24 February 2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	REPLY TO APPELLEE'S ANSWER
v.	)	
	)	Crim. App. No. 39397
Staff Sergeant (E-5), JASON M. BLACKBURN, USAF, *Appellant.*	)	USCA Dkt. No. 20-0071/AF

UNITED STATES' REPLY TO APPELLEE'S ANSWER

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TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Pursuant to Rule 22(b)(3) of this Honorable Court's Rules of Practice and Procedure, the United States submits this reply to Appellee's answer concerning the certified issues.

ADDITIONAL ARGUMENT

I.

UNDER MIL. R. EVID. 311(D)(2)(A), APPELLEE WAIVED THE BASIS FOR SUPPRESSION UPON WHICH THE LOWER COURT GRANTED RELIEF.

A. Appellee's motion to suppress did not make a particularized objection that the affidavit was false or reckless to preserve the issue for appeal

Appellee contends that the lower court's basis for overturning the military judge's decision was based on his arguments at the trial level. (Appellee's Br. at 10-12.) But this argument is unsupported by AFCCA's opinion. At trial, Appellee never argued that the government's affidavit was reckless or false. Indeed,

Appellee's trial defense counsel never used the words "reckless" or "false" during oral argument or in his written motion when referring to AFOSI's actions in this case.

While this Court has recognized that Leon allows an appellant to specifically object to the good-faith exception if "information in the affidavit is false or provided recklessly," United States v. Fogg, 52 M.J. 144, 151 (C.A.A.F. 1999) (citing Leon, 468 U.S. at 914), here, Appellee did not challenge the good faith exception on this ground. And "[u]nder Mil. R. Evid. 311(d)(2)(A), arguments for suppression of evidence under Mil. R. Evid. 311 that are not made at trial are waived." United States v. Perkins, 78 M.J. 381, 390 (C.A.A.F. 2019). Accordingly, Appellee's failure to make an argument that the affidavit was reckless or false waived the objection on appeal.

B. AFCCA's ruling was not pursuant to its plenary de novo power of review under Article 66(c)

In the alternative, Appellee invites this Court to consider AFCCA's decision to be an exercise of its "awesome, plenary, de novo power" to reach waived issues. (Appellee's Br. at 13.) However, the lower court's opinion demonstrates that its failure to apply the waiver doctrine in Appellee's case was not pursuant to this power. First, the court cited the abuse of discretion standard as the standard by which it would review the issue. (JA at 18.) Second, AFCCA did not cite Article 66(c) as a reason for refusing to apply waiver, which is the preferred practice.

Nerad, 69 M.J. at 147. Third, after again referring to the abuse of discretion standard, the lower court stated that it would only grant relief if Appellee could "show material prejudice to a substantial right" under Article 59(a), UCMJ, 10 U.S.C. § 859(a),[1] which is irrelevant when a service appellate court exercises its plenary authority under Article 66(c). United States v. Tardif, 57 M.J. 219, 220 (C.A.A.F. 2002) ("[W]e hold that the [CCAs'] authority to grant relief under Article 66(c) does not require a predicate holding under Article 59(a) that 'the error materially prejudices the substantial rights of the accused.'") Fourth, when motioned by the United States to reconsider its decision on the basis of waiver under Mil. R. Evid. 311(d)(2)(A), the Court elected not to clarify whether it used its plenary de novo power, which further demonstrates that its decision was not based on Article 66(c).

Further, Appellee's reliance on United States v. Claxton, 32 M.J. 159 (C.M.A. 1991) is misplaced. There, the lower court affirmatively stated that it was exercising its plenary power under Article 66. Id. at 162 (citing United States v. Claxton, 29 M.J. 1032, 1033 (C.G. Ct. Crim. App. 1990). Here, the lower court did not do so. In addition, this Court should not infer that AFCCA exercised its plenary Article 66(c) authority in light of the lower court recently showing that it will explicitly state when it has done so. *Cf.* United States v. Coppolla, 2019 CCA

[1] JA at 23.

LEXIS 510, *8 (A.F. Ct. Crim. App. 2019) (unpub. op.) ("[W]e have chosen to exercise our discretion under Article 66(c), UCMJ").[2]

In short, AFCCA's decision demonstrates that it did not intend to conduct a plenary review of the issue under Article 66(c). And given that a CCA decision made under its plenary Article 66(c) authority is still reviewable by this Court, Nerad, 69 M.J. at 147-48, it is incumbent upon the CCAs to articulate whether a decision draws from its plenary de novo power of review. This is important to allow this Court to determine by what standard to review a CCA's decision under Article 67. *See* Nerad, 69 M.J. at 147 (recognizing this Court still ensures a CCA reviews a case with a "correct view of the law" even if the CCA exercised its plenary review authority); United States v. Cole, 31 M.J. 270, 272 (C.M.A. 1990) (acknowledging "[t]his Court would be required to use an 'abuse of discretion' test should the military judge enjoy any discretion in his ruling."). Here, AFCCA demonstrably did not use its power under Article 66(c) to review the military judge's decision to deny the motion to suppress. Instead, it reviewed the decision for an abuse of discretion and ignored precedent and sound policy reasons to uphold the waiver doctrine. Therefore, the lower court erred in reaching the finding that TSgt DD's affidavit contained intentional or reckless falsehoods and

[2] In accordance with this Court's rules, this unpublished opinion may be found in the appendix to this brief.

using this finding as the basis to conclude the military judge abused his discretion in denying the motion to suppress.

