IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Private (E-2)
LEEROY M. SIGRAH
United States Army,
Appellant

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLEE

Docket No. ARMY 20190556

Tried at Fort Campbell, Kentucky, on 4 April, 8 July, and 13–15 August 2019 before a general court-martial appointed by Commander, Fort Campbell, Colonel Matthew Calarco and Colonel Jacqueline Tubbs, Military Judges, presiding.

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

Assignment of Error I

THE MILITARY JUDGE ERRED BY FAILING TO PROVIDE APPROPRIATE RELIEF UNDER RULE FOR COURTS-MARTIAL 914(e).

Assignment of Error II

THE GOVERNMENT VIOLATED APPELLANT'S DUE PROCESS RIGHTS WHEN IT FAILED ITS DUTY UNDER *BRADY V. MARYLAND* TO TURN OVER FAVORABLE AND MATERIAL INFORMATION IN ITS POSSESSION TO THE DEFENSE.

Assignment of Error III

APPELLANT'S CONVICTIONS ARE FACTUALLY INSUFFICIENT.

PANEL NO. 4

Assignment of Error IV

DILATORY POST-TRIAL PROCESSING MERITS RELIEF WHERE 302 DAYS ELAPSED FROM SENTENCING TO DOCKETING AT THE ARMY COURT.

Statement of the Case

Appellant filed his brief on 4 November 2020. The government filed its response on 4 March 2021 and appellant filed his reply brief on 18 March 2021. On 23 March 2021, this court noted that the record of trial did not contain the military judge's written findings of fact or conclusions of law regarding appellant's motions made pursuant to Rule for Courts-Martial [R.C.M.] 914, despite stating, "I will supplement my ruling with written findings of fact and conclusions of law prior to authentication of the record." (R. at 410). This court ordered the government to inquire with the Fort Campbell Office of the Staff Judge Advocate whether the military judge's written R.C.M. 914 ruling existed. *United States v. Sigrah*, ARMY 20190556 (Army. Ct. Crim. App. 23 March 2021) (order). The government confirmed the existence of the military judge's written ruling and pursuant to this court's order, submitted a motion to attach the ruling to the record of trial. (Motion to Attach Government Appellate Exhibit G, H, I) (24 March 2021).

On 26 March 2021, this court returned the record of trial to the military judge "for action consistent with R.C.M. 1112, to resolve the matter of the military judge's written R.C.M. 914 ruling and correcting the record." *United States v. Sigrah*, ARMY 20190556 (Army. Ct. Crim. App. 26 March 2021) (order). The military judge complied with this court's order and returned the corrected record of

trial, including the military judge's written R.C.M. 914 ruling and several associated appellate exhibits, on 14 April 2021. (*United States v. Sigrah*, ARMY 20190556 (Army. Ct. Crim. App. 16 April 2021) (order). This court then ordered supplemental briefing on appellant's "first assignment of error and any issues related to the correction procedures conducted by the military judge." (*United States v. Sigrah*, ARMY 20190556 (Army. Ct. Crim. App. 16 April 2021) (order). Appellant submitted his supplemental brief on 26 April 2021.

Assignment of Error I

THE MILITARY JUDGE ERRED BY FAILING TO PROVIDE APPROPRIATE RELIEF UNDER RULE FOR COURTS-MARTIAL 914(e).

Standard of Review

A military judge's decision whether to strike testimony under Rule for Courts-Martial 914 is reviewed for an abuse of discretion. *United States v. Muwwakkil*, 74 M.J. 187, 191 (C.A.A.F. 2015). An abuse of discretion occurs when a military judge's findings of facts are clearly erroneous or his conclusions of law are incorrect. *United States v. Olson*, 74 M.J. 132, 134 (C.A.A.F. 2015).

Statement of Facts

At the end of the government's direct examination of Specialist [SPC] [redacted], appellant requested an Article 39(a) session to discuss his motion for relief under R.C.M. 914. (R. at 326).

Law and Argument

Appellant avers the military judge's findings of fact were clearly erroneous, her conclusions of law were incorrect, and thus she abused her discretion when she denied appellant's motion for relief under R.C.M. 914. (Appellant's Supp. Br. 7). However, "[t]he abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (internal quotation marks and citations omitted). Appellant has again failed to prove that the military judge abused her discretion and thus this court should affirm appellant's conviction and sentence.

I. The Record Clearly Supports the Military Judge's Findings of Fact.

Appellant contends that facts contained in paragraphs 3, 4, 7, 23b of the military judge's ruling are wrong and therefore the military judge abused her discretion. (Appellant's Supp. Br. 8–10). It should be noted that the evidence presented to the military judge for the purposes of appellant's R.C.M. 914 motion was limited to three witnesses called by appellant: Special Agent [SA] DM, SA RP, and SPC YM.

