v. Grooters, 39 M.J. 269, 273 (C.M.A. 1994)* (accused may not have been compelled to testify to explain improperly admitted statements); *United States v. Bearchild, 17 U.S.C.M.A. 598, 602, 38 C.M.R. 396, 400 (1968)* (in-court testimony tainted if given to **[*12]** overcome inadmissible confession)). Thus, "we cannot view [appellant's] trial testimony as an 'independent' basis for concluding that the improperly admitted evidence 'did not contribute to'" any portion of the findings. *Simmons, 59 M.J. at 490*.

unregistered weapons, it is impossible for us to conclude this knowledge had no effect on his finding of guilt.

The importance of all of the evidence found in the home was underscored by trial counsel in his closing argument. For example, he began: "what does 5.25 pounds of marijuana, over $7,600 in cash, four unregistered firearms, numerous baggies, and a scale equal? We have a criminal enterprise." Of the five things he mentioned, only one was properly in evidence.[5] Moreover, trial counsel's focus on the evidence now determined to be illegally admitted supported not only the "criminal enterprise," but also appellant's knowledge of the drugs in the house, and the child endangerment specification. In short, the illegally admitted evidence formed the "cornerstone" of the government's case against appellant. *See* *United States v. Long, 64 M.J. 57, 66 (C.A.A.F. 2006)*.

For these reasons, at this stage in the proceedings, it is impossible to separate the impact of all these items on the ultimate conviction. Accordingly, we cannot conclude that the error was harmless beyond a reasonable doubt.

CONCLUSION

The findings of guilty and the sentence are set aside. A rehearing may be ordered by the same or a different convening authority. *See generally* R.C.M. 810.

Senior Judge MULLIGAN and Judge BURTON concur.

End of Document

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[5] The actual amount of marijuana in the box was closer **[*15]** to 3-4 pounds, according to the postal inspector. The rest of the 5.25 pounds purportedly included the amount of marijuana found throughout the home, an amount now improperly considered.

APPENDIX B

United States v. Clayton

United States Army Court of Criminal Appeals

May 18, 2009, Decided

ARMY 20040903

Reporter
2009 CCA LEXIS 365 *; 2009 WL 6843561

UNITED STATES, Appellee v. Sergeant ROBERT B. CLAYTON, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review granted by *United States v. Clayton, 68 M.J. 225, 2009 CAAF LEXIS 1117 (C.A.A.F., Oct. 9, 2009)*

Affirmed by *United States v. Clayton, 68 M.J. 225, 2009 CAAF LEXIS 1129 (C.A.A.F., Oct. 9, 2009)*

Prior History: **[*1]** Headquarters, 1st Infantry Division. Robin L. Hall, Military Judge, Lieutenant Colonel Michael E. Mulligan, Staff Judge Advocate.

United States v. Clayton, 67 M.J. 283, 2009 CAAF LEXIS 212 (C.A.A.F., Mar. 26, 2009)

Core Terms

sentence, marijuana, confinement, reassessment, misconduct, fleeing, obstruction

Case Summary

Procedural Posture

A general court-martial convicted appellant servicemember of reckless driving, possession and use of marijuana, possession of marijuana with intent to distribute, assault on a law enforcement officer, obstruction of justice, and fleeing apprehension, in violation of Unif. Code Mil. Justice (UCMJ) arts. 111, 112a, 128, and 134, *10 U.S.C.S. §§ 911*, *912a*, *928*, and *934*. On appeal, the U.S. Court of Appeals for the Armed Forces remanded the case.

Overview
The servicemember was charged with violating UCMJ arts. 111, 112a, 128, and 134 for events that occurred on three separate dates while he was stationed in Germany. A general court-martial composed of officer members convicted the servicemember of all charges, and the convening authority approved a sentence of a dishonorable discharge, confinement for five years, total forfeitures, and reduction to Private (E1). The court of criminal appeals affirmed the findings and sentence, but the U.S. Court of Appeals for the Armed Forces set aside the servicemember's conviction for possession of marijuana with intent to distribute and remanded the case. On remand, the court of criminal appeals found that it could reassess the sentence without returning the record of trial to the convening authority for a rehearing. The court considered the fact that convictions that were not set aside showed a pattern of criminal behavior and that the servicemember aided and abetted another person in committing the offense that was set aside, and it affirmed only so much of the sentence as provided for a dishonorable discharge, confinement for 42 months, total forfeitures, and reduction to Private.