WHEREFORE, the United States respectfully requests this Honorable Court find Appellee waived this issue and reverse AFCCA's decision.

II.

THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN DETERMINING THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE DID NOT APPLY.

A. TSgt DD did not make reckless misstatements to the military magistrate

Appellee asserts that AFOSI acted with a reckless disregard for the truth because AFOSI had no definitive evidence that he had recorded ES naked. (Appellee's Br. at 24-26.) However, as discussed in United States' initial brief, when reviewing "the evidence in the light most favorable to the prevailing party," United States v. Macomber, 67 M.J. 214, 219 (C.A.A.F. 2009) (internal quotation marks omitted) (citations omitted), AFOSI had sufficient evidence to support a conclusion that Appellee wanted to obtain images of ES naked, that he had attempted to do so, and that he had likely succeeded. (*See* Brief in Support of Certified Issues at 25-26.) Therefore, when reviewing the affidavit in a non-hypertechnical manner, it was not unreasonable to conclude that Appellee may have captured naked images of ES.

But even if this Court disagrees, AFOSI still did not act with a reckless disregard for the truth. Specifically, AFOSI did not tell the military magistrate that it knew ES had been captured in a state of total undress. In fact, TSgt DD's affidavit shows he accurately informed Colonel SAK that the camera was "recording [ES] *while she undressed to take a shower*." (JA at 72.) The affidavit coupled with the testimony at trial show that TSgt DD's statements to the military magistrate did not amount to a "deliberate falsehood or of [a] reckless disregard for the truth." Herring v. United States, 555 U.S. 135, 145 (2009). And given the other information known to AFOSI at that time, the fact that ES did not confirm the existence of nude recordings did not prevent law enforcement from concluding that Appellee had tried to record her nude. (Appellee's Br. at 25.) Nor did Appellee's innocent explanations meant to hide his intent to capture ES nude preclude AFOSI from determining a crime had been committed. District of Colombia v. Wesby, 138 S. Ct. 577, 592 (2018) ("[O]fficers are not required to take a suspect's innocent explanation at face value.") (citation omitted).

The information known to AFOSI was at least enough to support probable cause to believe that Appellee had attempted to commit an offense. It was undisputed that ES found Appellee's hidden video camera in the bathroom while recording and pointed towards the shower area where she was undressing. (JA at 72.) And it was also uncontroverted that ES then saw "an 11 minute long video of

[herself] in the bathroom." (Id.) Thus, it was reasonable for AFOSI to infer that Appellee had at least intended to record ES while nude. Wesby, 138 S. Ct. at 592 (recognizing that "officers can infer a suspect's guilty state of mind based solely on his conduct.")

More importantly, AFOSI was not required to know with absolute certainty that they would find images of ES nude. AFOSI was merely required to provide information that would allow the military magistrate to "believe that the search *may* reveal evidence of a crime," and not that the allegation was "'more likely true than false.'" United States v. Bethea, 61 M.J. 184, 187 (C.A.A.F. 2005) (quoting Texas v. Brown, 460 U.S. 730, 742 (1983)) (emphasis added). To require more would go beyond what the law requires for probable cause. TSgt DD was not required to have "evidence that ES had been recorded naked" before seeking search authorization. It was enough that TSgt DD established a fair probability that Appellee had at least attempted to record ES naked and that evidence thereof would be found on his electronic media. Therefore, TSgt DD's statements did not amount to a reckless disregard for the truth.

B. Whether AFOSI knew Appellee owned computers is relevant when analyzing whether law enforcement acted in good faith

Appellee contends that AFOSI and TSgt DD's knowledge that Appellee owned computer and electronic equipment "cannot be considered when determining whether the good faith exception applies" and cites the Fourth Circuit

Court of Appeals in support. (Appellee's Br. at 26.) However, that court recently held that law enforcement's knowledge of information not presented to a magistrate may be considered when determining whether it acted in good faith. United States v. Thomas, 908 F.3d 68 (4th Cir. 2018). In Thomas, a law enforcement officer investigating the appellant applied for a search warrant via an affidavit that inadvertently omitted facts that would have linked the appellant's phone to suspected sexual abuse of minors. Id. at 71. Despite the omission, the magistrate issued a search warrant for the appellant's phone where evidence of his offenses were later found. Id. On appeal, the appellant argued that the law enforcement officer's affidavit presented to the magistrate "was so 'lacking in indicia of probable cause' that [the officer] could not reasonably have relied on the warrant." Id. at 72. The government responded that "even if [the officer]'s affidavit was obviously deficient in establishing probable cause … [he] reasonably believed in the existence of probable cause based on his own knowledge of the investigation." Id. at 72-73.