First, appellant takes issue with the military judge's finding that "SA [DM] was present when [SPC [redacted]'s] statement was made." (App. Ex. XXVIII, ¶3). However, SA DM testified "I conducted the interview of [SPC [redacted]]." (R. at 335).

Thus, the military judge correctly found as fact that SA DM was present when SPC [redacted] gave her statement to the Criminal Investigation Command [CID].

Special Agent DM seemingly contradicted the military judge's finding when he testified he was not present for SPC [redacted]'s entire interview. (R. at 337; App. Ex. XXVIII, ¶3, 23(b)). However, SA DM qualified his statement and noted that he left prior to SPC [redacted] reducing her statement to writing. (R. at 338). Special Agent RP, at this point, conducted the question and answer portion of the interview. (R. at 338, 376, 386). Thus, a CID Special Agent was in fact present for the entirety of SPC [redacted]'s interview, and both testified as appellant's witnesses during his R.C.M. 914 motion. (R. at 532, 574).

Next, appellant alleges the military judge erred by finding that "[a]t the time, it was CID policy not to download or save witness interviews, including an alleged victim." (App. Ex. XXVIII, ¶4; Appellant's Br. 9). However, the record unequivocally supports the military judge's finding. Special Agent DM testified, "[w]e only, at CID office, we only downloaded and put onto DVDs subject suspect interviews" and "there was no regulatory guidance to obtain the recordings . . . of witness or victim interview." (R. at 339). Special Agent DM differentiated between the mandatory CID policy of downloading subject/suspect interviews within twenty-four hours of the interview and the discretionary policy requiring multiple parties' concurrence to download, store and save a victim interview. (R.

at 362, 370, 373). Accordingly, the record easily supports the military judge's conclusion on this matter.

Finally, appellant maintains that the military judge erroneously found as fact that SPC [redacted]'s CID interview lasted approximately two to three hours. (Appellant's Br. 10; App. Ex. XXVIII, ¶7). Again, the record of trial clearly supports the military judge's finding of fact. Special Agent DM, in response to appellant's direct examination, testified SPC [redacted]'s interview began in the afternoon and it lasted approximately two to three hours. (R. at 337, 346, 366). Special Agent RP stated he was unsure of how long his portion of SPC [redacted]'s interview lasted. (R. at 386). Specialist YV[1] testified she could not recall how long SA DM indicated his interview with SPC [redacted] lasted, but that she was certain that SA DM stated the interview began in the morning. (R. at 398). Moreover, during appellant's argument in support of his R.C.M. 914 motion, he seemingly adopted SA DM's estimate that SPC [redacted]'s interview lasted two to three-hours. (R. at 400). Accordingly, all of the evidence appellant presented in support of his R.C.M. 914 motion[2] actually bolsters the military judge finding of fact that SPC [redacted]'s CID interview lasted approximately two to three hours.

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[1] Specialist YV was a trial defense service paralegal who witnessed a phone interview between trial defense counsel and SA DM. (R. at 397–98).

[2] Appellant points to SPC [redacted]'s testimony as evidence that her interview lasted longer than two to three hours. (Appellant's Br. 10). However, SPC [redacted]'s

This court should find the military judge did not abuse her discretion because appellant has failed to prove that she made erroneous findings of fact. Accordingly, this court should deny appellant's request for relief.

II. The Military Judge's Conclusions of Law.

The military judge found that the government did not violate R.C.M. 914 or the Jencks Act. (App. Ex. XXVIII, ¶18). She noted the government possessed the witnesses' recorded statements at one time, but the statements were overwritten prior to the preferral of charges. (App. Ex. XXVIII, ¶18). Additionally, the military judge found that the witnesses' written statements were "adequate substitutes" for their video recorded statements because the written statements were "comprehensive, thorough, and detailed." (App. Ex. XXVIII, ¶18).

The military judge's examination of the timing of the loss was entirely appropriate because appellate courts review the circumstances surrounding the loss of contested statements in their determination of whether the good faith exception to R.C.M. 914 applies. *United States v. Lewis*, 38 M.J. 501, 508 (A.C.M.R. 1993) (finding that good faith and harmless error exceptions to R.C.M. 914 may be applicable based upon the circumstances of the loss). The military judge's finding

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testimony occurred outside of the pertinent Article 39(a) session, was not presented as evidence nor did appellant mention SPC [redacted]'s allegedly contradictory testimony during his argument in support of his R.C.M. 914 motion. Accordingly, the military judge did not err by not considering allegedly contrary evidence that was not properly before her.

that the loss occurred prior to preferral supported her finding that there was no evidence of bad faith or negligence on the government's part and that the government acted in good faith when it attempted to locate the video recorded statements. (App. Ex. XXVIII, ¶12–13).

