UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
BROOKHART, PENLAND, and ARGUELLES[1]
Appellate Military Judges

UNITED STATES, Appellee
v.
Captain CHRISTOPHER L. WILKINSON
United States Army, Appellant

ARMY 20210052

Headquarters, U.S. Army Intelligence Center of Excellence and Fort Huachuca
Robert A. Fellrath, Military Judge
Colonel Andrew D. Flor, Staff Judge Advocate

For Appellant: Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Joyce C. Liu, JA; Captain Joseph A. Seaton, Jr., JA (on brief); Jonathan F. Potter, Esquire; Captain Joseph A. Seaton, Jr., JA (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Captain Karey B. Marren, JA (on brief).

26 May 2022

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

ARGUELLES, Judge:

A military judge, sitting as a general court-marital convicted appellant, *in absentia* and contrary to his pleas, of one specification of attempted indecent viewing, two specifications of sexual abuse of a child, and one specification of indecent exposure, in violation of Articles 80, 120b, and 120c, Uniform Code of Military Justice. 10 U.S.C. §§ 880, 920b, 920c (2018) (UCMJ). The military judge found appellant not guilty of one specification of indecent viewing, in violation of Article 120b, UCMJ. The military judge sentenced appellant to confinement for

[1] Judge Arguelles decided this case while on active duty.

three years and a dismissal. The convening authority took no action on the findings and approved the sentence.

This case is now before us for review under Article 66, UCMJ. Appellant raises two assignments of error, one of which merits discussion but no relief.[2]

BACKGROUND

Appellant was an instructor in the Reserve Component Career Captains Course at Fort Huachuca in Sierra Vista, Arizona. The charges in this case pertain to appellant's alleged sexual abuse of his daughter at the family's previous duty station in South Carolina. Just prior to transferring to Fort Huachuca, appellant and his wife divorced, and he had little to no contact with either his daughter or wife after arriving in Arizona.

Appellant's arraignment occurred on 16 January 2020. Given delays owed to the Covid-19 pandemic, the military judge granted multiple continuances, and trial was finally set for 1 February 2021. The military judge advised appellant at his arraignment that "if you are voluntarily absent at any point in this trial going forward, you may forfeit the right to be present. Future sessions and the trial could go forward even if you were not present, up to, and including sentencing if necessary." Appellant made all of his appearances prior to trial, and there is no dispute that he was both properly arraigned and aware that his court-martial was set to begin on 1 February.

Based in part on his history of professionalism and timeliness, appellant's command granted him leave from 11-30 January 2021 in order arrange his affairs prior to the court-martial. Appellant's last identification card scan at the Fort Huachuca gate was on 23 January 2021, and his supervisor last spoke to him on Tuesday 26 January.

On Wednesday 27 January, appellant told his mother during a phone call that he was hiking up a mountain. He also told his girlfriend (who was incarcerated in the local Cochise County jail) on a recorded jail call that he was hiking in the Dragoon Mountains, a small mountain range northeast of Fort Huachuca. During the conversation with his mother, appellant also talked about his plans for the future in the event he was convicted at his upcoming court-martial. Although it had recently snowed in the area, and appellant was not an experienced hiker, a license plate reader identified his car (a white Subaru Forester) heading west, away from the Dragoon Mountains and towards Fort Huachuca, at approximately 1800 that same

[2] We have given full and fair consideration to appellant's other assigned error, and find it to be without merit.

evening, Wednesday 27 January. That same day, appellant's phone was turned off, with the last known location being in the vicinity of North Sands Ranch Road near the Whetstone Mountains. The Whetstone Mountains are northwest of Fort Huachuca, and closer to Sierra Vista than the Dragoon Mountains. The military judge made a specific finding of fact that given the lack of cellular phone towers in this rural area, "cellular geolocation information for this area can include a range of many miles."

