UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
COOK, TELLITOCCI, and HAIGHT
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant BRENT A. BURKE
United States Army, Appellant

ARMY 20120448

Headquarters, 101st Airborne Division and Fort Campbell
Timothy Grammel, Military Judge
Colonel Jeff A. Bovarnick, Staff Judge Advocate

For Appellant: Captain Ryan T. Yoder, JA (argued); Colonel Kevin Boyle, JA; Lieutenant Colonel Peter Kageleiry, Jr., JA; Major Vincent T. Shuler, JA; Captain Brian J. Sullivan, JA (on brief).

For Appellee: Captain Benjamin W. Hogan (argued); Colonel John P. Carrell, JA; Lieutenant Colonel James L. Varley, JA; Major Steven J. Collins, JA; Captain Benjamin W. Hogan, JA (on brief).

26 February 2015

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

TELLITOCCI, Judge:

An officer panel sitting as a general court-martial convicted appellant, contrary to his pleas, of premeditated murder (two specifications), felony murder, burglary, child endangerment (three specifications), and obstruction of justice, in violation of Articles 118, 129, and 134, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 918, 929, 934. The panel sentenced appellant to a dishonorable discharge, confinement for life without the possibility of parole, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand. The convening authority approved the adjudged sentence and credited appellant with 1,676 days of confinement.

This case is before us for review pursuant to Article 66, UCMJ. Appellant raises three assignments of error. Two assignments of error warrant discussion and one merits relief.[1]

BACKGROUND

On the morning of 11 September 2007, the Kentucky State Police (KSP) responded to the scene of a multiple homicide in Rineyville, Kentucky. Rineyville is approximately a two-hour drive from Fort Campbell. At the scene were the dead bodies of TB (appellant's wife) and KC (TB's mother-in-law from a previous marriage), both killed by multiple gunshots. Also on the scene were TB's three minor children, aged nine, four, and two. One of the children informed first responders that the appellant was the shooter. This information was relayed to the KSP.

That afternoon, someone at the KSP called appellant's battalion commander informing him that appellant's wife and her ex-mother-in-law had been killed. The KSP requested that the command notify appellant and also informed the battalion commander that KSP officers were on their way to Fort Campbell to talk to appellant. Appellant's battalion commander ordered the company commander to make the notification of death. The company commander subsequently directed the company first sergeant to have appellant report to the battalion headquarters. The appellant, a military policeman, was conducting patrol duties on the installation when he was contacted by the desk sergeant and told to report back to the station, turn in his weapon, and prepare for other duties. The command was not notified that appellant was a suspect in the shootings.

When appellant arrived at the battalion conference room he was notified of the deaths and that both women were shot in the head. The company commander notified the chaplain and requested that he attend due to the stressful nature of the notification. After appellant was officially notified of the deaths, he then spent approximately one hour alone with the chaplain. It was not until after this notification that the company commander learned that the KSP were on their way to speak with appellant. Appellant was not questioned by any military personnel but was informed that the KSP were on their way and wished to speak with him. No restrictions were placed upon the appellant, nor was he ordered to stay in place or ordered to talk to the KSP.

[1] Appellant also personally raises issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), none of which merit discussion or relief.

Three KSP detectives arrived at Fort Campbell, two in plain clothes and one in KSP uniform. They neither requested nor received any investigative assistance from the Army. They met appellant in the battalion conference room; the detective in uniform did not enter the conference room.

At this time no one had informed appellant of his rights pursuant to Article 31, UCMJ, or *Miranda v. Arizona*, 384 U.S. 436 (1966). No military personnel other than appellant remained in the conference room during the subsequent discussions between appellant and the KSP detectives. The detectives and appellant remained in the conference room for approximately twenty-five minutes, then went out to appellant's car upon appellant's suggestion, and returned to the conference room. The plain clothes detectives also followed appellant back to his barracks room in a separate vehicle to gather his clothing and continue the dialogue. While the detectives interviewed appellant's roommate in the dayroom, appellant was left to his own devices and, in fact, made at least one phone call. Appellant was not searched, restrained, or otherwise restricted in his movements. He was not told he was free to go, but he was also not told the converse.

The interactions between the detectives and appellant totaled approximately three hours. Appellant made no admissions but did make some contradictory statements and provided other information that may have called his credibility into question and deepened the detectives' suspicions. The military judge denied appellant's motion to suppress audio recordings made during these interviews between appellant and the KSP detectives on 11 September 2007. The audio recording was played to the panel and a copy was provided for their review during deliberation. Also, government counsel argued during closing that the statements by appellant were absurd, incredible, and indicative of guilt.

