

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
WALKER, EWING, and PARKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Private E1 ETHAN J. FRASUR
United States Army, Appellant

ARMY 20210420

Headquarters, 7th Army Training Command
Kenneth W. Shahan, Military Judge
Lieutenant Colonel John J. Merriam, Staff Judge Advocate

For Appellant: Major Christian E. DeLuke, JA; Captain David D. Hamstra, JA.

For Appellee: Pursuant to A.C.C.A. Rule 17.4, no response filed.

8 July 2022

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

WALKER, Senior Judge:

While not raised by appellant on appeal before this court, we hold that the military judge erred in admitting an Article 15 during the government's presenting case, over defense objection, that a paralegal downloaded from Military Justice Online. We further hold that the admission of the Article 15 substantially influenced the adjudged sentence and provide relief.

BACKGROUND

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of two specifications of absence without leave, one specification of larceny, and one specification of communicating a threat, in violation of Articles 86, 121, and 115, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 921, and 915 [UCMJ]. The military judge sentenced appellant to a bad-conduct discharge and confinement for a total of 110 days.

During the presentencing phase of appellant’s court-martial, the government moved to admit into evidence a company grade Article 15 that appellant received less than two years prior to his court-martial while assigned to his current General Court-Martial Convening Authority (GCMCA).¹ Appellant’s defense counsel objected to its admission “on the basis of authentication and hearsay. . . .” In response, the government argued the Article 15 bore “an attestation memorandum from the paralegal that pulled the Article 15 from a system of records regularly maintained and regularly used by that paralegal.” Defense counsel argued that the business records exception should not apply because the “attestation should be coming from S1 as this document is appropriately maintained in Private Frasur’s AMHRR; that’s where it’s stored.”² The military judge clarified that the Article 15 was pulled from Military Justice Online (MJO)—and not appellant’s AMHRR—before he overruled defense counsel’s objection and admitted appellant’s 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).

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.

² AMHRR is the acronym for Army Military Human Resource Record. We note that defense counsel’s assertion was incorrect, as appellant’s original Article 15 would have been “filed locally in the unit NJP or unit personnel files” AR 27-10, para. 3-37b(1).

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

Army Regulation 27-10, Legal Services: Military Justice (20 Dec. 2020) [AR 27-10], serves as the authority for the admission of records of non-judicial punishment under Article 15, UCMJ. A record of NJP may be admissible at courts-martial “from any file in which it is properly maintained by regulation.” AR 27-10, para. 3-44b. 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. . . .” AR 27-10, para. 3-37b(1). 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) (emphasis added). *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 Military Judge Erred in Admitting the Article 15

Here, appellant’s Article 15 occurred within two years of his court-martial while assigned to the same GCMCA, making it admissible evidence in presentencing so long as the authenticated copy was pulled from a “file in which the record is properly maintained by regulation.” AR 27-10, para. 5-37a(4). In this case, appellant’s Article 15 was pulled from MJO. Pursuant to our recent opinion in *United States v. Lewis*, ARMY 20210179, 2022 CCA LEXIS 303 (Army Ct. Crim. App. 20 May 2022), we find that the unit paralegal copy in MJO does not constitute a “file in which the record is properly maintained by regulation” within the meaning of AR 27-10. AR 27-10, para. 5-37a(4). The outlined 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 *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 Official Military Personnel File (OMPF)), not a paralegal database for record keeping.³ We therefore find the military judge's interpretation that MJO constituted a "file" in this context to be erroneous and conclude he abused his discretion in allowing the admission of appellant's Article 15.

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.

The government relied heavily on appellant's Article 15 as the prime piece of evidence in justifying the imposition of a harsher sentence by asserting in their sentencing argument that it demonstrated appellant's lack of rehabilitative potential:

[Appellant] received an Article 15 not only for his failure to wear the correct uniform and to secure his barracks room but for his purposeful deceit of an NCO when he lied about his whereabouts and for larceny by stealing \$827 worth of audio equipment from the PX.