The neighbor/landlord of appellant's girlfriend testified that he knew appellant based on how often he was at her house. The neighbor also testified that he was unaware that appellant's girlfriend had been incarcerated since November, as her rent was being paid and the trash was put out regularly. Because it had been a "long, long time" since he had seen any of their friends come over, the neighbor opined that appellant was the one taking care of the residence, and the only person likely to have recently visited the property. The neighbor also stated that he saw appellant's car at the girlfriend's house on Friday, 29 January, and heard someone running a wood chipper on the property on Saturday the 30th. Although the house blocked his view of the wood chipper, because he saw appellant's car at the house on Friday, the neighbor assumed appellant was the one running the wood chipper on Saturday. On Monday 1 February, after he failed to show up for his court-martial, authorities subsequently found appellant's pickup truck at his girlfriend's house, with its bed full of wood chips.

After appellant failed to appear for his court-martial on Monday morning, and his command was not able to contact him, the unit began searching for him, to include sending out a search party to the last known coordinates for his cell phone (which as described above was near North Sands Ranch Road just south of the Whetstone Mountains). In addition, members of appellant's unit checked local hospitals, jails, bars, and restaurants in the area between his cell phone's last known location and Fort Huachuca. The searchers did not find appellant or his phone.

On that same day, appellant's First Sergeant and another Solider went to appellant's residence, where his mother let them in. Appellant's mother testified that she arrived in town at 1230 on Sunday, but claimed she had not spoken with appellant since their conversation the Wednesday prior, during which he said he was climbing a mountain. Appellant's mother did not testify about whether or not she attempted to reach out to appellant once she arrived in town on Sunday, and/or when she first learned that he was missing.

After verifying that appellant was not home and that there was only a "day or two of mail" in the mailbox, the First Sergeant looked through his house, taking several photographs. Among other things, all of appellant's expensive watches appeared to be present, and all of his vehicles, with the exception of his Subaru Forester and pick-up truck, were in the garage. Moreover, there was a partially

completed "to-do" list posted in the residence. The First Sergeant also testified that for the most part the house was like a museum, and in his opinion appeared to be "staged." When asked for the basis of this opinion, the First Sergeant explained that as a credentialed counter-intelligence agent, he had experience executing search warrants in homes and offices in national security crime investigations. Although a power of attorney that appellant executed for his mother was also in the residence, she testified that she had no prior knowledge of his plans to sign such a document.

On Monday 1 February, a local police detective interviewed appellant's girlfriend at the Cochise County jail. Later that evening, appellant's girlfriend made a recorded jail call to a mutual friend of hers and appellant's, wherein both women expressed their belief that appellant had fled. During the call, which both of the women expressly acknowledged was being recorded, the mutual friend said that "I don't want to say anything . . . it's going to be self-incriminating." The mutual friend also asked appellant's girlfriend to recount the information she had received from the detective, because she was "curious if the story" was the same as the one "he told us."

At 0330 on Tuesday 2 February, appellant's cell phone pinged again near North Sands Ranch Road just south of the Whetstone Mountains. There was testimony that the second ping did not necessarily mean that appellant turned the phone back on, but rather that it is a common feature of cell phones that even when turned off they will periodically ping a tower. That same day the search efforts were increased to include personnel from the Directorate of Emergency Services (DES), military police, Criminal Investigation Command, U.S. Customs and Border Patrol, Cochise County Sheriff's Office, and the Sierra Vista Police Department. Among other things, the searchers utilized canine, aviation, and horseback assets.

Later that same day, a search and rescue helicopter discovered appellant's Subaru Forester in the vicinity of French Joe's Canyon and Apache Peak in the Whetstone Mountains, about ten miles north of the last ping location near North Sands Ranch Road, and about forty miles west of the Dragoon Mountains. The car had a few days of dirt and dust accumulation, contained a jug of water and two water bottles, and was located close to a makeshift fire pit with no evidence of recent use. Although not necessarily concealed, the car was located about three-quarters of a mile off the road in a location that required traversing a very steep and severe road. Subsequent searches of the area did not uncover any traces of appellant or his phone.