I. 5TH AMENDMENT AND *MIRANDA* RIGHTS

In his first assignment of error, appellant alleges the military judge erred in not suppressing appellant's statements made to the KSP over the course of the day of 11 September 2007.[2] We review a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F.

[2] In his second assignment of error, appellant argues the KSP were required to provide warnings pursuant to Article 31, UCMJ. Appellant concedes that there is no evidence that the Army and the KSP were engaged in a joint investigation nor was there any evidence the KSP were acting as an instrumentality of the Army. *See United States v. Rodriguez*, 60 M.J. 239, 252 (C.A.A.F. 2004). Appellant requests this court extend existing law to require civilian investigators to provide Article 31 rights warnings to a military non-custodial suspect under the specific circumstances of this case. We so decline.

2004). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion." *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000). In reviewing the military judge's ruling on a motion to suppress, we consider the evidence in the light most favorable to the prevailing party. *Rodriguez*, 60 M.J. 246-47.

We will not disturb a military judge's findings of fact unless they are "clearly erroneous or unsupported by the record." *United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007). "However, we review *de novo* any conclusions of law supporting the suppression ruling, including: (1) whether someone is in custody for the purposes of *Miranda* warnings, *Thompson v. Keohane*, 516 U.S. 99, 112-13 (1995); or (2) whether a statement is involuntary, *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991); *United States v. Bubonics*, 45 M.J. 93, 94 (C.A.A.F. 1996)." *United States v. Chatfield*, 67 M.J. 432, 437 (C.A.A.F. 2009).

In *Thompson*, the Supreme Court held that the determination of whether a suspect is "'in custody,'" so as to entitle the suspect to *Miranda* warnings, presents "[t]wo discrete inquiries . . . : first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." 516 U.S. at 112 (internal footnote omitted). The first inquiry is "distinctly factual," and the "[lower] court['s] findings on these scene- and action-setting questions" are entitled to a presumption of correctness. *Id*. "The second inquiry, however, calls for application of the controlling legal standard to the historical facts . . . . [and thus] presents a 'mixed question of law and fact' qualifying for independent review" by the reviewing court." *Id*. at 112-13.

In *Chatfield* our superior court summarized the applicable test as follows:

> The Supreme Court has looked to several factors when determining whether a person has been restrained, including: (1) whether the person appeared for questioning voluntarily; (2) the location and atmosphere of the place in which questioning occurred, and (3) the length of the questioning. *See* [*Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)] (finding no custody when the appellant voluntarily went to the police station, where he was immediately told he was not under arrest, and left after a thirty-minute interview). In addition, the federal circuit courts of appeals have evaluated the circumstances of an interrogation based on a variety of factors, including "'the number of law enforcement officers present at the scene [and] the degree of physical restraint placed upon the suspect.'" *United States v. Mittel-Carey*, 493 F.3d 36, 39 (1st Cir. 2007) (quoting *United States v. Masse*, 816 F.2d

> 805, 809 (1st Cir. 1987) (finding custody where the appellant was physically restrained by eight officers in his home and questioned for ninety minutes to two hours).

67 M.J. 432, 438 (C.A.A.F. 2009).

"To be considered in custody for purposes of *Miranda*, a reasonable person in Appellant's position must have believed that he or she was restrained in a 'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" *Chatfield*, 67 M.J. at 438 (quoting *California v. Beheler*, 436 U.S. 1121, 1125 (1983)).

DISCUSSION

The military judge made substantial and detailed findings of fact regarding the circumstances surrounding the interrogation—the "scene and action setting questions." *Id.* The military judge's conclusions are supported by the record and are not clearly erroneous.

Custody

a. Voluntary Appearance

The military judge found, and we agree, that appellant was not compelled to remain in the conference room or to speak to the KSP. Appellant was told to go to the battalion conference room by his chain of command. Upon arrival, appellant was greeted by his company commander. The commander notified the chaplain and requested that he attend due to the stressful nature of the notification. Appellant was officially notified of the deaths by his commander, then spent approximately one hour alone with the chaplain. Appellant was also informed that the KSP were on their way and wanted to talk to him, and appellant had no objection to meeting with them. Appellant was not interrogated by his company commander or by any of his leadership. Appellant was not told by anyone that he was required to stay and speak with the KSP. Appellant participated in the dialogue, asking questions and volunteering information, such as the location of his divorce decree, even absent questions from the KSP. Appellant was not restrained in any way.