Outcome
The court set aside and dismissed the findings of guilty to Charge IV and its Specification (possession of marijuana with intent to distribute), and affirmed only so much of the sentence as provides for a dishonorable discharge, confinement for 42 months, total forfeiture of all pay and allowances, and reduction to Private (E1).

LexisNexis® Headnotes

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Military & Veterans Law > ... > Courts Martial > Sentences > General Overview

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN1 **Judicial Review, Courts of Criminal Appeals**

If the United States Army Court of Criminal Appeals can determine that, absent error which occurring during a trial by court-martial, a servicemember's sentence would have been at least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing. A sentence of that magnitude or less will be free of the prejudicial effects of error. If the error at trial was of a constitutional magnitude, then the court must be satisfied beyond a reasonable doubt that its reassessment cured the error. If the court cannot reliably determine what sentence would have been imposed at the trial level if the error had not occurred, then a sentence rehearing is required. These rules ensure that the demands of Unif. Code Mil. Justice art. 59(a), *10 U.S.C.S. § 859(a)* (i.e., purging a reassessed sentence of prejudicial error) are met prior to determining sentence appropriateness as required by Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Sentences > General Overview

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN2 **Judicial Review, Courts of Criminal Appeals**

Unif. Code Mil. Justice art. 59(a), *10 U.S.C.S. § 859(a)*, provides that a sentence may not be held incorrect on the ground of error of law unless the error materially prejudices the substantial rights of the accused. Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*, provides that a U.S. military court of criminal appeals may affirm a sentence, or such part or amount of a sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.

Counsel: For Appellant: Colonel Mark Tellitocci, JA; Lieutenant Colonel Matthew M. Miller, JA; Major Grace M. Gallagher, JA; Captain Jennifer A. Parker, JA (on brief).

For Appellee: Colonel Denise R. Lind, JA; Lieutenant Colonel Mark H. Sydenham, JA; Major Lisa L. Gumbs, JA; Major Christopher R. Clements, JA (on brief).

Judges: Before SULLIVAN, COOK, and BAIME, Appellate Military Judges. Senior Judge SULLIVAN and Judge BAIME concur.

Opinion by: COOK

Opinion

MEMORANDUM OPINION

COOK, Judge:

A general court-martial composed of officer members convicted appellant, contrary to his pleas, of reckless driving, use of marijuana, possession of marijuana, possession of marijuana with intent to distribute, assault on a law enforcement officer, obstruction of justice (two specifications), and fleeing apprehension in violation of Articles 111, 112a, 128, and 134, Uniform Code of Military Justice [hereinafter UCMJ], *10 U.S.C. §§ 911*, *912a*, *928*, and *934*. The convening authority approved the adjudged sentence to a dishonorable discharge, confinement for five years, forfeiture of all pay and allowances, and reduction **[*2]** to Private E1, and credited appellant with 33 days of credit against his sentence to confinement.

On 23 January 2008, the United States Court of Appeals for the Armed Forces set aside this court's decision with respect to Charge IV and its specification, [1] possession of marijuana with intent to distribute (hereinafter Charge IV), and with respect to the sentence but affirmed the decision in all other aspects. [2] Our superior court returned the record of trial to The Judge Advocate General for remand to this court directing us to either reassess the sentence or remand for a rehearing on the affected charge and specification. Rather than remanding, we will dismiss the affected charge and specification and reassess the sentence, as we are confident that we can "reliably determine what sentence would have been imposed at the trial level if the error had not occurred." *United States v. Sales, 22 M.J. 305 (C.M.A. 1986)*.

BACKGROUND

Appellant's pattern of criminal activity covers three separate time periods. On 26 August 2003, a noncommissioned officer (NCO) in appellant's unit observed marijuana in a plastic bag in a bathroom shared between his room and appellant's room. The NCO believed the marijuana belonged to appellant. The NCO locked the bathroom door leading to appellant's room and notified appellant's chain of command of the found marijuana. An inquiry commenced, including coordination with the military police (MP), into possible drug possession by appellant. Before the MP arrived, appellant gained access to the bathroom and unsuccessfully attempted to dispose of the plastic baggie and marijuana therein, as well as other contraband, such as marijuana joint butts, by flushing **[*4]** the evidence down the toilet and throwing it out his window. For this misconduct, appellant was convicted on charges of drug possession and obstruction of justice. [3]