A local hunter confirmed that he saw appellant's car parked in the same location earlier that day. In addition, an off-duty police officer hiking in the area on Sunday 31 January spotted what he believed to be appellant's car parked next to a white Ford Explorer in the area of Dry Canyon, several miles away from where law enforcement agents subsequently found the Subaru.

After conducting several hearings on 1 and 2 February in which he heard from multiple witnesses, on 2 February the military judge denied the defense request for a further continuance and proceeded to try the case in absentia after concluding that "[t]he accused voluntarily absented himself from these proceedings." To date, appellant remains absent.

LAW AND DISCUSSION

A. Law

We review a military judge's decision to proceed to trial in absentia for abuse of discretion. *United States v. Sharp*, 38 M.J. 33, 34, 37 (C.M.A. 1993). The abuse of discretion standard is deferential, predicating reversal on more than a mere difference of opinion. *See United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004) ("[T]he abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range.") (citation omitted). Although Rule for Courts-Martial (R.C.M.) 804(a)(1) provides that the accused shall be present at all stages of the trial, under R.C.M. 804(c)(1) this right is waived if the accused "[i]s voluntarily absent after arraignment . . . ."

The appellant in *Sharp* went on leave from 22 December to 2 January, and failed to show up for his court-martial on 4 January. 38 M.J. at 34. At an Article 39(a) session on the morning of trial, the military judge heard evidence of ongoing efforts to find appellant in the local community, as well as defense counsel's argument that because appellant never made it home to see his mother on leave, "I am quite concerned that something actually did happen to him." *Id.* Following a short continuance, after appellant again failed to show up, the military judge denied the defense motion for a second continuance and tried the case in absentia. *Id.* at 35.

The Court of Military Appeals (C.M.A.) in *Sharp* first referenced the Discussion to R.C.M. 804(b) ("Discussion") in a footnote.[3] 38 M.J. at 35, n.1. The Discussion starts with the general principle that for an absence to be voluntary, "the accused must have known of the scheduled proceedings and intentionally missed them." *Id.* The Discussion then provides that: (1) the "prosecution has the burden to establish by a preponderance of the evidence that the accused's absence is voluntary"; (2) "[v]oluntariness may not be presumed, but it may be inferred, depending on the circumstances"; and (3) "in the absence of evidence to the contrary" it may be inferred that an accused who knows when the proceedings are scheduled to resume, yet fails to show up, is voluntarily absent. *Id.*; R.C.M. 804(c), Discussion.

[3] Rule for Courts-Martial 804(b), which was the governing rule at the time of the *Sharp* decision, is essentially identical to the current R.C.M. 804(c).

The Court in *Sharp* did not, however, expressly adopt the non-binding Discussion, or otherwise incorporate it into its holding. *See United States v. Chandler*, 80 M.J. 425, 429, n.2 (C.A.A.F. 2021) ("The provisions of a discussion section to the R.C.M. are not binding but instead serve as guidance.") (citations omitted). To the contrary, the Court in *Sharp* ultimately held that "the defense has the burden of going forward and offering evidence to refute the inference that the absence was voluntary." *Id.* at 37 (citing *United States v. Abilar*, 14 M.J. 733, 735 (A.F.C.M.R. 1982)). Applying that standard, the C.M.A. concluded that because "the defense did not meet this burden and thereby did not 'refute the inference' of a voluntary absence," appellant's trial in absentia was proper. *Id.*

Unfortunately, the Court in *Sharp* did not explain the contrast and interplay between its reference to the Discussion's suggestion that the government bears the burden, and its ultimate holding appearing to shift the burden to the defense to rebut the inference of voluntariness. As such, we are left with multiple possible interpretations.