The Fourth Circuit Court of Appeals held that Leon's good faith exception to the exclusionary rule applied and affirmed the conviction. Id. at 72. In so holding, the court reasoned that "'Leon presents no barrier' to considering 'uncontroverted facts' known to an officer but 'inadvertently not presented to the magistrate' in assessing the officer's objective good faith." Id. at 73 (citation

omitted). Here, AFOSI's failure to inform the magistrate of these facts was not nefarious or in bad faith. The only reasonable explanation is that it was inadvertent because providing this information to the magistrate would have only helped its application for the search authorization. Thus, contrary to Appellee's argument, this Court should consider AFOSI's knowledge that Appellee owned computers and AFOSI's knowledge of how camcorder files are generally transferred to other storage media when conducting the good faith analysis. Indeed, "[t]he key, objectively ascertainable question under Leon is whether a reasonably well trained officer would have known that the search was illegal in light of all of the circumstances." Id. at 73 (emphasis in original) (internal quotations omitted) (citations omitted). Under all of the circumstances presented in this case, this Court should find AFOSI acted in good faith.

C. TSgt DD's use of the term "child pornography" did not amount to a reckless disregard for the truth

TSgt DD's reference to child pornography was not a reckless attempt to "exaggerate[] [Appellee's] criminality." (Appellee's Br. at 29.) Though he used the term "child pornography," he never told the magistrate that Appellee possessed child pornography. (JA at 111, 123.) Rather, TSgt DD used the term to state that he believed "evidence proving [Appellee]'s intent to manufacture child pornography" was located in the home. (JA at 73.) At that time, AFOSI knew that Appellee had attempted to record ES while she was undressing in the bathroom on

multiple occasions and directly requested nude photographs from her. Under the circumstances, TSgt DD could have reasonably believed that Appellee was attempting to record a lascivious exhibition of ES's genitals. Thus, it was reasonable to "believe that the search *may* reveal evidence" of Appellee's intent to create child pornography. Bethea, 61 M.J. at 187 (emphasis added). TSgt DD was not required to ensure that his belief was "more likely true than false." Id. And based on the information known at that time, his belief that evidence of *intent* to manufacture child pornography was not a "deliberate falsehood or of reckless disregard for the truth." Herring, 555 U.S. at 145 (quoting citation omitted). Therefore, TSgt DD's reference to child pornography was not reckless or made in bad faith.

Further, even assuming TSgt DD erred by referencing child pornography, the remaining information presented to Colonel SAK was still sufficient to allow AFOSI to believe she had a substantial basis to authorize the search. Mil. R. Evid. 311(d)(4)(B) is instructive on this point. The rule requires that before finding a false or reckless statement invalidates a search, a court must "set aside" the false information and determine whether "the remaining information presented to the authorizing officer is sufficient to establish probable cause. Here, the remaining information was more than enough to establish probable cause that Appellee committed, or attempted to commit, the offense of indecent recording despite any

technical mislabeling of the images as "child pornography." Moreover, it was not as though the military magistrate was required to determine that Appellee had attempted to manufacture child pornography before authorizing the search. United States v. Manufacturers Nat'l Bank, etc., 536 F.2d 699, 702 (6th Cir. 1976) ("In determining what is probable cause, the [magistrate] is not called upon to determine whether the offense charged has in fact been committed.") (quoting citation omitted). Therefore, the reference to child pornography did not invalidate the search.

WHEREFORE, the United States respectfully requests this Honorable Court to reverse the majority's decision and uphold the military judge's application of the good faith exception.

III.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION UNDER MIL. R. EVID. 311(A)(3) WHEN HE DETERMINED EXCLUSION WAS UNWARRANTED.

A. AFOSI's execution of the search authorization did not amount to conduct that warranted the application of the exclusionary rule

Appellee contends that AFOSI's seizure of items in his home exceeded the scope of the search authorization and justifies the deterrent effect of the exclusionary rule. (Appellee's Br. at 34-35.) Specifically, he points to several items he argues "were not covered by the authorization." (Id. at 35.) However,

nearly all of these items, with the exception of a condom, were accessories for the electronic equipment that they had written authorization to seize. Such "'technical' or 'de minimis'" violations of a search authorization's terms "do not warrant suppression of evidence." United States v. Cote, 72 M.J. 41, 42 (C.A.A.F. 2013) (quoting citation omitted). Put another way, the seizure of one condom and accessories to electronic media, that AFOSI had authorization to seize, did not amount to a "'deliberate,' 'reckless,' or 'grossly negligent' disregard for [Appellee's] Fourth Amendment rights." Davis v. United States, 564 U.S. 229, 238 (2011). Therefore, the deterrent benefits of the exclusionary rule "do not outweigh the costs" in Appellee's case. Id.

