UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
WALKER, EWING, and PARKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist PIETR N. LEWIS
United States Army, Appellant

ARMY 20210179

Headquarters, U.S. Army Fires Center of Excellence and Fort Sill
Lanny J. Acosta, Jr., Military Judge
Lieutenant Colonel Michael E. Schauss, Acting Staff Judge Advocate

For Appellant: Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Captain Lauren M. Teel, JA; Captain Ian P. Smith, JA (on brief and brief on specified issue).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Pamela L. Jones, JA; Captain Andrew M. Hopkins, JA (on brief and brief on specified issue).

20 May 2022

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

WALKER, Senior Judge:

Appellant asserts the military judge erred by admitting a company grade Article 15 in the government's pre-sentencing case that was administered during appellant's prior permanent assignment to a different duty station when he was a Private First Class.[1] We agree and provide relief in our decretal paragraph.

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[1] An "Article 15" is nonjudicial punishment (NJP) imposed by a commander that is authorized under Article 15, Uniform Code of Military Justice, 10 U.S.C. § 815 [UCMJ]. The record of an Article 15 proceeding is documented on a Department of the Army [DA] Form 2627.

BACKGROUND

On 11 June 2020, appellant and a group of fellow soldiers went out to a few bars to socialize. Appellant, being under 21, was one of the designated drivers. By the end of the evening, only appellant and the victim remained at the bar. Despite being under the legal drinking age of 21, and a designated driver, appellant consumed "about five to seven drinks" that evening.

At approximately 0200, appellant drove himself and the victim back to White Sands Missile Range (WSMR), their current duty station. The victim did not wear his seatbelt on the drive back to the installation. At approximately 0317, appellant's vehicle rapidly approached one of the WSMR's installation access points. The guard shined a flashlight at appellant in an attempt to get his attention, but appellant's vehicle ultimately collided with one of the concrete barriers. The impact from the collision launched the vehicle into air where it then struck the guard shack and landed upside down. The guard narrowly escaped being hit by appellant's vehicle, which had been traveling approximately eighty-six to ninety-one miles-per-hour at the time of impact. Appellant was airlifted to a nearby hospital for the injuries he sustained. Appellant's blood alcohol level was 0.068 at the time his blood was drawn a few hours after the accident. The victim was declared dead at the scene.

A military judge sitting as a general court-martial convicted appellant, pursuant to his plea, of one specification of involuntary manslaughter, in violation of Article 119, UCMJ. The military judge sentenced appellant to a dishonorable discharge, confinement for forty-two months, and reduction to the grade of E-1.

During the presentencing phase of appellant's court-martial, the government moved to admit into evidence a company grade Article 15 that appellant received at his former duty station for underage drinking. Appellant's defense counsel objected to its admission, stating that the Article 15 appellant received as a Private First Class should have been destroyed upon appellant's permanent change of station (PCS), pursuant to Army Regulation 27-10, Legal Services: Military Justice, para. 3-37b(1) (20 Dec. 2020) [AR 27-10]. In response, the government argued that they were moving to admit the unit paralegal specialist copy into evidence, pursuant to AR 27-10, para. 3-37h, which directs the unit paralegal to maintain a copy of the completed Article 15 with all allied documents in Military Justice Online (MJO) for a period of two years. The military judge overruled defense counsel's objection and admitted appellant's prior Article 15 into evidence as Prosecution Exhibit 5.

LAW AND DISCUSSION

A. Standard of Review

"We review a military judge's decision on the admission of evidence in aggravation at sentencing for an abuse of discretion." *United States v. Ashby*, 68 M.J. 108, 120 (C.A.A.F. 2009) (citing *United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009)). The abuse of discretion standard requires "more than a mere difference of opinion[;]" rather, the military judge's ruling must be "arbitrary . . . , clearly unreasonable, or clearly erroneous." *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014) (cleaned up). If this court finds the military judge abused his discretion, our inquiry does not end there, and we must then determine whether the admission of the evidence "substantially influenced the adjudged sentence." *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005).

For the reasons set forth below, we conclude the military judge's ruling to admit the evidence was an abuse of discretion and that the erroneous admission of the Article 15 substantially influenced the adjudged sentence and warrants relief.