b. Location and Atmosphere of the Interview

This was not an interrogation room, though those were available in the same building. The room was large and had a conference table, chairs, and a window. The interview by the KSP took place in the room wherein appellant had been given condolences by his commanders, eaten a meal, and spent an hour talking with the chaplain. The interview moved from the conference room to the parking lot and back. Appellant and the KSP detectives then moved to appellant's barracks room, a

place with which the appellant was certainly familiar. Appellant's movements were not restricted and he moved to the barracks in a privately owned vehicle—separate from the KSP. He was allowed to roam freely and was able to make phone calls during interludes in the conversation. There were two plain clothes detectives present during most of the interview in the conference room and in the barracks room, but the doors were open and other persons could occasionally be observed in the hallways.

c. Length of the Questioning

The interview with the KSP lasted, *in toto*, approximately three hours. There were numerous breaks in conversation and changes of location during this time. Appellant was free to move about independently of the KSP and was able to make personal phone calls.

We agree with the military judge's findings that appellant was not in custody. The facts as a whole show that the KSP interview of appellant was free of the "inherently compelling pressures" with which the *Miranda* court was concerned. 384 U.S. at 467. The military judge concluded, and we agree, that in this case "considering all the circumstances, a reasonable person in [appellant's] position would have believed he was free to leave the battalion conference room and not talk to the KSP. The reasonable person would also have believed that he was free to leave his barracks room and not talk to the KSP."

Voluntariness

A statement admitted against an accused's interests must be "voluntary." *See Fulminante*, 499 U.S. 279; *Bubonics*, 45 M.J. 93. When introducing such a statement, the government has the burden of showing "the confession is the product of an essentially free and unconstrained choice by its maker." *Bubonics*, 45 M.J. at 95. While the statements introduced here do not amount to a confession, we will nonetheless apply this standard as the statements were ultimately presented as evidence against appellant. We review the totality of the circumstances to determine whether appellant's "will was overborne and his capacity for self-determination was critically impaired. . . ." *Id*. The factors to consider include "both the characteristics of the accused and the details of the interrogation." *Id*. (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)) (internal quotation marks omitted).

Our superior court has found it appropriate to consider the accused's age, education, experience, and intelligence as part of the circumstances bearing on the question of whether a statement was voluntary. *United States v. Freeman*, 65 M.J. 451, 454 (C.A.A.F. 2008). In this case, appellant was a 29-year old military police sergeant. Appellant had experience with investigating crimes and had received training on *Miranda* and Article 31, UCMJ. Appellant expressed his familiarity with

investigative processes during the interview with the KSP. There is no evidence in the record that appellant was of below average intelligence or had any mental disability to prevent him from understanding the investigative procedures. *See id.* Overall, appellant's characteristics weigh in favor of his statement being found voluntary.

We agree with the military judge that appellant's statements were voluntary and properly admitted into evidence. Because appellant was not in custody at any time, he was not entitled to receive warnings under *Miranda*. Further, the record demonstrates that appellant's statements were the product of his free will and thus voluntarily given.

II. MULTIPLICITY

Appellant, in his third assignment of error, contends that the felony murder charge (the Specification of Additional Charge I) is an unreasonable multiplication with respect to the murder charge for the same victim (Specification 2 of Charge I) and the burglary charge (the Specification of Additional Charge II).[3] Appellant requests that we set aside and dismiss the finding of guilty to the felony murder charge. Curiously, appellant then proceeds to discuss and argue multiplicity as the basis for the requested relief. The appellee, in its response to this assignment of error, notes the disconnect but concedes multiplicity of these offenses.

The test for multiplicity is whether each provision requires proof of an additional fact that the other does not. *United States v. Blockburger*, 284 U.S. 299 (1932); *United States v. Teters*, 37 M.J. 370, 377 (C.M.A. 1993). Here, felony murder is multiplicious with the underlying felony—in this case burglary—as the final element of felony murder (Article 118(4), UCMJ) is proof of the underlying burglary in its entirety. *See Manual for Courts-Martial, United States* (2008 ed.), pt. IV, ¶ 43.b.(4). Hence, if this court affirms the felony murder charge, we must dismiss the burglary charge. Conversely, this court could affirm the burglary and dismiss the felony murder charge. *United States v. Graves*, 47 M.J. 632, 637 (Army Ct. Crim. App. 1997) (*citing United States v. Dock*, 35 M.J. 627, 639 (A.C.M.R.

[3] Assignment of Error III reads as follows:

> The military judge erred in failing to dismiss the Specification of Additional Charge I as an unreasonable multiplication of charges with Specification 2 of Charge I and the Specification of Additional Charge.

