UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
WALKER, EWING, and PARKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Private E1 NOAH M. HOEFS
United States Army, Appellant

ARMY 20200558

Headquarters, 1st Cavalry Division
Maureen A. Kohn, Military Judge
Colonel Howard T. Matthews, Jr., Staff Judge Advocate

For Appellant: Colonel Michael C. Freiss, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Christian E. DeLuke, JA; Major Alexander N. Li, JA (on brief).

For Appellee: Colonel Christopher Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Pamela L. Jones, JA (on brief).

11 July 2022

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

EWING, Judge:

The government disclosed appellant's videotaped statement on the eve of trial and months after arraignment. *See* Military Rule of Evidence [Mil. R. Evid.] 304(d) (requiring disclosure of such statements "[b]efore arraignment"). Based on this admittedly late disclosure, appellant moved the military judge to dismiss a related assault specification, or, in the alternative, suppress appellant's videotaped statement and two derivative written statements. The military judge suppressed both the videotaped and written statements. In this court, appellant contends that the military judge's ruling constituted an abuse of discretion because she did not dismiss the assault specification. We disagree, and hold that the military judge's suppression ruling fell comfortably within her zone of discretion and addressed any

prejudice to appellant resulting from the late disclosure. We therefore reject appellant's claim and affirm.[1]

BACKGROUND

A. The Charges

In March 2019, appellant was a [redacted]-year-old tank crewman assigned to the 1st Cavalry Division at Fort Hood, Texas. Appellant was living in on-post family housing with his wife, who was eight months' pregnant with the couple's second child, and the couple's [redacted]-year-old daughter. On a Friday evening that March, appellant took the family's only car to an on-base cookout with fellow soldiers, leaving his wife at home with their daughter. Appellant "appeared drunk" when he arrived back at the residence around 2300 hours that evening. Following a disagreement involving appellant's cell phone, appellant stood over his wife while she sat on the couch, put his hands around her neck, and strangled her. Appellant increased the pressure on his wife's neck as he yelled that she needed to "know [her] place" and "not question him as a man." Appellant's wife testified that appellant strangled her for approximately thirty seconds, and released her only when she attempted to kick him in the "privates."

While appellant was pending investigation for assaulting his wife, he: (1) tested positive for marijuana; (2) violated his division commander's "shelter-in-place" general order related to COVID-19 by traveling from Fort Hood to Ohio; and, (3) remained in Ohio for over thirty days without leave until authorities arrested him on a deserter warrant. The government placed appellant in pretrial confinement upon his return to Fort Hood, and ultimately charged him with one specification of assault consummated by battery of a spouse, one specification of wrongful use of marijuana, one specification of desertion terminated by apprehension, and one specification of violating a lawful general order, in violation of Articles 128, 112a, 85, and 92, Uniform Code of Military Justice, 10 U.S.C. §§ 928, 912a, 885, and 892 [UCMJ].

B. The Late Disclosure Litigation

In March 2020, months before trial and in the due course of discovery, the government disclosed to appellant's defense counsel the following: a videotaped statement appellant provided to the U.S. Army Criminal Investigation Command ("CID") on 24 March 2019, a handwritten statement appellant provided CID on 12 April 2019, and a typewritten sworn statement in "question and answer" format that

[1] We have given full consideration to appellant's other two assignments of error related to post-trial delay and factual sufficiency and find them to be without merit.

appellant also provided to CID on 12 April 2019. Appellant denied strangling his wife during the 24 March videotaped statement, but later admitted in the two 12 April written statements that he "reacted by grabbing her by the neck" (the handwritten statement) and strangled her for "[a]round three seconds" (the typewritten statement).

Three days before trial in September 2020, the trial counsel disclosed to appellant's defense counsel that he had just learned that appellant had provided a second two-hour videotaped statement to CID on 12 April 2019 as a precursor to his two written statements on that same day. The government further advised appellant's counsel that CID would allow counsel to review the statement at the CID office during business hours, but that CID would require a court order to release a copy of the statement. Appellant's counsel promptly moved the military judge to compel production of the video; trial counsel did not oppose this motion, and the next day—two days before trial—the military judge ordered CID to produce the video to the defense. Appellant's counsel finally received the video around noon on the day before trial. [2]

Based on the late disclosure, appellant filed a written motion requesting that the military judge either dismiss the assault specification, or "[i]n the alternative," suppress appellant's two 12 April 2019 statements. Appellant argued that the CID agent's conduct depicted in the video that led to appellant's written statements was "highly relevant to [the] defense's ability to move to suppress" appellant's incriminating written statements. At a pretrial hearing on the issue, appellant further explained that while the defense team included a false-confession expert who had traveled from out of town and was present to testify, the expert was unable to adequately synthesize and evaluate the import of the new videotaped statement in less than one day. Appellant did not desire a continuance due to his continuing pretrial confinement, where he had already served over five months, or what his counsel characterized as "approaching a reasonable amount" for the charged