B. The Filing and Maintaining of Article 15 Records of Proceedings

Army Regulation 27-10 serves as the authority for both the destruction and the admission of records of non-judicial punishment under Article 15, UCMJ. The regulation states that soldiers who are below the rank of specialist or corporal—and are not guilty of a sex-related offense—will have their original Article 15 "filed locally in the unit NJP or unit personnel files" and:

> Locally filed originals will be destroyed at the end of 2 years from the date of imposition of punishment *or on the Soldier's permanent change of station* or permanent reassignment to another GCMCA, *whichever occurs first.*

AR 27-10, para. 3-37b(1) (emphasis added). Within that same paragraph, the regulation also states that the unit "paralegal specialist will maintain a copy of the completed DA Form 2627 with all allied documents in MJO for a period of 2 years." AR 27-10, para. 3-37h. Further, when we look to AR 27-10, para. 3-44b, a record of NJP may be admissible at courts-martial "from any file in which it is properly maintained by regulation." Specifically, for purposes of introducing records of the accused's prior service for sentencing, AR 27-10 states:

> For purposes of RCM 1001(b)(2) and (d), trial counsel and defense counsel may, at the counsel's discretion, introduce to the court-martial copies of any personnel records that

> reflect the past conduct and performance of the accused, made or maintained according to departmental regulations.

AR 27-10, para. 5-37a. That same paragraph gives "[r]ecords of NJP" as an example of an admissible record of the accused's prior service for purposes of sentencing, so long as the NJP is not a summarized Article 15 and the record comes "from any file in which the record is properly maintained by regulation." AR 27-10, para. 5-37a(4). *See also* Rule for Courts-Martial [R.C.M.] 1001(b)(2) (permitting the introduction of personnel records of the accused including Article 15). A copy of the Article 15 can be substituted for the original if properly authenticated. *See* AR 27-10, para. 5-37b and Military Rule of Evidence 901.

C. The Admission of the Article 15 Was Clearly Erroneous

Here, there is no dispute that appellant's original Article 15 should have been destroyed upon his PCS to WSMR—the main point of contention is whether the paralegal's copy maintained in MJO constitutes a "file in which the record is properly maintained by regulation." AR 27-10, para. 3-44b.

Appellant argues the Article 15 was improperly admitted into evidence because: (1) the declaration used to authenticate Prosecution Exhibit 5 did not indicate whether it was maintained in or obtained from MJO; (2) the MJO database is not a personnel record akin to a local unit file or Official Military Personnel File (OMPF)[2]; and, (3) any conflicts in filing guidance in AR 27-10 should weigh in favor of appellant—namely, the requirement to destroy locally filed NJP records when a soldier conducts a PCS would be rendered "a useless nullity" if that same record is maintained in MJO for two years regardless of that soldier's assignment status.

The government argues that the separate provisions for "filing" and "maintaining" an Article 15 are compatible and not contradictory. Specifically, the government asserts that the requirement to "file" the original Article 15 in a

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[2] "The OMPF is defined as permanent documentation within the [Army Military Human Resource Record (AMHRR)] that documents facts related to a Soldier during the course of his or her entire Army career, from time of accession into the Army until final separation, discharge or retirement." Army Reg. 600-8-104, Army Military Human Resource Records Management, para. 1-6b (7 April 2014) [AR 600-8-104]. Additionally, "[t]he purpose of the OMPF is to preserve permanent documents pertaining to enlistment, appointment, duty stations, assignments, training, qualifications, awards, medals, disciplinary actions, insurance, emergency data, separation, retirement, casualty, and other personnel actions." AR 600-8-104, para. 1-6*b*(1).

soldier's local unit file and the requirement to "maintain" a copy of the locally filed Article 15 for a period of two years in MJO are separate and distinct requirements that are harmonious. In asserting this argument, the government summarily dismisses the policy rationale for destroying a locally filed Article 15 when a soldier conducts a PCS *or* after a period of two years, that being rehabilitation. Rather, the government asserts this "compelling rationale," as the government concedes, is "inapplicable to the admissibility of recent NJP evidence during a pre-sentencing court-martial." In essence, the government argues that because appellant was being court-martialed for conduct involving the same misconduct of underage drinking then the government is justified, and the military judge is allowed, to use the prior Article 15 in determining an appropriate sentence. The government argues that because appellant's Article 15 for underage drinking was so close in time to his court-martial, it is relevant aggravation evidence merely based upon timing. The government's argument ignores the distinction between *relevant* information and *admissible* information under the rules of evidence.

We are unpersuaded by the government's argument that AR 27-10 para. 3-3-37b(1) is harmonious with para. 3-37h for purposes of admission of evidence in aggravation by the government. Rather, we agree with appellant and find that the unit paralegal copy does not constitute a "file in which the record is properly maintained by regulation" within the meaning of AR 27-10. The regulatory and official purpose of MJO is to be the primary *tool* for: (1) "creating, processing, and managing administrative reprimands, administrative separation, NJP, and courts-martial[;]" and, (2) "for generating data and conducting analysis related to the execution of administrative actions and the practice of military justice." AR 27-10, para. 14-1a. The MJO application is not a personnel *file* but rather, an official Army *application* for creating and processing adverse administrative actions and NJP and for data analysis. It is those stated purposes for which the unit paralegal must maintain the information contained in MJO for a period of two years. It is clear from the language of AR 27-10 and R.C.M 1001(b)(2) that the admission of prior records of service are to be pulled from an accused's *personnel file* (whether local or permanent OMPF), not a paralegal database used for record keeping.[3] To interpret the regulation otherwise would, in fact, render paragraph 3-37b as a nullity because it would go against the plain language of the regulation and the purpose of allowing junior soldiers to have a clean slate when they PCS or change to a different General Court-Martial Convening Authority (GCMCA). We therefore find the military judge's interpretation of AR 27-10 to be clearly erroneous and conclude he abused his discretion in allowing the admission of appellant's Article 15 because it was inadmissible given appellant's PCS move to WSMR.