1992), *aff'd on other grounds*, 40 M.J. 112 (C.M.A. 1994)).[4] Affirmance of the felony murder conviction would "leave appellant in the somewhat anomalous

---

[4] Appellant cites numerous cases in which this court and our superior court held that felony murder is not only multiplicious with the underlying felony but also with premeditated murder. *United States v. Hubbard*, 28 M.J. 27 (C.M.A. 1989); *United States v. Dodson*, 21 M.J. 237 (C.M.A. 1986); *United States v. Teeter*, 16 M.J. 68 (C.M.A. 1983) *Graves*, 47 M.J. 632.

The courts in *Graves* and *Dodson* rely directly upon the decision in *Teeter*. In *Teeter*, the Court of Military Appeals determined that although the elements of premeditated murder and felony murder were distinct sets,

> the homicide elements of felony-murder are included within premeditated murder, and of course the rape elements of felony-murder are the same as the separate rape charge. Indeed all of the elements of felony-murder, not surprisingly, appear to fall within the elements of either premeditated murder or rape. Therefore we hold that the felony-murder charge here is multiplicious with the other two offenses.

16 M.J. at 72.

In *Graves*, this court determined that both premeditated murder and felony murder were part of the same statutory provision and that therefore, the *Blockburger*/*Teters* test did not apply. 47 M.J. at 639. The court went on to apply the test established in *Teeter* which it described in a footnote as being "slightly different in . . . approach" to that set out in *Blockberger/Teters*, but that "both involve the matching of elements to determine whether the offenses being compared are multiplicious or separate for findings purposes." *Id.* at 639 n.2. The difference between these two tests is that, as opposed to comparing the elements between two separate specifications, the *Teeter* test compares elements of one charged offense (felony-murder) to the elements of multiple other offenses with which an accused has been charged.

This court is uncertain as to the validity of this holding in *Graves* and the applicability of the *Teeter* test, in light of subsequent developments in multiplicity and clarification of multiplicity's relationship with unreasonable multiplication of charges. *United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012) (stating "[W]e now explicitly hold that there is only one form of multiplicity, that which is aimed at the protection of double jeopardy as determined using the *Blockburger/Teters* analysis."); *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001). However, in light

(continued . . .)

position of being convicted of two separate murder charges for one slaying." *Teeter*, 16 M.J. at 72. This would also unnecessarily create a "unit of prosecution" issue. *See Bell v. United States*, 349 U.S. 81, 83 (1955).

III. UNREASONABLE MULTIPLICATION OF CHARGES

"What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." Rule for Courts-Martial 307(c)(4). We consider five factors to determine whether charges have been unreasonably multiplied:

> (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?;
>
> (2) Is each charge and specification aimed at distinctly separate criminal acts?;
>
> (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?;
>
> (4) Does the number of charges and specifications [unreasonably] increase [the] appellant's punitive exposure?; and
>
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001) (internal citation and quotation marks omitted).

After reviewing the five factors, we find that appellant suffered an unreasonable multiplication of charges. The premeditated murder charge in Specification 2 of Charge I sought to punish appellant for killing Ms. KDC, the same death for which he was also convicted under the Specification of Additional Charge I. Two murder convictions for a single victim misrepresents appellant's criminality. Factors two and three, therefore, favor the appellant. *See United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012) (noting one or more factors may be sufficiently compelling, without more, to warrant relief). Accordingly, we will dismiss the

---

(. . . continued)
of our application herein of the principle of unreasonable multiplication of charges, we will leave further discussion of this test for another day.

felony murder offense as an unreasonable multiplication of charges with the premeditated murder offense.

CONCLUSION

On consideration of the entire record and the assigned errors, the findings of guilty of Additional Charge I and its Specification are set aside and that charge and its specification are DISMISSED. The remaining findings of guilty are AFFIRMED.

We are able to reassess the sentence on the basis of the error noted and do so after conducting a thorough analysis of the totality of the circumstances presented by appellant's case, and in accordance with the principles articulated by our superior court in *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013) and *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986).

In evaluating the *Winckelmann* factors, we first find no dramatic change in the penalty landscape or exposure which might cause us pause in reassessing appellant's sentence; the accused faced a mandatory minimum life sentence for the remaining convictions. Additionally, the military judge determined that the felony murder charge was "multiplicious for sentencing" and instructed the panel accordingly. Second, appellant was sentenced by members, but because the remaining offenses are not based on customs of the service, this factor has less weight. Third, we find the nature of the remaining offenses captures the gravamen of the original specifications. Finally, based on our experience, we are familiar with the remaining offenses so that we may reliably determine what sentence would have been imposed at trial.

Reassessing the sentence based on the noted error and the entire record, we AFFIRM the approved sentence. We find this reassessed sentence is not only purged of any error but is also appropriate. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by this decision are ordered restored.

Senior Judge COOK and Judge HAIGHT concur.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court