UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant PHILLIP T. BURLEIGH
United States Air Force

ACM 37652

29 May 2013

Sentence adjudged 23 October 2009 by GCM convened at Robins Air Force Base, Georgia. Military Judge: Terry A. O'Brien (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 50 years, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; Major Nicholas W. McCue; and Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Deanna Daly; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

ROAN, Senior Judge:

A general court-martial composed of a military judge convicted the appellant, pursuant to his pleas, of one specification of committing indecent conduct with a child under the age of 16 on divers occasions, one specification of engaging in wrongful sexual contact with a child between the ages of 12 and 16 on divers occasions, five specifications of committing indecent acts with children between the ages of 12 and 16 on divers occasions, four specifications of taking indecent liberties with children under

the age of 16, and one specification of communicating indecent language to children under the age of 16, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934.[1] The adjudged and approved sentence consists of a dishonorable discharge, 50 years confinement, and reduction to E-1. Having considered the issues and the entire record, we find no error that materially prejudices a substantial right of the appellant and affirm.

Background

During his providence inquiry, the appellant admitted to committing indecent acts, taking indecent liberties, and communicating indecent language with various female children, all under the age of 16, between 2003 and 2008. These children were his daughter, two of his nieces, and the child of his best friend.[2]

The appellant admitted he saw his biological daughter as a "sexual object" and started having her stand naked in front of him when she was seven years old, while he stared at her breasts. He would also look at her while she was showering during this time frame. He began sexually assaulting her when she was 10 years old. On multiple occasions, while swimming in the backyard pool, the appellant would untie his daughter's bathing suit top and touch her breasts, move the bottom portion of her swimsuit to the side and then touch and digitally penetrate her vagina. The appellant stated he would also rub his erect penis against his daughter's vagina on several occasions. The appellant acknowledged that he would take showers with his daughter, during which he would wash and touch her breasts and vagina and would instruct her to hold his erect penis in her hand before rubbing his penis against her vagina. During his guilty plea inquiry, the appellant further admitted to other instances of wrongful sexual contact with his daughter, to include staring at her while she was nude, touching her breasts and rubbing his erect penis against her while she was both awake and asleep.

In the summer of 2003, the appellant's daughter was taking a bath with a 10-year-old female friend who was the daughter of the appellant's best friend. The appellant entered the bathroom and began to wash and touch this child's vagina with his fingers. Later that year, the appellant began walking around his residence nude, with an erect penis, in the child's presence. He continued to engage in this conduct for two years. The appellant admitted to tickling this child on multiple occasions, between 2003 and 2007, in a manner that allowed him to intentionally touch her vagina on several occasions. In 2004, the appellant agreed to cut the child's hair at her father's request. He instructed her to remove her clothing and get into the bathtub. The appellant admitted to looking at her

[1] The appellant was acquitted of attempted rape of a child under the age of 16, engaging in wrongful sexual contact with a child under the age of 16, committing an indecent act on a child under the age of 16, and communicating indecent language to a child under the age of 16, in violation of Articles 80, 120, and 134, UCMJ, 10 U.S.C. §§ 880, 920, 934.

[2] To the extent possible, the background information discusses the various sexual assaults committed against each victim separately.

and getting excited because she was nude. While swimming in the family pool in 2005, the appellant used his hands to move the fabric of the child's bathing suit bottom to the side, touched her vagina with his hand, and digitally penetrated her. At other times, the appellant discussed various sexual matters with her, to include sex, pregnancy, and available contraception measures. In 2007, while the child was lying on the appellant's couch, the appellant began to massage her back and then reached between her legs and digitally penetrated her vagina. She subsequently rebuffed the appellant's request to engage in sexual intercourse.

In 2004, the appellant's niece, who was approximately 14 years old at the time, was taking a bath in the appellant's master bathroom. The appellant entered the bathroom and asked her, "Do you want to have sex?" Although she refused, the appellant began to fondle her breasts and vagina. He then exposed his erect penis and took her hand and placed it onto his penis. Later that summer, the appellant followed her into his bedroom and pulled down her swimsuit, exposing her breasts. He then sucked on her breasts while other children were outside in the yard. In 2005, while swimming with another niece, the appellant touched that child's breasts and put his hand down the front of her bathing suit, touching her vagina while pressing his penis against her buttocks. Later that evening, the appellant fondled her breasts while sitting in the backyard.

In 2005, the appellant's daughter, his best friend's daughter, and a third child were spending the night in a camping tent in the appellant's backyard. The three girls were all under 16 years of age. The appellant entered the tent and suggested that they play a card game in which the loser of each hand would remove an article of clothing. Eventually, the three girls and the appellant were nude. The appellant was "dared" by one of the girls to touch the third child's breasts, which he did, and then she was "dared" to touch the appellant's penis, which she also did. Next, the appellant instructed the three girls to lie down and spread their legs. The appellant proceeded to masturbate in front of them. After the three girls and the appellant laid down to go to sleep, the appellant began kissing the third child, telling her she was beautiful and he could not wait to watch her grow up.

