IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
Staff Sergeant (E-6) **ALEX J. SECORD,** United States Army, Appellant	)	Crim. App. Dkt. No. 20210667 USCA Dkt. No. 24-0217/AR

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UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Granted Issues

I. WHERE THE GOVERNMENT SEIZED AND HELD APPELLANT'S PHONE PURSUANT TO A NARROW SEARCH AUTHORIZATION, BUT COULD NOT ACCESS THE DATA WITHOUT APPELLANT'S PASSCODE, WAS THE DATA WITHIN THE POSSESSION, CUSTODY, OR CONTROL OF MILITARY AUTHORITIES FOR PURPOSES OF R.C.M. 701?

II. DID THE MILITARY JUDGE ERR BY RULING APPELLANT COULD NOT ACCESS THE DATA WITHOUT SIMULTANEOUSLY PROVIDING THE GOVERNMENT WITH FULL ACCESS TO ALL HIS PERSONAL DATA?

III. IF THE MILITARY JUDGE ERRED, DID THE ERROR CONSTITUTE PREJUDICIAL ERROR?

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [UCMJ]; 10

U.S.C. § 866 (2018). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (a)(3) (2018).

Statement of the Case

On 17 December 2021, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of five specifications of wrongful use of a controlled substance (cocaine), in violation of Article 112a, 10 U.S.C. § 912a (2018) [UCMJ], and one specification of violation of a lawful general regulation (Army Regulation 600-20), in violation of Article 92, 10 U.S.C. § 892 (2018). (JA at 222).[1] On 18 December 2021, the enlisted panel sentenced appellant to confinement for 85 days, to be reprimanded, to be reduced to the grade of E-2, and to a bad-conduct discharge. (JA at 223). On 2 February 2022, the convening authority approved the waiver of automatic forfeitures and otherwise took no action on the findings and adjudged sentence. (JA at 260). The military judge entered judgment on 8 February 2022. (JA at 261). On June 26, 2024. The Army Court affirmed the findings and sentence. (JA at 2-9).

Statement of Facts

MB, a junior enlisted soldier in the Army at the time, first met appellant on

[1] Appellant was acquitted of two specifications of wrongful possession of a controlled substance with intent to distribute, two additional specifications of wrongful use of a controlled substance, and one specification of aggravated assault with a dangerous weapon in violation of Articles 112a and 128 UCMJ.

deployment to Afghanistan in 2019. (JA at 67). Appellant worked as the NCOIC on the same shift as MB at Camp Pittman in Afghanistan. (JA at 67). Upon her return from Afghanistan, MB and appellant worked at the same unit at Fort Liberty. (JA at 68). Appellant and MB exchanged cell phone numbers after they were assigned to do group physical training (PT) together. (JA at 68).

Appellant provided cocaine to MB, and on multiple occasions, appellant and MB communicated via cell phone to facilitate appellant providing drugs to MB. (JA at 72-79). Appellant sold the cocaine to MB, and they consumed the drug on several occasions at her residence. (JA at 73-74).

On 18 September 2020, appellant's command conducted a probable cause urinalysis, based on appellant's misconduct of sleeping in a hooch with two female Soldiers and MB's allegation of his drug use, and appellant tested positive for cocaine. (JA at 182, 186, 198). On 16 March 2021, appellant's command conducted a one hundred percent urinalysis. and appellant again tested positive for cocaine. (JA at 183, 187). Additionally, MB and two other junior enlisted Soldiers testified to appellant's drug use while partying at MB's residence. (JA at 191).

Special Agents (SAs) from the U.S. Army Criminal Investigation Division investigated appellant's cocaine use and distribution. SAs lawfully seized appellant's cell phone pursuant to a search and seizure authorization. (JA at 232-235). The magistrate limited the authorization to messages and media pertaining to

wrongful use, possession, and distribution of cocaine, and was based off witness interviews that alleged appellant would use his phone to contact drug dealers and then pay for drugs with his phone via cash app or Apple Pay. (JA at 233). The Criminal Investigation Division could not extract any data from appellant's cell phone because it was passcode protected and the CID's extraction software was incompatible with the cell phone. (JA at 35, 246-247).