B. The steps AFOSI took to seek search authorization do not warrant application of the exclusionary rule

AFOSI's actions that led to application for a search authorization were reasonable and did not amount to "recklessness towards the necessary facts." (Appellee's Br. at 36.) Before seeking search authorization, AFOSI interviewed the relevant witnesses to the reported incident including the victim, ES, the individuals to whom ES made the initial report, ES' father and stepmother, ES' mother, and attempted to interview Appellee. (JA 64-65.) In addition, AFOSI consulted with the base judge advocate, and discussed whether the information known at that time supported a search authorization. (JA 67, 97-98, 100, 102,

104.) Only after taking these steps did AFOSI request search authorization from the military magistrate with assistance from the "on-call JAG." (JA at 108.)

There is no evidence that all of the agents acted deliberately, recklessly, or with a grossly negligent disregard for Appellee's Fourth Amendment right in the hours following ES' initial report through the execution of the search. Davis, 564 U.S. at 238. Instead, AFOSI took affirmative steps to protect Appellee's privacy rights by seeking search authority from a neutral and detached magistrate, which is not the type of conduct Mil. R. Evid. 311(a)(3) means to deter. Further, the government did not have the benefit of this Court's decision in Nieto[3] to be charged with the knowledge that it may have been acting illegally. Herring, 555 U.S. at 143 ("evidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'") (quoting citations omitted). Even if additional steps could have been taken to ascertain more facts, the failure to do so was at most negligent, which is insufficient to justify application of the exclusionary rule. *See* Herring, 555 U.S. at 143 ("The beneficent aim of the exclusionary rule to deter police misconduct can be sufficiently accomplished by a practice . . . outlawing evidence obtained by

[3] United States v. Nieto, 76 M.J. 101 (C.A.A.F. 2017).

flagrant or deliberate violation of rights.") (citing The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929, 953 (1965) (footnotes omitted)).

Moreover, the facts of this case do not support Appellee's assertion that AFOSI had an abundance of time to seek search authorization. (Appellee's Br. at 36.) Although Appellee was apprehended, he was not ordered into pretrial confinement. AFOSI made the reasonable assumption that Appellee "knew that a police report could be made and that OSI or security forces could come," which created "the risk that evidence could possibly be tampered with or destroyed." (JA at 107.) Indeed, Appellee had demonstrated he was likely to delete the videos. (*See* JA at 65 ("SUBJECT stated he deleted the record video from the video camera" after ES discovered the camera recording her in the bathroom.)) AFOSI's decision to promptly search and seize Appellee's electronic media was not reckless behavior meant to skirt the requirements of the Fourth Amendment. *See* Fogg, 52 M.J. at 151 ("The police should not be penalized for seeking a warrant, however hastily.") Rather, AFOSI intended to gather relevant evidence that had a risk of being lost when Appellee returned to his home. Law enforcement's conduct in this case was not "sufficiently deliberate that exclusion can meaningfully deter it, [nor] sufficiently culpable that such deterrence is worth the price paid by the justice system." Herring, 555 U.S. at 145. Therefore, the military judge did not abuse his discretion.

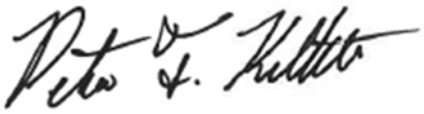
Further, affirming the military judge's decision would not "expand the concept of probable cause" as Appellee posits. (Appellee's Br. at 36.) The Judge Advocate General did not certify the military judge's probable cause determination. So regardless of whether the military judge's decision on probable cause was right or wrong, a decision by this Court on the certified issues would not "expand the definition of probable cause."

The military judge determined that, under the facts of this case, the deterrent remedy of exclusion was not warranted in the absence of "bad faith or illegality on the part or actions of the participants involved in the search authorization process." (JA at 197.) When considering the evidence "in the light most favorable to the prevailing party," this Court should find that the military judge's decision was based on extensive factual findings supported by the record and correctly applied to the applicable law. United States v. Eppes, 77 M.J. 339, 344 (C.A.A.F. 2018) (quoting citation omitted). The military judge conducted a complete analysis that showed his ruling was not "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." United States v. Erikson, 76 M.J. 231, 234 (C.A.A.F. 2017) (quoting citation omitted). Accordingly, the military judge did not abuse his discretion when he found application of the exclusionary rule to be inappropriate and denied Appellee's motion to suppress.

WHEREFORE, the United States respectfully requests this Honorable Court to reverse the lower court's decision and hold that the military judge did not abuse his discretion under Mil. R. Evid. 311(a)(3).

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court reverse the lower court's decision and find the military judge did not abuse his discretion in denying Appellee's motion to suppress.