About one month later, between on or about 27 September 2003 and 27 October 2003, appellant used marijuana. Appellant's use of marijuana was discovered as a result of a positive urinalysis test administered to appellant on 27 October 2003. For this misconduct, appellant was convicted on a charge of drug use. [4]

Appellant's remaining conduct, which occurred on 16 March 2004, is thoroughly addressed by our superior court in *Clayton* and we need not reiterate the facts relied upon by our **[*5]** superior court. *67 M.J. at 285-6*. However, for our analysis, we add the following additional facts pertaining to the events of 16 March. Specifically, after appellant abandoned his car, he attempted to further flee on foot. While in pursuit, Mr. Buttner came across appellant near a carport with his hand in his pocket. Mr. Buttner said "Stop. Police. Don't move." Appellant ignored Mr. Buttner's commands and removed his hand from his pocket. Concerned by appellant's continued movement, Mr. Buttner fired a warning shot. Appellant ignored the warning shot and continued to flee, until finally apprehended after running approximately 100 to 150 meters. This was the second time that the German police fired a shot based on

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[1] After amendment at trial, Charge IV, Specification 1, read "Did, at or near Ansbach, Germany, on or about 16 March 2004, wrongfully possess some amount of marijuana with the intent to distribute the said controlled substance."

[2] Our superior court found the trial judge erred **[*3]** by admitting, over defense counsel objection, a report from the German police pursuant to the business records exception to the hearsay rule under Military Rule of Evidence 803(6). The court found the report testimonial under *Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*. As such, the court held the error to be constitutional and not harmless beyond a reasonable doubt. *See United States v. Clayton, 67 M.J. 283, 286 (C.A.A.F. 2009)*.

[3] Charge I, Article 112a, Specification 2, "Did, at or near Shipton Kaserne, Germany, on or about 26 August 2003, wrongfully possess some amount of marijuana;" Charge III, Article 134, Specification, "Did, at or near Shipton Kaserne, Germany, on or about 26 August 2003, wrongfully endeavor to impede an investigation in the case of *United States v. Clayton*, by disposing of evidence."

[4] Charge I, Article 112a, Specification 1, "Did, at or near Shipton Kaserne, Germany, on or about 27 September 2003 and 27 October 2003, wrongfully use marijuana."

actions of the appellant. For this misconduct, excluding the set aside charge, appellant was convicted on charges of reckless driving, assault on a law enforcement officer, obstruction of justice, and fleeing apprehension. [5]

LAW

In *United States v Doss, 57 M.J. 182, 185 (C.A.A.F. 2002)* (citations omitted), our superior court reiterated its guidance in *Sales* regarding sentence reassessment **[*7]** by a Court of Criminal Appeals:

> ***HN1***[] If the court can determine that, absent the error, the sentence would have been at least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing. A sentence of that magnitude or less will be free of the prejudicial effects of error. If the error at trial was of a constitutional magnitude, then the court must be satisfied beyond a reasonable doubt that its reassessment cured the error. If the court cannot reliably determine what sentence would have been imposed at the trial level if the error had not occurred, then a sentence rehearing is required. [6]

These rules ensure that the demands of *Article 59(a), UCMJ*, (i.e., purging a reassessed sentence of prejudicial error) are met prior to determining sentence appropriateness as required by *Article 66(c) UCMJ*. [7] *See United States v. Buber, 62 M.J. 476, 479 (C.A.A.F. 2006)*; *Sales, 22 M.J. at 308*.

DISCUSSION

We do not find a dramatic change in the penalty landscape. At trial, the appellant faced a maximum possible punishment of a dishonorable discharge, confinement for 33 years, [8] forfeiture of all pay and allowances, and reduction to Private E1. By dismissing the finding as to Charge IV, the appellant's **[*9]** maximum sentence reduces solely with respect to confinement from 33 years to 18 years.