One possible interpretation of *Sharp* is that the C.M.A. intended to shift the burden to the defense only with respect to the "inference," but still placed upon the government the overall burden to show voluntary absence by a preponderance of the evidence. Put another way, it is possible that the C.M.A. implicitly recognized that if the defense could not overcome an inference of voluntariness, such an inference would always ensure that the government would be meet its burden to show voluntary absence. Moreover, it is possible that under such a reading, even if the defense could show sufficient "evidence to the contrary," the government could still meet its burden based on the entire record even absent the inference.

An alternative interpretation is that the Court in *Sharp* rejected the Discussion's suggestion that the government bears the ultimate burden to show voluntary absence, and instead placed the burden on the defense. *See United States v. Bolden*, 1996 CCA LEXIS 533, at *11 (N.M. Ct. Crim. App. 19 Apr. 1996) ("The *Sharp* court also recognized that in order to preclude trial *in absentia*, the burden of proof is on [the] accused to demonstrate that he did not voluntarily absent himself from the proceedings.") (citations omitted).

Appellant cites to *United States v. Peebles*, a case decided sixteen years before *Sharp*, which stated that "*Cook* stands for the proposition that absence alone warrants a finding of voluntariness only when there are no circumstances indicating the contrary." 3 M.J. 177, 179 (C.M.A. 1977) (citing *United States v. Cook*, 43 C.M.R. 344 (C.M.R. 1971)). To the extent appellant is suggesting that *Peebles* stands for the broad proposition that if there are *any* circumstances indicating that the absence may not be voluntary, a military judge abuses his discretion by proceeding in absentia, we unaware of any court which has adopted this reasoning, and we decline to do so now. To the contrary, the C.M.A. in *Sharp* factually

distinguished *Peebles* as "entirely different," and limited the holding of that case to an accused who fails to receive notice of the trial date. *Sharp*, 38 M.J. at 37. Moreover, in *Cook*, the case cited by *Peebles*, the Court held only that where there was substantial evidence that an accused suffered from mental illness which could have caused his absence, the military judge erred by proceeding in absentia. 43 C.M.R. at 347–48; *see also United States v. Lane*, 48 M.J. 851, 856–57 (A.F. Ct. Crim. App. 1998) (limiting *Cook* as standing for the proposition that if "even if there is evidence that the accused is voluntarily absent, if there is also evidence that the appellant was not mentally competent at the time of his absence, the trial should be delayed").

B. Analysis

As noted above, is it undisputed that appellant knew that his trial was starting on 1 February 2021, failed to appear on that date, and still remains absent as of today. Appellant's sole assertion on appeal is that because "[t]he only reasonable explanation for [his] absence is that he became lost or injured while hiking," the military judge erred in trying him in absentia. We disagree.

As noted above, the Court in *Sharp* did not explain why it footnoted the non-binding Discussion indicating that the prosecution bears the burden to prove voluntary absence, but then appeared to shift the burden to the defense to refute the inference of voluntariness. We need not resolve that contradiction here, because under either standard, the military judge did not abuse his discretion in finding appellant's absence to be voluntary.[4]

At the first evidentiary hearing, before all of the facts were fully developed, defense counsel appeared to argue that appellant suffered some kind of calamity while hiking in the Dragoon Mountains on Wednesday 27 January. It is not entirely clear if appellant is still making this argument on appeal, as his briefing does not flesh out a theory of where, when, or how appellant "became lost or injured while hiking." In any event, with respect to any argument that appellant disappeared in the Dragoon Mountains, the full record indicates otherwise. Among other things, a license plate reader spotted appellant's car on the evening of the 27th headed west, away from the Dragoon Mountains and back towards Fort Huachuca. In addition,

[4] In pertinent part, the military judge's ruling also addressed both standards: "The current whereabouts of the accused are unknown, but there is sufficient evidence in the record to suggest the government has demonstrated by a preponderance of the evidence the accused has voluntarily absented himself. The court therefore accepts the inference of voluntary absence in this matter based on the evidence presented. The defense has not rebutted the inference of voluntary absence of the preponderance standard [sic]."

