

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
SIMS, COOK, and GALLAGHER
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant PAUL R. JASPER
United States Army, Appellant

ARMY 20100112

United States Army Aviation and Missile Command
James Pohl, Military Judge
Colonel Craig A. Meredith, Staff Judge Advocate

For Appellant: Captain Stephen J. Rueter, JA (argued); Colonel Mark Tellitocci, JA; Lieutenant Colonel Imogene M. Jamison, JA; Lieutenant Colonel Peter Kageleiry, Jr., JA; Captain Tiffany K. Dewell, JA (on brief); Major Jacob D. Bashore, JA
Captain Stephen J. Rueter, JA (reply brief).

For Appellee: Captain Bradley Endicott, JA (argued); Major Ellen S. Jennings, JA; Captain Michael J. Frank, JA (on brief).

13 July 2012

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

GALLAGHER, Judge:

A panel of officer and enlisted members, sitting as a general court-martial, convicted appellant, contrary to his pleas, of indecent conduct, indecent acts, knowingly possessing child pornography, persuasion and enticement of sexually explicit conduct, knowingly receiving child pornography, and obstruction of justice, in violation of Articles 120 and 134 of the Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934 (2006) [hereinafter UCMJ]. The panel sentenced appellant to a dishonorable discharge, confinement for twenty-three years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority [hereinafter CA] approved, only so much of the sentence as provided for a dishonorable discharge confinement for eighteen years, forfeiture of all pay and allowances, and reduction to the grade of E-1.

This case is before this court for review pursuant to Article 66, UCMJ. Appellant has raised four assignments of error; two of which merit discussion¹, but no relief.

FACTS

In 2007, BK, appellant's stepdaughter, and AJ, appellant's wife and BK's mother, met with Pastor Ellyson for spiritual counseling following the sexual contacts alleged in Specification 1 of Charge II and Specification 1 of The Additional Charge.

At trial, defense counsel moved to compel the production of Pastor Ellyson to testify regarding statements BK made while meeting with Pastor Ellyson in 2007. During the motion hearing, the parties proffered that Pastor Ellyson would testify essentially that in 2007 he spoke to BK about the charged offenses and BK "came back and said that she had made it all up at that time to get attention."

The government objected to producing Pastor Ellyson because they claimed his conversations with BK and AJ were privileged communications under Military Rule of Evidence [hereinafter Mil. R. Evid.] 503, communications to clergy. Appellant conceded the conversations were privileged but asserted that BK and AJ had waived the privilege when they gave Pastor Ellyson permission to speak about the 2007 counseling sessions.²

¹ Assignment of Error I:

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING DEFENSE'S MOTION TO COMPEL PRODUCTION OF PASTOR ELLYSON FINDING THE ALLEGED VICTIM'S COMMUNICATIONS TO PASTOR ELLYSON WERE PRIVILEGED UNDER M. R. E. 503, RESULTING IN A DENIAL OF APPELLANT'S SIXTH AMENDMENT RIGHT TO CROSS-EXAMINE WITNESSES AND PRESENT A DEFENSE.

Assignment of Error II:

WHETHER AN ARTICLE 134 CLAUSE 1 OR 2 SPECIFICATION THAT FAILS TO EXPRESSLY ALLEGE EITHER POTENTIAL TERMINAL ELEMENT STATES AN OFFENSE UNDER THE SUPREME COURT'S HOLDING IN UNITED STATES V. RESENDIZ-PONCE AND RUSSELL V. UNITED STATES, AND THE COURT OF APPEALS FOR THE ARMED FORCE'S RECENT OPINIONS IN MEDINA, MILLER, AND JONES.

² The specific colloquy between the military judge and appellant's trial defense counsel was:

MJ: Defense, let me ask you. Do you believe the privilege applies or doesn't apply?

DC: I think it does, Your Honor.

During pre-trial preparation, the trial counsel informed Pastor Ellyson that he needed to get consent from BK and her mother, AJ, before discussing the 2007 conversations. Pastor Ellyson contacted his attorney who also told him he needed consent from the parties involved before he could engage in discussions. Pastor Ellyson then called AJ to get permission. Pastor Ellyson asked AJ if he could talk to the trial counsel about what he recalled of their 2007 counseling sessions. He did not explain in any way the possible ramification of disclosure or that she held a privilege not to have him disclose the communications. AJ gave him permission. At the time AJ gave Pastor Ellyson permission to speak to the trial counsel, she was not aware she had a privilege allowing her to prevent Pastor Ellyson from disclosing any information from the counseling sessions.

BK was not home when Pastor Ellyson contacted AJ. Without ever speaking to Pastor Ellyson, BK subsequently called Pastor Ellyson and left a message on his answering machine giving permission for Pastor Ellyson to speak to the trial counsel about the 2007 counseling sessions. At the time BK left the message, she was unaware that she had a privilege allowing her to prevent Pastor Ellyson from disclosing any information from the counseling sessions.

At the time of the motion hearing, both AJ and BK had been informed that they had a privilege not to disclose the information from the 2007 counseling sessions. At the motion hearing, both AJ and BK asserted their privilege to prevent Pastor Ellyson from being a witness or disclosing information from the 2007 conversations.

After hearing the testimony of Pastor Ellyson, AJ and BK, appellant stated that he did not see any evidence of a waiver. The military judge agreed there had not been a waiver of the privilege. He found that both AJ and BK asserted their privilege and "... any testimony of what they said to Pastor Ellyson in the course of his clergy duties is privileged." Accordingly, the military judge denied the defense motion to compel production of Pastor Ellyson.

MJ: Okay, so it's a question of whether it's waived or not waived?

DC: Yes, Your Honor.

MJ: Okay, so no dispute about that.