The reduced maximum possible confinement is not striking in light of the serious nature of the remaining offenses and the aggravated nature of appellant's misconduct in relationship to the dismissed charge. [9]

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[5] The other four charges of which appellant remains guilty are: Charge V, Article 111, Specification (as amended at trial), "Did, at or near Ansbach, Germany, on or about 16 March 2004, at or near intersection of Feuchtwanger Strasse and the turn-off lane **[*6]** of Hohenzollern Ring, operate a vehicle, to wit: a passenger car, in a wanton or reckless manner by driving the vehicle back and forth several times in a hectic manner;" Charge VI, Article 128, Specification, "Did, at or near Ansbach, Germany, on or about 16 March 2004, assault J.B., who then was and was then known by the accused to be a person then having and in the execution of civilian law enforcement duties, by striking him on the leg with a vehicle, to wit: a passenger car;" Charge VII, Article 134, Specification 1, "Did, at or near Ansbach, Germany, on or about 16 March 2004, wrongfully endeavor to impede an investigation in the case of *United States v. Clayton*, by disposing of evidence" and Specification 2, "Did, at or near Ansbach, Germany, on or about 16 March 2004, flee apprehension by Ansbach Criminal Police, armed policemen, persons authorized to apprehend accused, which conduct was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces."

[6] *See also United States v. Moffeit, 63 M.J. 40, 41 (C.A.A.F. 2006)*. In his concurring opinion in *Moffeit*, Judge Baker provided a nonexhaustive list of factors as relevant to buttressing the presumption that appellate judges can indeed reassess a sentence. *Moffeit, 63 M.J. at 43-4*. **[*8]** These factors include: (1) changes in the penalty landscape; (2) appellant's choice of forum at trial; (3) nature of remaining offenses; and (4) identification and evaluation by the Court of Criminal Appeals of the factors relied upon in a reassessment decision. *Id*. While we consider these factors in applying the Sales rules, we recognize no one factor, or combination of factors, is necessarily controlling of a decision to reassess a sentence or order a rehearing. *Id*.

[7] ***HN2***[] *Article 59(a)* provides that "[a] . . . sentence . . . may not be held incorrect on the ground of error of law unless the error materially prejudices the substantial rights of the accused." *Article 66(c)* provides that a Court of Criminal Appeals "may affirm . . . the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved."

[8] Two of the eight offenses of which appellant was found guilty, Charge VI and its Specification (assault on a law enforcement officer) and Charge VII, Specification 2 (fleeing apprehension), were found multiplicious for sentencing, thereby reducing appellant's maximum possible confinement by 6 months, from 33 years 6 months to 33 years. The military judge properly instructed the panel to consider them as one offense for sentencing.

[9] This case is distinguishable from other cases wherein our superior court has determined sentence reassessment **[*10]** inappropriate. For instance, in *United States v. Buber,*

First, appellant remains convicted of seven other UCMJ violations forming a pattern of serious criminal activity spanning nearly seven months, to include two obstruction of justice charges, assaulting a law enforcement officer, and fleeing apprehension in such a manner as to necessitate German police officers twice firing their weapons in the local community.

Second, many of the facts associated with Charge IV were independently established by the government without reliance on the improperly admitted German police report [10] and are *res gestae* of the remaining offenses committed by the appellant on 16 March 2004. Accordingly, the total picture of appellant's criminal activity on 16 March 2004 remains approximately the same. [11]

Third, during presentencing, **[*12]** the trial counsel never argued the inadmissible facts contained in the German police report or appellant's alleged possession of marijuana with intent to distribute as factors supporting a sentence. Rather, the trial counsel focused that portion of his sentencing argument related to the events of 16 March 2004 on appellant's aggravated and dangerous misconduct following the attempted police stop of his car.

Fourth, at best the evidence supporting Charge IV depicted the appellant as no more than a driver, aiding and abetting a known drug dealer in a single instance. Had the evidence depicted a greater involvement, such as appellant actually owning the drugs or being involved in more than one deal, we are convinced the panel would have sentenced him to substantially more confinement. We are further convinced that appellant's pattern of misconduct, including two obstruction of justice charges, and his dangerous acts while fleeing law enforcement, accounted primarily for his sentence to a dishonorable discharge and five years confinement. Even so, his sentence was lenient in comparison to the maximum possible sentence of 33 years confinement.

Thus, given the circumstances of this case, we **[*13]** are confident beyond a reasonable doubt we can reliably determine what sentence would have been imposed at the trial level if the error had not occurred, that such sentence is appropriate, and a sentence rehearing is not required.