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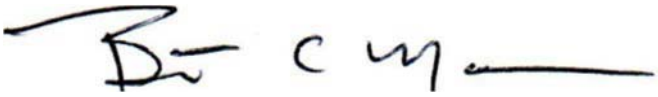

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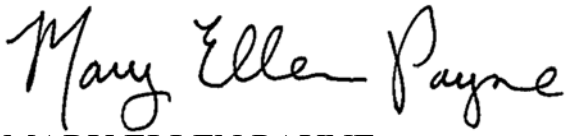

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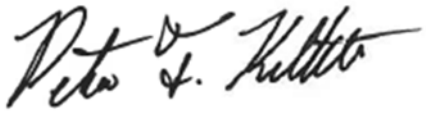
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 24 February 2020.



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COMPLIANCE WITH RULE 24(d)

1. This answer complies with the type-volume limitation of Rule 24(c) because:

☒ This brief contains 3,540 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because:

☒ This brief has been prepared in a monospaced typeface using Microsoft Word Version 2013 with 14 characters per inch using Times New Roman.

/s/_____

PETER F. KELLETT, Capt, USAF

Attorney for USAF, Government Trial and Appellate Counsel Division

Dated: 24 February 2020

APPENDIX

United States v. Coppola

United States Air Force Court of Criminal Appeals

December 16, 2019, Decided

No. ACM S32522

Reporter
2019 CCA LEXIS 510 *

UNITED STATES, Appellee v. Michael R. COPPOLA, Airman (E-2), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Prior History: **[*1]** Appeal from the United States Air Force Trial Judiciary. Military Judge: Donald R. Eller, Jr. Approved sentence: Bad-conduct discharge, confinement for 3 months, and reduction to E-1. Sentence adjudged 15 February 2018 by SpCM convened at Ellsworth Air Force Base, South Dakota.

Overview
HOLDINGS: [1]-The issue of discovery of the identity of the second confidential informant (CI) and production of the CI's dossier was not a jurisdictional defect, so appellant's unconditional guilty plea waived this issue. However, the court chose to exercise its discretion under Unif. Code Mil. Justice art. 66(c), 10 U.S.C.S. § 866(c), and reviewed Appellate Exhibit XVIII; the court was satisfied that it contained no information that was required to be disclosed to appellant, and he was therefore entitled to no relief; [2]-Having reviewed the entire record of trial, the court was convinced that the record of trial was complete as a matter of law; [3]-Though not raised by appellant, the delay in rendering this decision after 30 November 2019 was presumptively unreasonable. However, there had been no violation of appellant's right to due process and a speedy post-trial review and appeal.

Core Terms

military, guilty plea, sentence, dossier, cocaine, waived, unconditional, appellate review, pages, due process violation, specification, motions

Outcome
The findings and sentence were affirmed.

Case Summary

LexisNexis® Headnotes

Criminal Law & Procedure > Appeals > Reviewability > Waiver

Military & Veterans Law > Military Justice > Judicial Review

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Pleas

HN1 **Reviewability, Waiver**

It is well-settled that an unconditional plea of guilty waives all nonjurisdictional defects at earlier stages of the proceedings. While the waiver doctrine is not without limits, those limits are narrow and relate to situations in which, on its face, the prosecution may not constitutionally be maintained. An appellant who has entered an unconditional guilty plea ordinarily may not raise on appeal an error that was waived at trial. However, this "ordinary" rule does not apply to statutory review by a military court of criminal appeals (CCA) under Unif. Code Mil. Justice (UCMJ) art. 66(c), 10 U.S.C.S. § 866(c). The court has previously concluded that art. 66(c), UCMJ, empowers CCAs to consider claims even when those claims have been waived. This is because CCAs maintain an affirmative obligation to ensure that the findings and sentence in each such case are correct in law and fact and should be approved.

Criminal Law & Procedure > Appeals > Reviewability > Waiver

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Pleas

HN2 **Reviewability, Waiver**

If an appellant elects to proceed with review pursuant to Unif. Code Mil. Justice art. 66, 10 U.S.C.S. § 866, the courts of criminal appeals are required to assess the entire record to determine whether to leave an accused's waiver intact, or to correct the error. It does not mean an unconditional guilty plea is without meaning or effect. Waiver at the trial level continues to preclude an appellant from raising the issue on appeal, and an unconditional guilty plea continues to serve as a factor for a court of criminal appeals to weigh in determining whether to nonetheless disapprove a finding or sentence.