Appellant alleges the military judge's ruling "runs counter to the reason this court has given for R.C.M. 914's existence, [and thus] the [military] judge has abused her discretion." (Appellant's Supp. Br. 16). As a preliminary matter, "[t]he purpose of both the Jencks Act and R.C.M. 914 is 'to further the fair and just administration of criminal justice by providing for disclosure of statements for impeaching government witnesses.'" *United States v. Brooks*, 79 M.J. 501, 506 (A. Ct. Crim. App. 2019) (quoting *Muwwakkil*, 74 M.J. at 191). Thus, the military judge's finding that the witnesses' written statements were an adequate substitute for the video recorded statements is consistent with the purpose of R.C.M. 914 and the Jencks Act because these "comprehensive, thorough, and detailed" statements provided appellant with material to impeach the government's witnesses. (App. Ex. XXVIII, ¶18). Accordingly, the military judge did not abuse her discretion when she denied appellant's R.C.M. 914 motion.

Appellant next avers that the military judge erred in finding that witnesses' written statements were "an adequate substitute for the deleted video recordings" and thus the government did not violate R.C.M. 914. (Appellant's Supp. Br. 16;

App. Ex. XXVIII, ¶18). First, the government satisfied its obligation relative to the provision of the witnesses' written statements because each statement was a "written statement made by the witness that was signed . . . by the witness." R.C.M. 914(f)(1). The witnesses' written statements were not a "substantially verbatim recital"[3] of each their oral statements. R.C.M. 914(f)(2). However, as discussed below, this failure alone does not entitle appellant to relief under R.C.M. 914.

III. Appellant was Not Prejudiced by the Military Judge's Alleged Error.

Even assuming that the military judge erroneously found that the government did not violate R.C.M. 914, this court should nevertheless affirm appellant's conviction and sentence because he has not proven material prejudice to his substantial rights. Article 54, UCMJ, 10 U.S.C. § 854. Appellant resurrects his previous claim that prejudice should be viewed in light of the military judge's denial of his preferred relief. (Appellant's Supp. Br.; Appellant's Br. 20). In *Clark*, this court expressly repudiated appellant's limited concept of prejudice.

[3] Rule for Courts-Martial 914 does not provide appellant with an unqualified right to obtain everything that a witness says during an interview; rather, it only entitles appellant to "any statement of the witness that *relates to the subject matter concerning which the witness has testified*." R.C.M. 914(a) (emphasis added). Thus events such as the rapport building process between the CID and the witnesses and comfort or meal breaks, which may have consumed a significant portion of the witness interviews, are not part of a "substantially verbatim recital" of a witness's oral statement. R.C.M. 914(f)(2).

United States v. Clark, 2019 CCA LEXIS 247, at *11 (A. Ct. Crim. App. June 10, 2019) (memo op.) (citations omitted); (Appellee's Br. 15). Instead, appellate courts "evaluate prejudice from an erroneous evidentiary ruling by weighing (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *Clark*, 79 M.J. 449, 455 (C.A.A.F. 2020). As discussed in the government's initial brief, appellant was not prejudiced by the military judge's refusal to strike the witnesses' testimony because the government's case was strong, appellant's case was incredibly weak, and "trial defense counsel was not significantly encumbered in his examination of government witnesses because of the unavailability of the video-recorded interviews." (Appellee's Br. 19) quoting *Marsh*, 21 M.J. 445, 452 (C.M.A. 1986).[4]

[4] Should this court determine that the military judge erred in finding that the government did not violate R.C.M. 914, it can nevertheless affirm appellant's sentence and conviction based upon the analysis contained within the government's initial brief. (Appellee's Br. 7–19). *See United States v. Carista*, 76 M.J. 511, 515 (A. Ct. Crim. App. 2017) (finding that "'tipsy coachman' doctrine, allows an appellate court to affirm a trial court that 'reaches the right result but for the wrong reasons' so long as 'there is any basis which would support the judgment in the record'") (quoting *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002)).

THE MILITARY JUDGE'S CORRECTION PROCEDURES.

Standard of Review

Whether a record is complete is a question of law that appellate courts reviews de novo. *United States v. Davenport*, 73 M.J. 373, 376 (C.A.A.F. 2014).