DECISION

The findings of guilty as to Charge IV and its Specification are set aside and Charge IV and its Specification are dismissed. Considering the nature of the remaining findings of guilty, the entire record, the sentence adjudged at trial, and applying the principles of *Moffeit, 63 M.J. at 42-44*, and *Sales, 22 M.J. at 305*, to include those principles identified by Judge Baker in his concurring opinion, we are confident with our determination in this case. "[W]e perceive no reasonable possibility of benefit to [appellant] by remand of the record . . . for reassessment of the sentence." *United States v. Sims, 57 M.J. 419, 422 (C.A.A.F. 2002)* (citation omitted). We affirm only so much of the sentence as provides for a dishonorable discharge, confinement for forty-two months, total forfeiture of all

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62 M.J. 476 (C.A.A.F. 2006), our superior court found sentence reassessment inappropriate. In *Buber*, the appellant had been convicted of murder, assault upon a child, and false official statement, and received a sentence that included a dishonorable discharge and 33 years confinement. *Id*. Our court dismissed the murder and assault charges due to factual insufficiency, and only affirmed so much of the sentence as provided for a bad-conduct discharge and two years confinement. *United States v. Buber, ARMY 20000777, 2005 CCA LEXIS 458 (Army Ct. Crim. App. 12 Jan. 2005)* (unpub.). On appeal, our superior court set aside the sentence and ordered a rehearing. *Buber, 62 M.J. at 480*. In addition to finding that our court failed to articulate the serious circumstances of appellant's lie, our superior court found that the sentencing landscape changed dramatically; the court noted that only a single offense of false official statement remained with a maximum sentence including only 5 years of confinement, versus the previous maximum of life without eligibility for parole. *Id*. The court also highlighted that no death-related offense remained, making the penalty **[*11]** landscape change even more dramatic. *Id.; See also United States v. Riley, 58 M.J. 305 (C.A.A.F. 2003)* (sentence reassessment inappropriate when intentional murder charge reduced to negligent homicide).

[10] We may not, and do not, consider the evidence from the German police report. *See generally Sales, 22 M.J. at 308*.

[11] As expressed by our superior court [regarding Charge IV and its Specification]:

> On the one hand, the Government presented a strong case against Appellant and independently established much of the information contained in the [German police] report. . . .
>
> On the other hand, the report effectively relieved the government of its burden to present direct testimony . . . . and other necessary elements to prove Appellant possessed marijuana with the intent to distribute.

Clayton, 67 M.J. at 288.

pay and allowances, and reduction to Private E1.

Senior Judge SULLIVAN and Judge BAIME concur.

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APPENDIX C

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
ALDYKIEWICZ, SALUSSOLIA, and WALKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant First Class RICHARD W. GILLIAM
United States Army, Appellant

ARMY 20180209

Headquarters, Fort Campbell
Matthew A. Calarco, Military Judge
Colonel Andras M. Marton, Staff Judge Advocate

For Appellant: Lieutenant Colonel Tiffany D. Pond, JA; Major Angela D. Swilley, JA; Major Alison L. Gregoire, JA (on brief).

For Appellee: Colonel Steven P. Haight, JA; Major Dustin B. Myrie, JA; Major Lauryn D. Carr, JA (on brief).

15 July 2020

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

SALUSSOLIA, Judge:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas of one specification of rape of a child in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 120 (2008) [UCMJ] and one specification each of rape of a child and sexual abuse of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 120b (2012). The military judge sentenced appellant to be reduced to the grade of E-1, confined for eleven years, and dishonorably discharged from the service. The convening authority approved the adjudged sentence.

We review this case under Article 66, UCMJ. Appellant asserts the evidence is legally and factually insufficient to sustain his convictions of rape of a child and

sexual abuse of a child.[1] We agree that appellant's convictions are factually insufficient and provide relief in our decretal paragraph.[2]

BACKGROUND

Appellant's convictions stem from multiple sexual acts with his step-daughter, HD, who was not yet twelve years old at the time of the offenses. The misconduct occurred while they lived off post near Fort Campbell, Tennessee.

The Government's Pleadings

Two of the specifications of which appellant was convicted relate to digital penetration. Specification 1 of Charge I alleged a violation of Article 120, UCMJ (2008), and Specification 1 of Charge II alleged a violation of Article 120b, UCMJ (2012). The specifications alleged:

> In that appellant did at or near Clarksville, Tennessee, on divers occasions, between on or about 1 October 2010 and on or about 27 June 2012, engage in a sexual act, to wit: penetrating with [his] finger the genital opening of [HD], a child who had not attained the age of age of 12 years.
>
> In that appellant did at or near Clarksville, Tennessee, on divers occasions, between on or about 28 June 2012 and on or about 22 September 2013, commit a sexual act upon [HD] a child who had not attained the age of age of 12 years, to wit: penetrating with [his] finger the vulva of [HD] with [his] finger.