DC: No, Your Honor.

MJ: Do you believe it's been waived?

DC: Yes your honor.

(R. at 225)

MJ: Defense, at least as alleged earlier, you agree that they did the privilege. The question is whether it was waived or not?

DC: Yes, Your Honor.

(R. at 248)

LAW AND DISCUSSION

A military judge's decision to admit evidence or deny the admission of evidence is reviewed for an abuse of discretion. *United States v. Eslinger*, 70 M.J. 193, 197 (C.A.A.F. 2011).

Whether a communication is privileged is a mixed question of fact and law. *United States v. Shelton*, 64 M.J. 32, 37 (C.A.A.F. 2006). Giving deference to the military judge's findings of fact, we reverse "such findings only if they are clearly erroneous while we review the legal conclusions de novo." *Shelton*, at 37.

Pursuant to Mil. R. Evid. 510(a), a person waives the privilege when he or she "voluntarily discloses or consents to disclosure of any significant part of the matter or communication under circumstances that it would be inappropriate to allow the claim of privilege." The context of a disclosure is key to determining whether there has been a waiver. *See U.S. v. McElhaney*, 54 M.J. 120 (C.A.A.F. 2000). Voluntary disclosure applies where the speaker elects to share a substantial portion of a privileged communication with a party outside of the privileged relationship. *United States v. Custis*, 65 M.J. 366, 371 (C.A.A.F. 2007); (citing *United States v. McCollum*, 58 M.J. 323, 339 (C.A.A.F. 2003)). Military Rule of Evidence 511(a) provides that "[e]vidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if disclosure was compelled erroneously or was made without an opportunity for the holder of the privilege to claim the privilege."

At trial, appellant affirmatively waived any issue as to the applicability of the clergy privilege to the communications BK made to Pastor Ellyson. *See United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008). Thus, the only issue before this court is whether or not the military judge abused his discretion in finding the privilege had not been waived based on the evidence presented.

The military judge did not abuse his discretion in ruling that neither BK nor AJ had waived their privilege to preclude disclosure of BK's communications to Pastor Ellyson. The alleged waiver in this case germinates from the trial counsel's pretrial preparation, yet no one informed AJ nor BK that they had a right to maintain the confidentiality of BK's communications with Pastor Ellyson in the court-martial process. Additionally, AJ and BK both believed that the disclosure was limited to the trial counsel, which although not asserted as a privileged communication, certainly does not demonstrate a knowing intent to make the information public. Neither AJ nor BK voluntarily consented "to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege." Mil. R. Evid. 510(a).

Failure to Allege Terminal Elements

Appellant also alleges that Specification 1 of Charge II (indecent acts with a child) and Specification 2 of The Additional Charge (obstruction of justice) are defective and should be set aside in that they do not expressly allege either that the charged conduct was prejudicial to good order and discipline or service discrediting.³ Although not raised by appellant, we note that Specification 1 of The Additional Charge suffers the same deficiency. Based on the deficiencies in the specifications, we review for prejudice. *See United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012); *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012) and *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). However under the facts of this case we find no reason to set them aside as there was no prejudice to appellant under the facts of this case.

Although the government neither alleged the terminal elements in the charging documents, nor addressed them in opening argument, the trial counsel did expressly attempt to prove that appellant's conduct was service discrediting early in the trial. In conducting direct examination of the second government witness and mother of the victim, AJ, trial counsel attempted to elicit her opinion that appellant's conduct was service discrediting. The defense counsel objected and the trial counsel ensured the defense team was on notice of the existence of the terminal element when the following colloquy occurred:

TC: Your Honor, one of the elements the government has to prove is service discrediting. I would think the witness' opinion ----

MJ: That's something the members can infer, that element. Opinion testimony on that by this witness or any witness, I don't believe is appropriate. Objection sustained.

This exchange occurred early in the government's "case-in-chief . . ." and "reasonably placed [appellant] on notice" as to the terminal element. *Humphries*, 71 M.J. at 219 (internal citations omitted). Furthermore, at no point following this

³ Prior to the entry of pleas, Additional Charge I was amended without objection from a violation of Article 120 to a violation of Article 134 and it was redesignated "The Additional Charge." At the same time, the Specification of Additional Charge II (obstruction of justice) was renumbered as Specification 2 of The Additional Charge. Although appellant's assignment of error refers to the obstruction of justice specification as the Specification of The Additional Charge, we will refer to it as Specification 2 of the redesignated Additional Charge throughout this opinion.

exchange, did the trial defense counsel object to the form of the specifications nor did he make a motion to dismiss for failure to state an offense. Likewise, he voiced no objection to the military judge's instructing the panel as to the terminal elements in regard to the three specifications at issue.

Accordingly, after reviewing the record in its entirety we find that "under the totality of the circumstances in this case, the government's error in failing to expressly plead the terminal element of Article 134, UCMJ, resulted in [no] material prejudice to [appellant's] substantial, constitutional right to notice." *Id* at 217. (citing *United States v. Girouard*, 70 M.J. 5, 11-12 (C.A.A.F. 2011); *United States v. McMurrin*, 70 M.J. 15, 19-20 (C.A.A.F. 2011); *Fosler*, 70 M.J. at 229.

CONCLUSION

On consideration of the entire record, the submissions of the parties, and oral argument, we hold the findings of guilty and the sentence as approved by the convening authority correct in law and fact. We have also considered the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982) and find them to be without merit. Accordingly, the findings of guilty and the sentence are AFFIRMED.

Senior Judge SIMS and Judge COOK concur.



FOR THE COURT:

A handwritten signature in black ink, which appears to read "Malcolm H. Squires, Jr.", is written over a light blue horizontal line.

MALCOLM H. SQUIRES, JR.
Clerk of Court