Statement of Facts

At the end of the government's direct examination of SPC [redacted], appellant requested an Article 39(a) session to discuss his motion for relief under R.C.M. 914. (R. at 326). After hearing evidence and argument from both parties, the military judge deliberated overnight and denied appellant's R.C.M. 914 motion, adding that she would supplement her ruling with written findings of fact and conclusions of law prior to authentication of the record. (R. at 410).[5] The record of trial, as previously certified, did not include the military judge's written ruling. The index of trial exhibits indicates that "there is no [Appellate Exhibit] XII.

The military judge provided a signed memorandum for record [MFR] that described the circumstances surrounding the mistaken exclusion of her written R.C.M. 914 ruling from the record of trial. (App. Ex. XXIX). She received feedback on the final draft of her ruling to the Chief Circuit Judge, Colonel [COL] Tyesha Smith on 5 December 2019 and then provided a signed hard copy of her

[5] *See* Appellee's Initial Brief, 4 March 2021, for a more thorough treatment of the evidence and argument of both parties.

ruling to the court clerk, Ms. [redacted], on or about 9 December and 11 December 2019. (App. Ex. XXIX, ¶3). The military judge recalled sending an email to Ms. [redacted], and instructed her to shred the ruling because she intended to make an additional change prior to its inclusion in the record. (App. Ex. XXIX, ¶4). Ms. [redacted] shredded the ruling but the military judge ultimately did not make any changes to her ruling. (App. Ex. XXIX, ¶4–5).

The military judge next remembered overhearing the court reporter, SGT [redacted], and Ms. [redacted] discussing a missing or nonexistent Appellate Exhibit XII. (App. Ex. XXIX, ¶6). The military judge informed her[6] that the missing exhibit was the military judge's R.C.M. 914 ruling. (App. Ex. XXIX, ¶6). The military judge subsequently printed and provided the signed ruling to "her" for inclusion to the record of trial. (App. Ex. XXIX, ¶6). This event was especially memorable for the military judge: this was her first case, she spent a significant amount of time researching and writing the brief, and she was cognizant of the importance of providing a written ruling because she had not previously put her findings of fact or conclusions of law on the record. (App. Ex. XXIX, ¶6).

[6] Although the military judge does not specify with whom she spoke, a plain reading of the pertinent part of the military judge's MFR clearly indicates that the military judge was speaking to SGT [redacted]. (App. Ex. XXIX).

In accordance with R.C.M. 1112(d)(2) and this court's order, the military judge provided the government and appellant's trial defense counsel[7] with notice of her proposed corrections to the record of trial and permitted both parties to "examine and respond to the proposed correction." (R.C.M. 1112(d)(2); App. Ex. XXX). The government reviewed the correction and provided no additional response. (App. Ex. XXXI). Appellant's trial defense counsel objected to the military judge's proposed changes, arguing that she lacked the authority under R.C.M. 1112(d) to make the proposed changes. (App. Ex. XXXIII, p. 1, 22). Trial defense counsel also requested the opportunity to present evidence and oral argument to support his opposition to the proposed changes. (App. Ex. XXXIII, p. 1, 22). The military judge denied trial defense counsel's request, citing her lack of authority to order a post-trial hearing while this case was under appellate review. (App. Ex. XXXIV).

Law and Argument

At trial, the military judge declared she would supplement her oral denial of appellant's R.C.M. 914 motion with written findings of facts and conclusions of law. Yet the record of trial incorrectly stated, "[t]here is No Appellate Exhibit XII." The military judge confirmed that her written R.C.M. 914 ruling was

[7] Appellant's original trial defense counsel was detailed, subsequent to a request for Individual Military Counsel, to assist him with responding to the military judge's proposed corrections. (App. Ex. XXXII).

mistakenly excluded from the record. (App. Ex. XXIX, ¶7). A military judge may correct an incomplete or defective record of trial "before or *after* certification . . . to make it *accurate*." R.C.M. 1112(d)(2) (emphasis added). A military judge may correct a defective or incomplete record by "reconstructing the portion of the record affected." R.C.M. 1112(d)(3). In the present, the military judge complied with this court's order by properly reconstructing the affected portion of the record through the addition of Appellate Exhibit XXVIII, her extant but mislaid written R.C.M. 914 ruling. The military judge undeniably adhered to the notice requirements listed in R.C.M. 1112(d)(2) when she notified counsel of her proposed corrections and provided them with an opportunity to examine and respond to her proposed changes. (App. Ex. XXX; XXXI; XXXIII). Thus, this court should deny appellant's request to remove Appellate Exhibit XXVIII from the record of trial.