the neighbor of appellant's girlfriend testified that he saw appellant's car on Friday 29 January, and presumed that appellant was running the wood chipper on the property on Saturday. This is consistent with the discovery of appellant's pickup truck at his girlfriend's house on Monday loaded with wood chips. It is also worth noting that both of the pings from appellant's phone on 27 January and 2 February were from a location south of the Whetstone Mountains. Finally, the fact that authorities ultimately found appellant's car in the Whetstone Mountains, forty miles from the Dragoon Mountains, makes it highly unlikely that he met some tragic fate while hiking a week earlier in the Dragoon Mountains.

We recognize that *one* interpretation of these facts could be that appellant decided to check out the Whetstone Mountains on his way home from hiking in the Dragoon Mountains on Wednesday 27 January, for some unknown and unexplained reason turned his phone off that day and never turned it back on, and after chipping wood at his girlfriend's house that weekend, met his untimely demise when he decided to return back to the Whetstone Mountains for one last final hike before his court-martial started. Along the same lines, appellant could argue that the recorded jail conversation is just speculation. But, this is certainly not the only reasonable interpretation of the record, and indeed suffers from the additional flaw that, as noted by the military judge in his well-reasoned ruling, if appellant "were to have actually gone hiking in [the Whetstone Mountains the weekend before his trial started], he might well have brought water along with him such as the jug that was found in the vehicle, or the water bottles that were found in the vehicle."

On the other hand, there are a number of considerations which could lead a reasonable factfinder to conclude that appellant voluntarily fled. First, there is no explanation as to why he apparently turned his phone off on 27 January. Moreover, the fact on 2 February appellant's phone sent out another ping approximately ten miles south of the location of his car might indicate that appellant was moving south the day after he failed to show up for his court-martial. There was also no explanation as to why appellant's mother did not attempt to call or otherwise reach out to him when she arrived into town on Sunday, or when she even first became aware of his absence. In addition, the First Sergeant provided a reasonable foundation to support his conclusion that appellant's residence looked "staged." The recorded jail call in which both his girlfriend and a mutual friend expressed their beliefs that appellant fled, and the friend stated that anything she said about his disappearance would be "self-incriminating," is additional evidence that appellant voluntarily fled. And finally, notwithstanding the extensive search and rescue operations, authorities did not find appellant or his phone.

In sum, the question before us is *not* whether we think it is more likely that appellant perished in the mountains or voluntarily absented himself from his trial. Rather, we can only provide relief if we find that the military judge's ruling constitutes an abuse of discretion. *See Gore*, 60 M.J. at 187 ("[T]he abuse of

discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range.") (citation omitted). As such, based on our review of the entire record and for all of the reasons stated above, we conclude that the military judge did not abuse his discretion in: (1) finding that the government met its burden to prove by a preponderance of the evidence that appellant's failure to appear was voluntary; (2) finding that the defense failed to refute the inference that his absence was voluntary; and (3) proceeding with the trial in absentia.

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.[5]

Senior Judge BROOKHART and Judge PENLAND concur.

FOR THE COURT:

JAMES W. HERRING, JR.
Clerk of Court

[5] At the conclusion of the court-martial, the Military Judge properly announced one unitary sentence for the four specifications for which he returned guilty verdicts. *See* Executive Order 13825, Section 10, 83 Fed. Reg. 9889 (March 8, 2018). The Statement of Trial Results (STR) Segmented Sentencing Worksheet, however, incorrectly indicates a segmented sentence of three years for each specification to run concurrently. Exercising our authority under R.C.M. 1111(c)(2), we direct that the STR Segmented Sentencing Worksheet be stricken. *United States v. Pennington*, ARMY 20190605, 2021 CCA LEXIS 101, at *5 (Army Ct. Crim. App. 3 Mar. 2021) (summ. disp.) ("Exercising our authority under R.C.M. 1111(c)(2), we note and correct the following issues in appellant's post-trial documents . . . .").