[2] It is this court's understanding that CID's reluctance to release the 12 April 2019 videotaped interview stemmed from the fact that it was a so-called "pre-polygraph" interview. We stress that this CID-internal characterization of a *videotaped interview of the accused* is legally meaningless for the purposes of applying Military Rule of Evidence 304, or, for that matter, any other applicable discovery rules. That is to say, regardless of what CID calls it, *all* videotaped interviews of accused servicemembers conducted by law enforcement implicate the black letter of Rule 304(d), which is entitled "*Disclosure of Statements by the Accused and Derivative Evidence.*" As discussed in this opinion, CID's apparent failure to recognize this fact for nearly eighteen months led directly to the suppression of a confession in this case, and could result in even more stringent sanctions in future cases.

offenses. Appellant's counsel again requested dismissal of the assault specification, and said the following about the alternative remedy of suppression:

> Preventing the Government from putting on evidence derived from late disclosure is, at a minimum, the appropriate remedy. It would allow the victim to have her day in court and it would clean up this issue.

In response, the government conceded that the video was "properly discoverable" and "should have been provided prior to arraignment. . . ." The government further conceded that suppression of the video itself would be an appropriate remedy, but opposed suppression of the two written statements.

The military judge initially suppressed only the 12 April videotaped statement, and not the two written statements. Appellant requested reconsideration, and explained that the remedy was "essentially empty" to the defense. To this end, appellant presented testimony from its false confession expert, who indicated that the timing of the video's disclosure made it impossible for her to adequately address the impact of CID's questioning tactics on appellant vis-a-vis the voluntariness of the written statements before the start of trial. Based on this testimony and appellant's arguments, the military judge reconsidered her earlier suppression ruling and suppressed both the video and written statements. Appellant did not object to the military judge's final suppression ruling or request any additional relief.

C. Trial

After the late disclosure litigation, appellant entered mixed pleas to the charges, as follows: (1) assault—not guilty; (2) wrongful use of marijuana—guilty; (3) desertion terminated by apprehension—not guilty, but guilty of the lesser included offense of absence without leave (AWOL) terminated by apprehension; and, (4) violation of a lawful general order—not guilty. Following a *Care* inquiry for appellant's guilty pleas, the parties proceeded to a contested trial before the military judge alone on the remaining offenses.[3] Appellant's wife testified and described the assault as noted *supra*. The military judge ultimately found appellant guilty of all of the contested specifications with the exception of desertion, and sentenced appellant to an aggregate of 125 days of confinement and a bad-conduct discharge. As appellant had served 157 days of pretrial confinement at the time of sentencing, the sentence did not result in any additional confinement.

[3] *United States v. Care*, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (C.M.A. 1969)

LAW AND DISCUSSION

A. Standard of Review

We question whether appellant properly preserved his current claim for appellate review. After all, the military judge *granted* one of appellant's two requested remedies—suppression. Following the military judge's final suppression ruling, appellant did not object or claim that the ruling was inadequate. Rather, at trial, appellant characterized suppression as an "appropriate remedy." Appellant now argues in this court that this same remedy constituted an abuse of the trial court's discretion. On these facts, we could view appellant's current claim as either affirmatively waived or, relatedly, barred by the "invited error" doctrine. *See, e.g., United States v. Martin*, 75 M.J. 321, 325 (C.A.A.F. 2016) ("The invited error doctrine prevents a party from creating error and then taking advantage of a situation of his own making on appeal.") (cleaned up).

We ultimately do not reach the waiver question, because, as explained below, even giving appellant the benefit of the doubt that his dismissal request at trial preserved his current claim, the military judge's suppression ruling was not an abuse of discretion. *See United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015) (applying abuse of discretion standard to claim that the military judge's remedy for a discovery violation was in error). An abuse of discretion "calls for more than a mere difference of opinion," but instead occurs when the military judge's "findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *Id.* (cleaned up).