Lying and stealing, that's not—forgetting to wear the right socks with your PT uniform, that isn't just immaturity; that is serious misconduct requiring a deliberative decision to make a false official statement and commit larceny. Despite that serious misconduct, Your Honor, his command gave him another chance. Even though he'd stolen over \$800 worth of goods from the PX, the Article 15 he received was a Company Grade. But at

³ "The OMPF is defined as permanent documentation within the 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, performance, awards, medals, disciplinary actions, insurance, emergency data, separation, retirement, casualty, and any other personnel actions." AR 600-8-104, para. 1-6b(1).

that point, does Private Frasur get that message and try to turn things around? Nope. . . .

. . . .

. . . Private Frasur has some rehabilitative potential; he just needs some assistance with that process. Private Frasur has thus far failed to get that message, and we will be remiss in not helping him rehabilitate by getting that message through to him with additional time to reflect on these offenses.⁴

Appellant presented a relatively strong case in extenuation and mitigation. Details of appellant's childhood difficulties, as well as a diagnosis of [REDACTED], were described in a stipulation of expected testimony from appellant's adoptive mother. These difficulties were further expanded on during appellant's unsworn statement: appellant "grew up around drugs, being beaten, being abandoned, and, on top of that, being poor." Appellant stated his biological mother was addicted to drugs, which resulted in her "selling [his] sister for a bottle of pills." Appellant described having to live in homeless shelters and a trailer without power and hot water. Appellant described being beaten up by his mother's boyfriends as a child and being abandoned for days, or sometimes up to a week at a time.

Both appellant's former First Sergeant, 1SG RT, and the stipulation of expected testimony of appellant's adoptive mother stated appellant was "a good person" who had "a good heart." Appellant's wife testified when she found out she was pregnant appellant was supportive and excited to be a father. First Sergeant RT testified appellant had some capacity to contribute to society and apply himself outside the military. The stipulation of expected testimony stated appellant's adoptive mother would support him when he was discharged from the Army. Appellant stated during his unsworn that he was remorseful for his actions and intended to get a job to support his family when he was released from confinement.

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 false official statement and larceny, among other offenses, which contained one of the same types of misconduct of which appellant was convicted. Repeated acts of similar misconduct within less than two years of each other is certainly aggravating

⁴ The government's other presentencing evidence consisted of photographs of appellant in his barracks building (Prosecution Exhibit 2), a picture of a broken barracks window screen (Prosecution Exhibit 3), appellant's enlisted record brief (Prosecution Exhibit 4), and testimony from one of appellant's former First Sergeants, SFC RH, stating appellant had low rehabilitative potential.

evidence that would impact appellant's sentence as evidenced by the adjudged sentence. The government requested appellant be sentenced to the maximum 120 days of confinement. The military judge sentenced appellant to 110 days of confinement, just ten days less than the sentence the government requested. The minimum sentence the military judge could impose in accordance with the plea agreement was zero days for each offense. 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, 12 (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 offenses of absence without leave, larceny, and communicating a threat 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 bad-conduct discharge and confinement for a total of 90 days as outlined in the decretal paragraph.

CONCLUSION

Upon consideration of the entire record, the findings of guilty are **AFFIRMED**. The bad conduct discharge and only so much of the sentence to confinement to run concurrently, as outlined below, is **AFFIRMED**.⁵

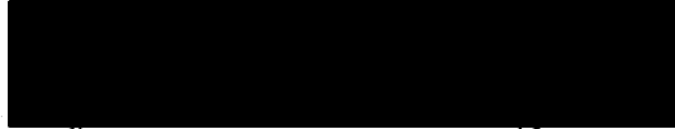
| | |
|--|---------|
| Absence Without Leave (Charge II, Specification 1) | 10 days |
| Absence Without Leave (Charge II, Specification 2) | 90 days |
| Larceny (Charge III, Specification 1) | 90 days |
| Communicating a Threat (Charge V, The Specification) | 10 days |

⁵ The Statement of Trial Results, as incorporated into the Judgment of the Court, is amended to reflect the response to block 29 as "Yes."

FRASUR—ARMY 20210420

Judge EWING and Judge PARKER concur.

FOR THE COURT:



JAMES W. HERRING, JR.
Clerk of Court