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[1] Appellant's second assignment of error asserts the government's dilatory post-trial processing of his case warrants relief. Once more, we face the issue of deciding whether any relief is warranted due to the inefficiency of the Fort Campbell Staff Judge Advocate Office's post-trial processing of a court-martial. In this case, approximately 290 days elapsed from sentence to action without any government explanation for the delay. Specifically, 70 days passed from the authentication of the record of trial until service on appellant and a staggering 155 days passed, without explanation, from the time of appellant's post-trial submission to the convening authority's action, despite appellant's two demands for speedy post-trial processing. Because of the relief we grant in our decretal paragraph, we need not decide this issue.

[2] Additionally, we have given full and fair consideration to the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find them to be without merit.

The government's reasons for charging appellant with those specifications appear to be threefold. First, the government believed the evidence would establish that appellant had committed multiple incidents of digital penetration during a timeframe of almost twenty-three months, spanning from 1 October 2010 to 22 September 2013. Second, the government recognized that the evidence did not establish exact dates of these rapes by digital penetration, and thus used the term of art "on or about" to describe the charged dates in both specifications. Third, the government understood that a statutory change to Article 120 required two specifications.

The National Defense Authorization Act for Fiscal Year 2012 (112 Pub. L. No. 112-81, § 541, 125 Stat. 1298 (2011)) replaced certain punitive articles contained in Article 120, UCMJ, involving sexual misconduct against children, to include rape of a child, with Article 120b, UCMJ. The effective date of this change was 28 June 2012. Due to this change, the government drafted Specification 1 of Charge I to cover appellant's rape of a child by digital penetration on divers occasions prior to the date of the effective change and Specification 1 of Charge II to cover similar acts committed on divers occasions after the effective date of the statutory change.

The other specification of which appellant was convicted pertained to his exposing his penis to HD on more than one occasion. In Specification 4 of Charge II, the government charged this misconduct as a violation of Article 120b, UCMJ. The specification alleged:

> In that appellant did at or near Clarksville, Tennessee, on divers occasions, between on or about 28 June 2012 and on or about 22 September 2013, commit a lewd act upon [HD], a child who had not attained the age of 12 years, to wit: exposing [his] genitalia to [HD].

Appellant's Court-Martial

Prior to trial, appellant's defense counsel moved for a bill of particulars, seeking to compel the government to provide "the exact times and dates for the alleged acts of misconduct as charged in the pleadings." The military judge denied appellant's motion. In his written findings and conclusions of law, the military judge ruled that appellant was both sufficiently on notice of what he must be prepared to defend against and protected from double jeopardy. The military judge's ruling was based in part on the fact that the government's pleadings set forth

timeframes as to when the crimes were alleged to have occurred, and that the timeframes were further limited by appellant's three deployments during them.[3]

At trial, the government primarily relied on the testimony of HD, the victim. HD testified that all of appellant's crimes against her began after they moved to their off-post home when she was "around 7 or 8." While this would have placed the initial inappropriate touching as occurring either at the end of 2010 or the beginning of 2011, HD provided no details regarding the first touching, testifying "I can't remember specifically the first time."

When HD testified about the times appellant digitally penetrated her, she explained where in the house the offenses occurred.[4] HD did not, however, state *when* any of the digital penetrations took place, other than the time the last act happened.[5] HD said the last time appellant digitally penetrated her was while they were laying on the living room couch, sometime in the summer of 2014.[6]

While HD also testified that appellant exposed his penis to her on more than one occasion, her testimony was equally vague about this offense. HD stated that appellant exposed himself in at least three different areas of the house, but she could

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[3] The government's response to appellant's motion for a bill of particulars clarified that appellant was deployed three times during the entire charged timeframe that included: 1 October 2010 to 1 November 2010, 14 August 2012 to 6 October 2012, and 16 January 2013 to 2 September 2013.

[4] HD indicated that appellant sexually assaulted her by digital penetration at least six times, testifying that the incidents occurred: "once or twice" in her bedroom; "at least two different times in the shower;" once in her "mom's bedroom;" and at least twice on the "living room couch."