[3] In its brief, the government concedes that the MJO system, "is not a place where personnel records are filed like the local unit file or AMHRR."

D. A Substantial Influence on the Adjudged Sentence

After examining the evidence and the parties' respective sentencing cases, we find the erroneous admission of the Article 15 had a substantial influence on the adjudged sentence, and materially prejudiced appellant's rights.

We recognize the severity and significance of appellant's misconduct in that his negligent actions of underage drinking and driving while intoxicated took the life of another soldier. The government presented compelling evidence about the impact of the victim's death of family and friends. The victim's mother testified she attempted suicide due to the loss of her son. The victim's sister and a fellow soldier testified that the impact of the victim's death caused them to have to seek behavioral health treatment. The guard who was at the entry control point at the time of the incident described months of sleepless nights as result of the trauma of witnessing the accident. Yet, the government relied on appellant's Article 15, less than two years old at the time of trial, as the prime piece of evidence in justifying the imposition of a harsher sentence by arguing that it demonstrated appellant's lack of rehabilitative potential:

> Finally, Your Honor, after receiving an Article 15 for underage drinking in 2019, [appellant] was not deterred from again drinking underage and making poor choices that night, he knew better, only this time it led to the death of another Soldier. Your Honor, the sentence you give, therefore, needs to affect the fundamental change in [appellant] to ensure that his actions do not result in any more senseless loss of pain—senseless loss of life or pain and suffering in others.

Appellant presented a relatively strong case in extenuation and mitigation. Appellant's mother testified about appellant's childhood and his decision to join the Army despite begin offered full scholarships from three colleges. Appellant's mother and father both testified about the long-term brain injuries appellant suffered as a result of the accident and the impact it has on his daily life. Appellant provided an unsworn statement in which he described the remorse he felt for taking his friend's life and the emotional impact it had on him, his feelings of worthlessness, nightmares, as well as the resulting anxiety and depression he experiences from having taken a life. He also discussed suffering from TBI and the loss of short-term memory from injuries he sustained during the accident.

Although this is a close case on prejudice, we believe the balance tips in favor of appellant in light of the nature of the underlying misconduct for the Article 15 and appellant's adjudged sentence. Appellant received the inadmissible Article 15 for underage drinking which was the same type of misconduct that resulted in

appellant taking the life of another soldier. Repeated acts of similar misconduct within less than two years of each other is certainly aggravating evidence that would impact appellant's sentence as evidenced by the adjudged sentence. The government requested appellant be sentenced to four years of confinement. The military judge sentenced appellant to forty-two months of confinement, just six months less than the sentence the government requested and almost double the minimum sentence of twenty-four months the military judge could have imposed. For all of the afore-mentioned reasons, we find that the erroneously admitted Article 15 substantially influenced the adjudged sentence.

In light of this conclusion, we now address whether we are able to reassess appellant's sentence. Having considered the entire record, we conclude we are able to reassess the sentence and do so in accordance with the principles articulated by our superior court in *United States v. Sales*, 22 M.J. 305, 307–08 (C.M.A. 1986) and *United States v. Winckelmann*, 73 M.J. 11, 15–16 (C.A.A.F. 2013). We recognize this case was tried by a military judge alone, which favors reassessment by this court. *United States v. Adams*, 74 M.J. 589, 593 (Army Ct. Crim. App. 2015) (finding reassessment appropriate, in part, because a judge alone sentenced the appellant). Based on our experience as judges on this court, we are familiar with the offense of involuntary manslaughter such that we may reliably determine what sentence would have been imposed had the Article 15 not been erroneously admitted as evidence in aggravation. Having conducted this reassessment, we affirm only so much of appellant's sentence as provides for a dishonorable discharge, confinement for thirty-six months, and reduction to the grade of E-1.

CONCLUSION

Upon consideration of the entire record, the finding of guilty is AFFIRMED. We AFFIRM only such much of the sentence as provides for a dishonorable discharge, confinement for thirty-six months, and reduction to the grade of E-1.

Judge EWING and Judge PARKER concur.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court