On August 13, 2021, defense counsel filed a motion to compel discovery, seeking equal opportunity to access appellant's phone, and for the defense's appointed digital forensic examiner to conduct an extraction of appellant's phone. (JA at 224-229). After reviewing several briefs and multiple arguments from both parties, the military judge ultimately granted the appellant's motion, in part, to inspect his cell phone and attempt to extract the data but ruled that the inspection must occur at the CID office with the CID DFE present. (JA at 51-52, 252-254). On December 3, 2021, appellant declined to utilize the military judge's "[offer of] a voluntary joint inspection, joint extraction." (JA at 57). Based on appellant's decision, neither appellant nor the government gained access to any data on appellant's seized cell phone.

The Army Court affirmed. (JA at 2-9). In its opinion, the Army Court determined:

> [R.C.M.] 701(a) and 701(b) appear to contemplate that the data in question is in the current physical "possession,

> custody, or control" (ie: capable of being immediately reviewed and in a format that it could be presented as an exhibit for identification at trial) of one of the parties at the time of the discovery request by the party not in possession.

(JA at 6). The Army Court concluded appellant's phone data was "not in the government's physical possession," and the military judge's ruling restricting appellant's discovery rights was not an abuse of discretion under R.C.M. 701(g)(1). (JA at 2-9).

Summary of the Argument

The data located in appellant's cell phone was not in the "possession, custody, or control of military authorities" as used in R.C.M. 701(a)(2)(A) because the government was unable to access the data. The phone itself was not "evidence" because, without the PIN, it was nothing more than an inert physical object that could provide no information to either side.

Appellant's framing of the decision of the military judge as one that forced appellant to choose between his right to access evidence that may assist in his defense and his constitutional right against self-incrimination misrepresents the decision. Nothing in the court's ruling compelled appellant to disclose his PIN to unlock his phone. However, once appellant opened the phone, the government had a right to access and view the responsive data on the phone pursuant to the magistrate's search authorization. The court's order granting appellant's motion to compel was proper to protect the evidence and preserve the parties' equal access to

evidence under R.C.M. 701(g)(1) and R.C.M. 701(e). Considering the evidence presented at the Court-martial and the ultimate sentence imposed, even if it was error to deny appellant's request to view the contents of his phone within the confines of confidentiality, the error was harmless beyond a reasonable doubt.

I. WHERE THE GOVERNMENT SEIZED AND HELD APPELLANT'S PHONE PURSUANT TO A NARROW SEARCH AUTHORIZATION, BUT COULD NOT ACCESS THE DATA WITHOUT APPELLANT'S PASSCODE, WAS THE DATA WITHIN THE POSSESSION, CUSTODY, OR CONTROL OF MILITARY AUTHORITIES FOR PURPOSES OF R.C.M. 701?

Standard of Review

Questions of statutory interpretation to include the interpretation of provisions of the Rules for Courts-Martial (R.C.M.) are questions of law this Court reviews de novo. *H.V.Z. v. United States*, __M.J. __, 2024 CAAF LEXIS 410 (C.A.A.F. July 18, 2024).

Law

"[T]he trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Article 46(a), UCMJ. Rule 701 of the Rules for Courts-Martial (R.C.M.) requires the government, upon defense request, to permit the inspection of any "data" or "tangible objects . . . within the possession, custody, or control of military authorities" that was "obtained from or

belongs to the accused." R.C.M. 701(a)(2)(A)(iv). Further, R.C.M. 701(e) states that "[e]ach party shall have . . . equal opportunity to interview witnesses and inspect evidence," and that "[n]o party may unreasonably impede the access of another party to a witness or evidence." R.C.M. 701(e); *see also* R.C.M. 703(a) ("The prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence . . . ."). Finally, Rule 701(g) provides, "The military judge may, consistent with this rule, specify the time, place, and manner of making discovery and may prescribe such terms and conditions as are just." R.C.M. 701(g)(1).