[5] Other than the last incident, which occurred on the couch, HD did not give any indication as to the order in which the other incidents took place. For instance, when describing appellant digitally penetrating her in her mother's bedroom, she responded that she could not say when it happened, or whether it occurred before or after the times in her bedroom.

[6] HD's testimony indicated the last incident occurred during the "summer" when she was "at least ten." Based on HD's birth month and year, January of 2004, the first summer when she would have been, "at least ten" years old was the summer of 2014. As such, we can infer that the last incident of digital penetration—the *only* act of digital penetration tied to any date certain—occurred during the summer of 2014.

not recall how many times he engaged in this type of misconduct.[7] She also did not provide when these incidents actually occurred.

On appeal appellant asserts the evidence is factually and legally insufficient to support his convictions for rape of a child by digital penetration and sexual abuse by exposing his genitalia.[8] We do not find appellant's arguments in support of his assertion particularly compelling. Nonetheless, we conclude for the reasons set forth below, that the three convictions are factually insufficient.

LAW AND DISCUSSION

We review factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (internal citation omitted). In weighing factual sufficiency, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt." *Id.* To affirm a conviction, "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we must be] convinced of [appellant's] guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

"The military is a notice pleading jurisdiction." *United States v. Folser*, 70 M.J. 225, 229 (C.A.A.F. 2011) (citing *United States v. Sell*, 3 C.M.A. 202, 206, 11 C.M.R. 202, 206 (1953)). It is the government's responsibility by virtue of its control of the charge sheet to place the accused on notice of the offense against which he must defend. *See United States v. Morton*, 69 M.J. 12, 16 (C.A.A.F. 2010). While the specific date of an offense need not be alleged unless time is an essential element of the offense, *United States v. Williams*, 40 M.J. 379, 382 (C.M.A. 1994) (citing *Ledbetter v. United States*, 170 U.S. 606, 612 (1898)), the date of the commission of an offense should be stated with sufficient precision as to (1) protect an accused against future prosecution for the same conduct, (2) allow him to prepare for trial, and (3) enable the accused the opportunity to defend against a particular charge. *See United States v. Aguirre*, ARMY 20090487, 2012 CCA LEXIS 209, at *11 (Army Ct. Crim. App. 1 Jun. 2012) (mem. op.) (citing *United States v. Marshall,* 67 M.J. 418, 420) (C.A.A.F. 2009) (quotations omitted).

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[7] HD testified that appellant exposed his penis to her while they were in three different areas of the house: her bedroom; her mother's room; and, in the shower.

[8] We note that appellant's brief only challenges Specification 1 of Charge II and Specification 4 of Charge II as being factually insufficient, but we conclude based on our review of the record that all three specifications of which he was convicted are factually insufficient.

"On or about," however, are words of art in pleading which generally connote any time within a few weeks of the "on or about" date." *United States v. Brown*, 34 M.J. 105, 110 (C.M.A. 1992) (citations omitted) (reversed on other grounds by *United States v. Reese*, 76 M.J. 297 (C.A.A.F. 2017) (holding R.C.M. 603(d) *does not* require a showing of prejudice for an appellant to prevail on a variance claim)). When charges employ "an on or about date" and set forth a timeframe of when the misconduct is alleged to have occurred, the government is required to establish that the crime occurred at a date within the timeframe charged or *reasonably near* the charged timeframe in order to avoid a material variance. *See United States v. Allen*, 50 M.J. 84, 86 (C.A.A.F. 1999).

Rape of a Child by Digital Penetration

As previously stated, Specification 1 of Charge I alleges rape of a child by digital penetration occurring on divers occasions between "on or about 1 October 2010" and "on or about 27 June 2012." Specification 1 of Charge II alleges rape of a child by digital penetration occurring on divers occasions between "on or about 28 June 2012" and "on or about 22 September 2013." To affirm these specifications, we must be convinced that two conditions have been met. First, we must be convinced that the evidence comports with the elements set forth in punitive Articles 120, UCMJ (2008) and 120b, UCMJ (2012), respectively. Second, we must be convinced that at least two[9] of the acts of raping HD by digital penetration either occurred within or reasonably near the timeframes charged in each specification. While we are convinced that the first condition has been met, we are not convinced the second has been met.