Criminal Law & Procedure > Appeals > Procedural Matters > Records on Appeal

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN3 **Procedural Matters, Records on Appeal**

Whether a record of trial is complete is a question of law that the court reviews de novo.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN4 **Procedural Due Process, Scope of Protection**

The court reviews de novo whether an appellant has been denied the right to due process and a speedy post-trial review and appeal. A presumption of unreasonable delay arises when appellate review is not completed and a decision is not rendered within

18 months of the case being docketed before the court. When a case is not completed within 18 months, such a delay is presumptively unreasonable and triggers an analysis of the four factors laid out in Barker: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. Moreno identified three types of cognizable prejudice arising from post-trial processing delay: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of ability to present a defense at a rehearing.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > Military Justice > Judicial Review

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Pleas

HN5[] **Procedural Due Process, Scope of Protection**

The court analyzes each factor and make a determination as to whether that factor favors the Government or appellant. Then, the court balances its analysis of the factors to determine whether a due process violation occurred. No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding. However, where an appellant has not shown prejudice from the delay, there is no due process violation unless the delay is so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

HN6[] **Posttrial Procedure, Actions by Convening Authority**

R.C.M. 1114(c)(2), Manual Courts-Martial (2016), provides that a promulgating order shall bear the date of the initial action, if any, of the convening authority.

Counsel: For Appellant: Major Mark C. Bruegger, USAF.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Major Dayle P. Percle, USAF; Mary Ellen Payne, Esquire.

Judges: Before MINK, LEWIS, and D. JOHNSON, Appellate Military Judges. Senior Judge MINK delivered the opinion of the court, in which Judge LEWIS and Judge D. JOHNSON joined.

Opinion by: MINK

Opinion

MINK, Senior Judge:

A military judge sitting as a special court-martial convicted Appellant, in accordance with his pleas pursuant to a pretrial agreement (PTA), of two specifications of wrongful use of a controlled substance (cocaine and methamphetamine) and one specification of wrongful distribution of a controlled substance (cocaine) in violation of Article 112a, Uniform Code of Military Justice

(UCMJ), 10 U.S.C. § 912a.[1][2][2] A panel of officer members sentenced Appellant to a bad-conduct discharge, confinement for three months, and reduction to the grade of E-1. The convening authority approved the sentence **[*2]** as adjudged.[3]

Appellant raises two issues on appeal: (1) whether the Government satisfied its discovery obligations and Mil. R. Evid. 507(d)(1)(B) with respect to its nondisclosure of confidential informant (CI) evidence and (2) whether a portion of an exhibit is missing from the record of trial. In addition, we consider the issue of timely appellate review. We find no prejudicial error and affirm the findings and sentence.

I. BACKGROUND

In January 2017, Appellant provided cocaine to two other Airmen, who then used the cocaine, while all three were attending a party at an off-base residence in Rapid City, South Dakota (SD). Appellant also used cocaine that night. Later, while driving back to Ellsworth Air Force Base, SD, Appellant was stopped by a SD Highway Patrol Officer who suspected Appellant was driving under the influence of alcohol. After arresting Appellant, the Patrol Officer asked Appellant if he would consent to a urinalysis because the Patrol Officer suspected Appellant had used cocaine. In response, Appellant spontaneously stated that he would test "hot" because he had "used" earlier that day and Appellant also indicated that others in his squadron were using **[*3]** illegal drugs. As a result of Appellant's statement regarding drug use by others in the squadron, Appellant's squadron commander ordered a unit-wide drug inspection. The two Airmen to whom Appellant provided cocaine at the party were members of his squadron and both tested positive for cocaine. Additionally, in June 2017, Appellant purchased and used methamphetamine in Rapid City, SD. Appellant's use of methamphetamine was discovered when he subsequently tested positive for the drug as the result of a random urinalysis.

II. DISCUSSION

A. Confidential Informant Evidence

Appellant asks us to review Appellate Exhibit XVIII, which was identified as a CI's dossier, which was sealed by the military judge without reviewing it *in camera*, to ensure that the Government complied with its discovery obligations and Mil. R. Evid. 507(d)(1)(B).

1. Additional Background

During its investigation into Appellant's drug offenses, the Air Force Office of Special Investigations (AFOSI) utilized two CIs. The Defense was aware of the identity of one of the CIs and they sought the identity of the second CI and the AFOSI dossier for the second CI. The Government asserted privilege under Mil. R. Evid. 507(a) and refused to disclose the second CI's identity or **[*4]** to produce the dossier. On 17 December 2017, the Defense filed a motion to compel production of the second CI's dossier. The Government opposed the Defense's motion. On 18-19 December 2017, the military judge conducted a hearing pursuant to Article 39a, UCMJ, 10 U.S.C. § 839, on the motion to compel and other motions. In response to questions from the military judge, the

[1] Unless otherwise noted, all references in this opinion to the Uniform Code of Military Justice (UCMJ), Rules for Courts-Martial (R.C.M.), and Mil. R. Evid. are to the *Manual for Courts-Martial, United States* (2016 ed.).

[2] Appellant pleaded not guilty to one specification alleging operation of a vehicle while the alcohol concentration in his blood was equal to or in excess of the legal limit in violation of Article 111, UCMJ, 10 U.S.C. § 911, and one specification alleging wrongful possession of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, both of which the convening authority withdrew and dismissed with prejudice after announcement of sentence in accordance with the terms of the pretrial agreement (PTA).