Argument

The defense's request was twofold: 1. To access the cellphone, which was the container of the evidence, and 2. to extract the cellphone's data. In this case, R.C.M 701(a)(2)(A) would only apply to data that is within the "possession, custody, or control of military authorities." Since, without entry of the PIN, the data in appellant's cellphone was not in the physical possession, custody, or control of military authorities the government could not provide it to defense. *See United States v. Mitchell*, 76 M.J. 413 (C.A.A.F. 2017) (distinguishing between "the contents of Appellee's phone," which in that case were inadmissible, and "Appellee's physical iPhone," which should not have been suppressed).

The phone itself was not the "evidence" defense wanted to inspect rather, it

was nothing more than an inert physical object that could provide no information to either side. "Evidence" is defined by *Black's Law Dictionary* as "[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or nonexistence of a fact." *Evidence*, Black's Law Dictionary (2019); *see also Burden v. Shinseki*, 727 F.3d 1161, 1167 (Fed. Cir. 2013), Robinette v. Brown, 8 Vet.App. 69, 78 (1995) (both relying upon Black's Law Dictionary's definition for evidence). "Relevant evidence" is evidence that "has any tendency to make a fact more or less probable than it would be without the evidence." Military Rule of Evidence [Mil. R. Evid.] 401(a).

A locked iPhone fits neither of these definitions in this context; instead, it is nothing more than a tangible object that may contain relevant evidence, not—in this case—relevant evidence itself. *See United States v. Mitchell*, 76 M.J. 413, 420 (C.A.A.F. 2017). The actual request involved here was for the data contained on appellant's phone, something that the government lacked access to. Unlike the factual scenarios in *Stellato*, *Rhea*, *Roberts*, and *Coleman*, the data was not in the military authorities' control. *United States v. Stellato*, 74 M.J. 473 (C.A.A.F. (2015). *United States v. Rhea*, 33 M.J. 413 (C.M.A. 1991). *United States v. Roberts*, 59 M.J. 323 (C.A.A.F. 2004); *United States v. Coleman*, 72 M.J. 184 (C.A.A.F. 2013). For example, in *Stellato*, the mother kept a box of evidence

relating to her daughter's sexual assault. She was willing to allow the government to access the evidence in the box and the government failed to do so. *Stellato*, 74 M.J. 473. The cellphone in this case is analogous to the box in *Stellato*, however, in this case, the accused did not allow military authorities to exercise control over the evidence inside the cellphone. *Stellato*, 74 M.J. 473, 484. Therefore, the military judge did not error when he ruled that the government did not have access to the phone. (JA at 39).

II. DID THE MILITARY JUDGE ERR BY RULING APPELLANT COULD NOT ACCESS THE DATA WITHOUT SIMULTANEOUSLY PROVIDING THE GOVERNMENT WITH FULL ACCESS TO ALL HIS PERSONAL DATA?

Standard of Review

This court reviews a military judge's ruling on a motion to compel discovery for an abuse of discretion. *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004) (citation omitted). "An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous or if the court's decision is influenced by an erroneous view of the law." *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (quoting *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008). This "standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000)

(internal quotation marks and citations omitted). "[T]he abuse of discretion standard of review recognizes that a judge has a range of choices and [a military judge's decision] will not be reversed so long as the decision remains within that range." *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004) (citation omitted). "When judicial action is taken in a discretionary matter, such action cannot [*sic*] be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of the relevant factors." *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010) (quoting *United States v. Sanchez*, 65 M.J. 145, 148 (C.A.A.F. 2007).

Law and Argument

Appellant's framing of the decision of the military judge as one that forced appellant to choose between his right to access evidence that may assist in his defense and his constitutional right against self-incrimination misrepresents the decision. Nothing in the court's ruling compelled appellant to disclose his PIN to unlock his phone. The military judge's ruling was based in response to appellant's motion to compel stating that "appellant was entitled to an equal opportunity to examine the device" under R.C.M. 701(e). (JA at 227-228).