We do find HD's testimony credible regarding appellant digitally penetrating her vulva with his fingers on at least five occasions prior to her turning twelve years old. In other words, HD's testimony establishes that appellant digitally penetrated her on divers occasions some time before 2016. Thus, we believe the evidence adduced at trial established the elements of each of the two punitive articles.[10]

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[9] By pleading "divers occasions," the government assumed the obligation of proving two or more incidences of the charged offense. While we recognize our authority to affirm a single act vice multiple acts as alleged in the pleadings, *see generally United States v. English*, 79 M.J. 116 (C.A.A.F. 2019), our decision herein rests not on whether appellant committed the charged acts once or more than once. Rather, our reversal rests on the absence of evidence establishing that appellant's charged offenses occurred during the period charged.

[10] There is evidence corroborating HD's assertion regarding digital penetration. First, her brother testified that he observed appellant with his hand down HD's pants. Second, HD's mother testified that upon becoming aware of the allegations,

(continued . . .)

However, because the evidence pertaining to the timing of these acts is ambiguous, we cannot determine whether any of the acts occurred within or reasonably near the timeframes charged.

The evidence at trial placed the last incident of digital penetration as occurring either in the summer of 2014, based on HD's testimony, or a couple of months prior to September of 2016, based on her brother's testimony.[11] Even if we were to adopt HD's testimony that the last incident occurred sometime during the summer of 2014, this would mean the last incident could have occurred almost eleven months after the last date charged by the government, which was "on or about 23 September 2013."[12] The "last incident" is the only incident tied to any date certain. All other incidents lack any specificity as to when they took place, and, thus, all we can surmise is that these other incidents occurred sometime between the end of 2010, shortly after the family moved off post, and the summer of 2014. Similar to the last incident, there is a reasonable possibility that the other incidents of digital penetration also occurred at least eleven months after the last date charged by the government.

Because the evidence reveals the distinct possibility that all of the acts of digital penetration could have happened approximately eleven months after the last date charged by the government, we are not convinced beyond a reasonable doubt that they occurred within or even reasonably near to the timeframes charged by the government. Accordingly, we find the evidence adduced at trial does not establish appellant's guilt beyond a reasonable doubt regarding Specification 1 of Charge I or Specification 2 of Charge II. *See English*, 79 M.J. at 121 (C.A.A.F. 2019) (holding

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(. . . continued)
she confronted appellant who did not deny anything but rather responded that he was drunk and he was sorry.

[11] We note that HD's testimony is in conflict with testimony offered by the government's only third-party eyewitness. HD's brother testified that he witnessed one of the digital penetrations that took place on the living room couch. The brother stated that one night he walked into the living room and observed HD on top of appellant on the couch, and appellant's hand was down HD's pants. The brother explained the incident took place a couple of months prior to September of 2016. His testimony placed the incident almost two years after the time HD stated the last digital penetration took place—the summer of 2014.

[12] Had the trier of fact modified the charged timeframes through exceptions and substitutions under R.C.M. 918(a)(1) to encompass the summer of 2014, the issue before us would have been whether this material change in dates created a fatal variance. See *United States v. Parker*, 59 M.J. 195 (C.A.A.F. 2003).

that military courts of criminal appeals lack the authority to affirm a finding by broadening the scope of a charged offense of which appellant was convicted at trial).

Sexual Abuse by Penile Exposure

Similarly, we cannot conclude that the evidence establishes that appellant exposed his penis to HD within or reasonably near the timeframe charged in Specification 4 of Charge II—from "on or about 28 June 2012" to "on or about 22 September 2013." While we again find HD's testimony credible and can conclude that appellant committed this type of sexual act on at least three occasions before she turned 12 years old, there is insufficient evidence to convince us that these sexual acts occurred within or reasonably near the charged timeframe. Rather, the evidence adduced at trial indicates these acts occurred sometime between the end of 2010 and the summer of 2014, the latter time extending well beyond that which was charged. Accordingly, we the find the evidence at trial does not support appellant's guilt beyond a reasonable doubt as to Specification 4 of Charge II.

CONCLUSION

In view of the foregoing, the findings of guilty and the sentence are set aside. The Charges and their Specifications are DISMISSED. All rights, privileges, and property, of which appellant has been deprived by virtue of the findings and sentence set aside by this decision are ordered restored. *See* UCMJ arts. 58b(c) and 75(a).

Senior Judge ALDYKIEWICZ and Judge WALKER concur.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on July 20, 2020.

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