I. The Military Judge's Written Ruling Completes the Record.

Rule for Courts-Martial 1112(d)(2) states the "record of trial is complete if it complies with the requirements of [R.C.M. 1112] subsection (b)." A complete record of trial includes "[e]xhibits . . . received in evidence and *any appellate exhibits*." R.C.M. 1112(b)(6) (emphasis added). Here, several factors demonstrate that the record was patently incomplete because it did not include the contested appellate exhibit.

First, the court reporter deemed it necessary to reserve a place for Appellate Exhibit XII, yet the transcribed proceedings contain no mention of such an exhibit. Second, the court reporter took the odd step of indicating, "[t]here is no Appellate Exhibit XII." Her confirmation of the absence of an exhibit vice simply marking the next exhibit in order as Appellate Exhibit XII is unusual, especially because as appellant noted "the military judge marked all of the exhibits for defense's R.C.M. 914 motion as appellate exhibits IX–XI. (R. at 410) . . . . Presumably, the court reporter reserved Appellate Exhibit XII for the military judge's ruling . . .." (Appellant's Br. 10, n. 5).

Additionally, the military judge unequivocally declared her intent to supplement the record with her written ruling, yet the written ruling was not just absent from the certified record, it was conspicuously missing. (R. at 410; Appellant's Br. 10) ("Although the military judge promised to supplement her ruling . . . *she never did so*.) (emphasis added). Even appellant's characterization of the military judge's actions as a "fail[ure] to ensure [her written ruling] became a part of the certified record," (Appellant's Supp. Br. 6) supports the conclusion that the record of trial was incomplete. The military judge acted in accordance with this court's order and appropriately corrected an otherwise incomplete record by reconstructing the affected portion of the record, her missing written R.C.M.

914 ruling. Accordingly, this court should reject appellant's attempt to deny this court the ability to review the complete record of trial.

II. The Military Judge's Ruling Perfects the Record.

While R.C.M. 1112(d)(2) specifies the contents of a complete record of trial, it does not define what may constitute a defective record. Other references to deficiencies within the *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*] generally portray a process lacking in a legally significant manner. *See e.g.* R.C.M. 907 (b)(3)(A) (a specification may be so defective that it substantially misleads the accused); R.C.M. 406 discussion (incorrect or incomplete information contained in pretrial advice render the advice defective).

Appellant correctly states that there is scant case law defining a defective record. (Appellant's Supp. Br. 3, n.1). Appellant cites to *United States v. Jackman*, No. ACM 39685, 2020 CCA LEXIS 273 (A.F. Ct. Crim. App. Aug. 21, 2020) (unpub. op.) to bolster his contention that the present record of trial "[i]s not defective as it d[oes] not contain anything it should not have." (Appellant's Supp. Br. 4). In *Jackman*, the Air Force Criminal Court of Appeals [A.F.C.C.A.] found that the record of trial was defective because it contained five audio recordings of courtroom conversations that occurred when the court-martial was not in session. *Jackman*, 2020 CCA LEXIS 273, at *3. The A.F.C.C.A.'s finding makes intuitive sense; the record of trial should not contain items that are not germane, as defined

by R.C.M. 1112(b), to the proceedings. However, *Jackman* is easily distinguishable from the present case because here, the military judge corrected the record by adding her mistakenly excluded written findings, an appellate exhibit intrinsically essential to appellant's court-martial. Consequently, this court should find that the military judge properly corrected the defects in the certified record of trial.

Lastly, the military judge corrected the record at the direction of this court. *United States v. Sigrah*, ARMY 20190556 (Army. Ct. Crim. App. 26 March 2021) (order). After it discovered that Appellate Exhibit XII was missing, this court investigated and learned that the military judge had reduced her decision to writing. Subsequently, the court returned the record of trial to the military judge "for action consistent with R.C.M. 1112, to resolve the matter of [her] written R.C.M. 914 ruling and correct[ion of] the record." *United States v. Sigrah*, ARMY 20190556 (Army. Ct. Crim. App. 26 March 2021) (order). The military judge complied. Now the record has all exhibits and is complete in accordance with R.C.M. 1112.

Conclusion

WHEREFORE, the government respectfully requests this honorable Court affirm the findings and sentence as approved by the convening authority.

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CERTIFICATE OF SERVICE, U.S. v. SIGRAH (20190556)

I hereby certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at ***usarmy.pentagon.hqda-otjag.mbx.dad-accaservice@mail.mil*** on the 4th day of May, 2021.

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