[3] The PTA contained no limitation on the sentence that could be approved.

Government stated that the second CI would not be called as a witness and that the second CI's dossier did not contain any information that required disclosure to the Defense. The military judge denied the motion to compel, and then without reviewing the contents of the dossier, ordered a copy of the dossier sealed as Appellate Exhibit XVIII for potential appellate review at a later date. When trial re-convened on 14 February 2018, Appellant entered an unconditional guilty plea to the offenses as detailed above.

2. Law

HN1[] It is well-settled that "an unconditional plea of guilty waives all nonjurisdictional defects at earlier stages of the proceedings." *United States v. Hardy*, 77 M.J. 438, 442 (C.A.A.F. 2018) (quoting *United States v. Lee*, 73 M.J. 166, 167 (C.A.A.F. 2014)). "While the waiver doctrine is not without limits, those limits are narrow and relate to situations in which, on its face, the prosecution may not constitutionally be maintained." **[*5]** *United States v. Bradley*, 68 M.J. 279, 282 (C.A.A.F. 2010) (citations omitted). An appellant who has entered an unconditional guilty plea ordinarily may not raise on appeal an error that was waived at trial. *United States v. Chin*, 75 M.J. 220, 222 (C.A.A.F. 2016) *(*citing *United States v. Campos*, 67 M.J. 330, 332-33 (C.A.A.F. 2009); *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)).

However, this "ordinary" rule does not apply to statutory review by a military court of criminal appeals (CCA) under Article 66(c), UCMJ, 10 U.S.C. § 866(c). *Id.* We have previously concluded that "Article 66(c) empowers [CCAs] to consider claims . . . even when those claims have been waived." *Id.* (quoting *United States v. Chin*, No. ACM 38452, 2015 CCA LEXIS 241, at *9-11 (A.F. Ct. Crim. App. 12 Jun. 2015) (unpub. op.), *aff'd*, 75 M.J. 220 (C.A.A.F. 2016)). This is because CCAs maintain an "affirmative obligation to ensure that the findings and sentence in each such case are 'correct in law and fact . . . and should be approved.'" *Id.* at 223 (quoting *United States v. Miller*, 62 M.J. 471, 472 (C.A.A.F. 2006)).

HN2[] "If an appellant elects to proceed with Article 66, UCMJ, review . . . the CCAs are required to assess the entire record to determine whether to leave an accused's waiver intact, or to correct the error." *Id.* (citation omitted). It does not mean an unconditional guilty plea is without meaning or effect. *Id.* "Waiver at the trial level continues to preclude *an appellant* from raising the issue [on appeal]," *Id.* (citing *Gladue*, 67 M.J. at 313-14), and an "unconditional guilty plea continues to serve as a factor for a CCA to weigh **[*6]** in determining whether to nonetheless disapprove a finding or sentence." *Id.*

3. Analysis

We find Appellant waived the issue of discovery of the identity of the second CI and the CI's dossier and we have determined to leave Appellant's waiver intact. After the military judge denied Appellant's motion to compel, Appellant pleaded guilty to the charge and specifications involving drug use, the subject of the investigation for which the second CI was utilized. The military judge conducted a providence inquiry, at the end of which he accepted Appellant's plea. During that inquiry, Appellant acknowledged that the PTA contained all of the agreements and understandings and that no one had made any promises to him that were not in the written PTA if he were to plead guilty. Appellant and his trial defense counsel acknowledged they had had enough time and opportunity to discuss Appellant's case. Appellant stated that he did not have any questions as to the meaning and effect of his pleas of guilty and that he fully understood the meaning and effect of his pleas.

There is nothing in the record to indicate that Appellant's guilty plea was contingent on his motion to compel production of the second **[*7]** CI's dossier or any other issue being preserved for appellate review. To the contrary, during his

colloquy with Appellant regarding the PTA, the military judge specifically reminded Appellant of the motions hearing in December and the evidence and the witnesses' testimony heard on the various motions at that time. Appellant acknowledged that the "waive all waivable motions" provision in his PTA would prevent appellate review of those issues. The military judge then asked Appellant if he understood that "by waiving these motions, essentially it is as if December didn't happen, and nobody is going to look over my shoulder, nobody is going to say, hey judge, you got it wrong. Those things are gone from that appellate review." Appellant acknowledged that he understood what the military judge had said and it is clear from the record that Appellant's guilty plea was unconditional.

The issue of discovery of the identity of the second CI and production of the CI's dossier is not a jurisdictional defect, so Appellant's unconditional guilty plea waived this issue. Because we find Appellant's unconditional guilty plea extinguished his ability to raise this issue on appeal, we decline to review **[*8]** Appellate Exhibit XVIII on this basis. However, in this case we have chosen to exercise our discretion under Article 66(c), UCMJ, and we have reviewed Appellate Exhibit XVIII. We are satisfied that it contains no information that was required to be disclosed to Appellant. Appellant is therefore entitled to no relief.