The court's order granting appellant's motion to compel simply translated the dual obligations of R.C.M. 701(a) and R.C.M. 701(e). *See United States v.*

Rhea, 33 M.J. 413, 418 (C.M.A. 1991) ("Since, certainly under the circumstances of this case, disclosure was required by law, defense counsel acted in full comportment with their ethical obligation to disclose the calendar [found within a box that belonged to the client] to the military judge. Of course, the military judge was correct in ordering its disclosure to the prosecution.").

Once appellant had access to the phone, the government was legally allowed to access and view the responsive data on the phone pursuant to the magistrate's search authorization. The military judge did not err when he stated, "there must be equal access to evidence… and equal and simultaneous access to the data and information that is extracted." (JA at 39-40). Nor did he err when he required the defense forensic expert to "do so in concert with the government's forensic expert" because no provision of law would allow appellant to re-lock the unlocked phone and deny the government access to its contents while the government had a valid warrant to search the phone. The military judge's ruling allowed equal access to what the government was legally entitled to. Additionally, appellant has offered no viable legal theory that would permit him to withhold evidence contained on his phone once he and his legal team accessed it.

Appellant makes no claim that the data on the phone itself is protected by the attorney–client privilege or the Fifth Amendment privilege against compelled testimonial incrimination, nor could he. The Fifth Amendment protects appellant

from being compelled to disclose the PIN that would unlock his phone. *Mitchell*, 76 M.J. at 418 ("[A]sking appellee to state his passcode involves more than a mere consent to search; it asks appellee to provide the Government with the passcode itself, which is incriminating information in the Fifth Amendment sense, and thus privileged."). There was no such compulsion here. Instead, the military judge simply stated that, were appellant to choose to share his PIN with his DFE for the purposes of accessing the data on his phone, the obligations of appellant under Rule 701(e) would require that the government be given an "equal opportunity" to "inspect [that] evidence," pursuant to the magistrate's authorization, with certain time, place, and manner restrictions being imposed to ensure the data was preserved. Any notion that the contents of the phone would be protected under the lawyer–client privilege set forth in M.R.E. 502 is entirely foreclosed by the decision in *United States v. Rhea*, 33 M.J. 413 (C.M.A. 1991) ("The calendar itself was not a 'communication' of any form between Rhea and defense counsel.").

In addition to ensuring that the government had an equal opportunity to inspect and extract the evidence contained on the phone, the military judge's order also was essential to preserving the integrity of that evidence for this case and ongoing investigations. As the government stated at the hearing on the motion to compel, "our purpose in maintaining sole custody and control of the phone is to maintain the phone's evidentiary value for use and further prosecution of other

individuals both known and unknown to the government, who may have conducted dealings with [appellant]." (JA at 36). In the interest of justice, the military judge was correct because every time data evidence is accessed, it could become compromised.

Under R.C.M. 701(g), the military judge may "specify the time, place, and manner of making discovery and may prescribe such terms and conditions as are just." R.C.M. 701(g). Permitting appellant and his legal team to conduct an *ex parte* inspection of his phone would open the door to the risk of spoliation of evidence as well as introduce chain-of-custody concerns that could form the basis for credibility challenges to the evidence if used against others in subsequent trials. Requiring appellant's DFE to access the phone at CID and in the presence of the government was a time, place, and manner restriction that was justified under such circumstances.

Given the strictures of R.C.M. 701 with respect to the government's entitlement to equal access to the data contained on appellant's phone if he chose to make that data available to his legal team, any effort to characterize the military judge's decision here as an abuse of discretion is unreasonable. Although another judge or this court might have set different conditions for appellant's review of the data on his phone, such a "mere difference of opinion" cannot form the basis for overturning the military judge's decision. *McElhaney*, 54 M.J. at 130. No error of

law or erroneous factual findings have been identified and the conditions that the military judge imposed were well within the range of choices available to him under the circumstances. *Gore*, 60 M.J. at 187. As such, the military judge's decision should not be set aside by this court.