B. The Military Judge Did Not Abuse Her Discretion

As this case comes to this court, the government has conceded both in the trial court and in this court that its late disclosure of appellant's videotaped statement violated Mil. R. Evid. 304(d). We therefore turn directly to the question of whether the military judge's chosen remedy of suppression constituted an abuse of discretion. We hold that the military judge here did not find any clearly erroneous facts, and was not influenced by an erroneous view of the law. *Stellato*, 74 M.J. at 480. Moreover, we find that the military judge's suppression ruling fell within the "range of choices reasonably arising" from the facts and the law in this situation, because the ruling adequately addressed and cured the prejudice stemming from the government's late disclosure. *Id.*

Appellant's main submission at trial was that the late-disclosed video provided evidence of CID's coercive interrogation techniques that could have assisted appellant in suppressing his two incriminating written statements. So, when

the military judge suppressed those statements and the video itself, appellant received the best possible outcome of any future litigation after more time to prepare with the benefit of the video. Stated differently, the military judge gave appellant the very thing—suppression—that he claimed the video could have assisted him in achieving had the government disclosed it in a timely manner. This is why appellant said (correctly) at trial that suppression would "clean up" the issue.

Nor was dismissal required here. Dismissal is a "'drastic remedy and courts must look to see whether alternative remedies are available.'" *United States v. Vargas*, 2022 CCA LEXIS 365, at *7-8 (Army Ct. Crim. App. 16 June 2022) (mem. op.) (quoting *Stellato*, 74 M.J. at 488) (citation omitted)). *See also Vargas*, 2022 CCA LEXIS 365, at *2, 7-12 (reversing a military judge's dismissal order in a case that also involved the government's late disclosure of an accused's statement).

Appellant points to three ways in which he alleges he suffered prejudice, but none requires dismissal. First, appellant contends that the late disclosure of the video affected his counsel's ability to present a defense, both in an overall sense and because counsel had to spend time on the eve of trial responding to the belated disclosure. But the military judge's suppression ruling blunted any tactical disadvantage that defense could have suffered—indeed, the ruling turned the late disclosure into a tactical *win* for the defense—and appellant has not shown that the trial would have had a different outcome but for his need to respond to this late-breaking issue.

Second, appellant seemingly claims that the government may have bargained away the assault specification had trial counsel known of the existence of the video. This is pure speculation, and belied by the fact that the government went forward with the assault specification even after the suppression ruling. Third, appellant claims that he suffered prejudice because the military judge, as fact-finder, was unduly influenced by her exposure to the 12 April statements during the pretrial litigation. This claim also rings hollow. The sifting of admissible and inadmissible evidence is routine to the judicial function, and the law recognizes that judges are "presumed to know the law and to follow it absent clear evidence to the contrary." *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007). Appellant could have, but did not, request to change his forum selection for the contested specifications from judge alone to panel. And finally, appellant did not so much as voir dire, much less challenge, the military judge at trial for what he now claims on appeal was an issue prejudicial to his case. *See United States v. Sanchez*, 81 M.J. 501, 506 (Army Ct. Crim. App. 2021) ("In criminal litigation, the trial is the 'main event,' and not 'simply a tryout on the road to appellate review.'") (quoting *Davila v. Davis*, 137 S. Ct. 2058, 2066 (2017)).

CONCLUSION

For the foregoing reasons we conclude that the military judge's suppression ruling was not an abuse of discretion.

Upon consideration of the entire record, the findings of guilty and the sentence are AFFIRMED.[4]

Senior Judge WALKER and Judge PARKER concur.

FOR THE COURT:

JAMES W. HERRING, JR.
Clerk of Court

---

[4] We note an error, albeit harmless, on the Staff Judge Advocate's ("SJA") post-trial clemency advice to the Convening Authority ("CA"). Specifically, the SJA's clemency advice informed the CA that appellant had not submitted matters for the CA's review. This was in error, as the Record of Trial includes written matters from appellant to the CA, including a four-page memorandum from his defense counsel (noting, *inter alia*, the discovery issue we address here), several letters from family members, and certain trial-related exhibits. Appellant's matters are dated before the SJA's clemency advice and the CA's ultimate "no action" document. Based on this chronology and the SJA's erroneous clemency advice we must presume that the CA did not see appellant's post-trial matters.

In such a situation we would normally remand for a new CA's action. However, pursuant to Article 60a, UCMJ, the CA could not have provided appellant with any meaningful relief on the specific facts of this case. The military judge sentenced appellant to an aggregate of 125 days of confinement and a bad-conduct discharge. Article 60a(b)(1)(B) prohibited the CA from providing any relief related to appellant's punitive discharge. While Article 60a(b)(1)(A) would normally allow the CA to grant appellant confinement relief because appellant's sentence was less than six months in duration, this would not be meaningful here, as at sentencing appellant had already served his entire sentence to confinement in pretrial confinement in a "pay" status, and thus any retroactive confinement credit would provide appellant with no additional benefit.