B. Suspected Missing Exhibit

Noting a disparity between the number of pages contained in Prosecution Exhibit 4, a letter of reprimand (LOR), and Prosecution Exhibit 8, the business records affidavit certifying Prosecution Exhibits 4-7, Appellant requests this court issue a Show Cause Order to the Government to determine whether the record of trial is complete. Having determined that the record of trial is complete, we decline to do so.

1. Additional Background

During presentencing, the Government introduced Prosecution Exhibit 4, a LOR dated 13 September 2016, which was marked, offered, and admitted without objection as a six-page document. The Government also introduced Prosecution Exhibit 8, which was a one-page business records affidavit, identifying the LOR dated 13 September 2016 as a seven-page document. Prosecution Exhibit 8 was also admitted without objection. Implicit **[*9]** in Appellant's assertion of error is that a page appears to be missing from the LOR admitted as Prosecution Exhibit 4 because Prosecution Exhibit 8 refers to the LOR as having seven pages, therefore resulting in an incomplete record.

2. Law

HN3[] Whether a record of trial is complete is a question of law that we review de novo. *United States v. Davenport*, 73 M.J. 373, 376 (C.A.A.F. 2014).

3. Analysis

A review of the record of trial indicates that Prosecution Exhibit 4 was marked and offered by the Government as a six-page document. The trial defense counsel did not object to admission of Prosecution Exhibit 4 or otherwise indicate that the document was incomplete as only containing six pages. The military judge admitted Prosecution Exhibit 4 as a six-page document and all six pages of the exhibit are contained in the record of trial. The trial defense counsel also did not object to Prosecution Exhibit 8, which indicated that Appellant's LOR dated 13 September 2017 was a seven-page document. The Government argues that the Defense's failure to object at trial waived any issue regarding the number of pages contained in Prosecution Exhibit 4. However, we are not convinced that there was any issue to waive. The six pages of Prosecution Exhibit 4 do appear **[*10]** to contain the complete record of the LOR admitted

at trial, including Appellant's indorsements to the LOR and Appellant's rebuttal letter. No page from any exhibit admitted at trial is missing from the record of trial. Having reviewed the entire record of trial and specifically Prosecution Exhibits 4 and 8, we are convinced that the record of trial is complete as a matter of law.

C. Timeliness of Appellate Review

1. Additional Background

Appellant's case was originally docketed with this court on 30 May 2018. Though not raised by Appellant, the delay in rendering this decision after 30 November 2019 is presumptively unreasonable. However, we determine there has been no violation of Appellant's right to due process and a speedy post-trial review and appeal.

2. Law

HN4[] We review de novo whether an appellant has been denied the right to due process and a speedy post-trial review and appeal. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citations omitted). A presumption of unreasonable delay arises when appellate review is not completed and a decision is not rendered within 18 months of the case being docketed before the court. *Id.* at 142. When a case is not completed within 18 months, such a delay is presumptively unreasonable and triggers an analysis **[*11]** of the four factors laid out in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972): "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Moreno*, 63 M.J. at 135 (citations omitted). *Moreno* identified three types of cognizable prejudice arising from post-trial processing delay: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of ability to present a defense at a rehearing. *Id.* at 138-39.

HN5[] "We analyze each factor and make a determination as to whether that factor favors the Government or [Appellant]." *Id.* at 136 (citation omitted). Then, we balance our analysis of the factors to determine whether a due process violation occurred. *Id.; see also Barker*, 407 U.S. at 533 ("[C]ourts must still engage in a difficult and sensitive balancing process."). "No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." *Moreno*, 63 M.J. at 136 (citation omitted). However, where an appellant has not shown prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006).

3. Analysis

The court is affirming the findings **[*12]** and sentence in this case. Appellant, who is no longer in confinement, has not pointed to any prejudice resulting from the presumptively unreasonable delay, and we find none.

Finding no *Barker* prejudice, we also find the delay is not so egregious that it adversely affects the public's perception of the fairness and integrity of the military justice system. As a result, there is no due process violation. *See Toohey*, 63 M.J. at 362. In addition, we determine that, even in the absence of a due process violation, the delay does not merit relief. *See United States v. Tardif*, 57 M.J. 219, 223-24 (C.A.A.F. 2002). Applying the factors articulated in *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016), we conclude that the time taken to review Appellant's case is not unreasonable and relief based on the delay is unwarranted.

III. CONCLUSION

The approved findings and sentence are correct in

law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are **AFFIRMED**.[4]

End of Document

[4] We note that the court-martial order (CMO) is not dated the same date as the convening authority's action, even though the header on the top of page 2 of the CMO is dated the same date as the action. *See* ***HN6***[ ] R.C.M. 1114(c)(2) ("A promulgating order shall bear the date of the initial action, if any, of the convening authority."). We direct a corrected court-martial order to reflect the date of the action.