III. IF THE MILITARY JUDGE ERRED, DID THE ERROR CONSTITUTE PREJUDICIAL ERROR?

Standard of Review

"Where an appellant demonstrates that the government failed to disclose discoverable evidence in response to a specific request the appellant will be entitled to relief, unless the government can show that nondisclosure was harmless beyond a reasonable doubt." *United States v. Cano*, 61 M.J. 74 (C.A.A.F. 2005). Under Article 59(a), UCMJ, a "finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." 10 U.S.C. § 859(a) (2018).

Law and Argument

Were this court to determine that the military judge did abuse his discretion, it would have to leave appellant's conviction undisturbed because any such error was harmless. Constitutional errors are reviewed for harmlessness beyond a reasonable doubt. *United States v. Paige*, 67 M.J. 442, 449 (C.A.A.F. 2009). The test is: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *Neder v. United States*, 527 U.S. 1, 18

(1999). "Harmless-error analysis necessarily requires review of the entire record." *Loving v. Hart*, 47 M.J. 438 (C.A.A.F. 1998).

Reviewing the entire record shows that the evidence supported appellant's conviction beyond any reasonable doubt and there is no basis for supposing that information contained on appellant's phone would have undermined the evidence presented at trial. The government charged appellant—and a panel found him guilty— of five specifications of wrongfully using cocaine and one specification of violation of a lawful general regulation, AR 600-20, by wrongfully creating an actual or clearly predictable perception of undue familiarity between a noncommissioned officer and a junior enlisted soldier (fraternization). (JA at 10).

Appellant is guilty beyond a reasonable doubt of the drug-related charges. Multiple people testified that they witnessed appellant using cocaine during the time periods indicated in Specifications 5, 6, and 7 of Charge II. (JA at 66-79, 132-141). Appellant obtained and provided cocaine to MB in exchange for $100. (JA at 89). Furthermore, the results of the urinalysis performed on appellant on 18 September 2020 and on 16 March 2021 showed that appellant tested positive for cocaine. (JA at 186-189).

Appellant's claim that his phone *could have* demonstrated that appellant was in a different location than alleged by the government's cast of characters on the charged dates, *could have* further impeached their credibility in other regards, or

could have provided alternative explanations for the supposed payment records relating to the drugs was not argued at the court-martial and has no basis in fact. (App. Brief at 16) (emphasis added). Appellant did not present a specific showing that exculpatory, or even relevant, evidence was on his phone and has yet to do so. Additionally, the military judge allowed appellant to access his phone; he chose not to do so.

Even if the credibility of the three witnesses to appellant's wrongful drug use could have been undermined by information contained on appellant's phone, appellant makes no suggestion that the phone contained information that would counter or undermine the urinalysis results. For those two specifications alone, appellant would have been subject to a total maximum confinement period of 10 years and a dishonorable discharge; appellant was sentenced to only 85 days of confinement and a bad-conduct discharge. (Statement of Trial Results).

Regarding the fraternization charge, MB's testified that appellant abused illegal drugs on multiple occasions with her—while her rank was a private and he was a staff sergeant. Additionally, BA testified appellant attended a 14 August 2020 cocaine party in the barracks when she was a private first class. This provided ample evidence for the panel's finding and sentence with respect to this charge. (JA at 108). Indeed, appellant makes no attempt to suggest in his brief that any information on the phone would have contradicted or undermined the strength of

the evidence for the fraternization charge.

In light of this evidence and the ultimate sentence imposed, even if it was error to deny appellant's request to view the contents of his phone within the confines of confidentiality, the error was harmless beyond a reasonable doubt.

Conclusion

WHEREFORE, the government respectfully requests this Honorable Court affirm the findings and sentence.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(b) and 37

1. This brief complies with the type-volume limitation of Rule 24(b)(1) because it contains no more than 14,000 words, nor does it contain more than 1,300 lines of text.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that the original was electronically filed to efiling@armfor.uscourts.gov on 6 December 2024 and electronically filed to Defense Appellate on December 6, 2024.

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