At various times, the appellant told the girls not to tell anyone about what he was doing or he would get in trouble. During the summer of 2005, the appellant was investigated by the Air Force Office of Special Investigations, following a report made by his sister-in-law (the mother of one of his nieces). His daughter and one of his nieces told investigators they had been sexually touched in the pool and shower in 2004 and 2005, but his daughter later recanted. During his interview under rights advisement, the appellant denied engaging in sexual contact with his daughter or nieces. After that investigation was closed, the appellant continued to engage in sexual contact with his daughter and his best friend's daughter.

After his sexual contact with his daughter was brought to the attention of civilian law enforcement authorities in Illinois in 2008, the appellant was interviewed and admitted he had an attraction to "women" aged 13-16 years old. He also admitted to some of the sexual misconduct with his daughter.

Failure to State an Offense

The appellant pled guilty to 10 specifications of criminal conduct alleging indecent acts, indecent liberties, and communicating indecent language, in violation of Article 134, UCMJ. None of the charged specifications alleged the terminal element of Article 134, UCMJ.

Whether a charge and specification state an offense is a question of law that we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citations omitted). Our superior court has held that failure to allege the terminal element of an Article 134, UCMJ, offense is error but, in the context of a guilty plea, the error is not prejudicial where the military judge correctly advises the appellant of all the elements and the providence inquiry shows that the appellant understood to what offense and under what legal theory he was pleading guilty. *United States v. Ballan*, 71 M.J. 28, 35 (C.A.A.F. 2012).

During the plea inquiry in the present case, the military judge advised the appellant of each element of the charged offense, to include the terminal element, and the appellant explained how his misconduct violated good order and discipline and was service discrediting. Therefore, as in *Ballan*, the appellant here suffered no prejudice to a substantial right: he knew under what clause he was pleading guilty and clearly understood how his conduct violated the terminal element of Article 134, UCMJ.

Confinement Conditions

Before, during, and after his court-martial, the appellant was placed into the Houston County Detention Center, a civilian confinement facility in Perry, Georgia. In a post-trial affidavit, the appellant claimed that he was housed in close proximity with foreign nationals from 5 October 2009 until approximately 31 August 2010. On appeal, the appellant argues that his confinement conditions violated Article 12, UCMJ, 10 U.S.C. § 812,[3] and asks this Court to provide relief.

We review de novo the question of whether an appellant's post-trial confinement violates Article 12, UCMJ. *United States v. Wise*, 64 M.J. 468, 473 (C.A.A.F. 2007). "A prisoner must seek administrative relief prior to invoking judicial intervention' to redress

[3] Article 12, UCMJ, 10 U.S.C. § 812 states: "No member of the armed forces may be placed in confinement in immediate association with enemy prisoners of war or other foreign nationals not members of the armed forces."

concerns regarding post-trial confinement conditions." *Id.* at 469 (citing *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001)). The purpose of this requirement is to promote the "resolution of grievances at the lowest possible level and [to] ensure[] that an adequate record has been developed to aid our appellate review." *Id*. (brackets and quotation marks omitted) (citing *United States v. Miller*, 46 M.J. 248, 250 (C.A.A.F. 2007)). "Since a prime purpose of ensuring administrative exhaustion is the prompt amelioration of a prisoner's conditions of confinement, courts have required that these complaints be made while an appellant is incarcerated." *Id.* at 471 (citations omitted). The appellant must show that, absent some unusual or egregious circumstances, he has exhausted the prisoner-grievance system in the confinement facility and that he has petitioned for relief under Article 138, UCMJ, 10 U.S.C. § 938. *Id.*

The appellant has the burden of proof to establish entitlement to additional sentence credit for pretrial confinement conditions when alleging violations of Article 13, UCMJ, 10 U.S.C. § 813. *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997). We find the same standard to be applicable in claims for confinement credit involving contravention of Article 12, UCMJ. *See* Rule for Courts-Martial 905(c)(2) (stating that burden of persuasion on any factual issue shall be on the moving party).

In an affidavit signed on 15 June 2011, the appellant claims that he ate, showered, and associated with foreign nationals throughout his time at the facility. The appellant also submitted the affidavit of a Houston County assistant public defender who states that after checking the records of the detention facility, he found at least four individuals that were housed in the same detention center and at the same time as the appellant "who were not and are not citizens of the United States."

We find the appellant has not met his burden to prove a violation of Article 12, UCMJ. The problem is exacerbated by the appellant's failure to avail himself of the administrative avenues available for redress within the military system that might have permitted an investigation into his allegations in a timely fashion, namely, filing an Article 138, UCMJ, complaint, submitting a grievance with the inspector general, asking his chain of command to address the issue while he was at the Houston County jail, or to even inform any of his several different defense counsel of his situation so that he might inquire into the problem with military authorities.

The appellant does not raise, and we cannot find based on the evidence before us, the existence of unusual or egregious circumstances that would have prevented the appellant from invoking the grievance system to redress his concerns regarding post-trial confinement conditions. *Wise*, 64 M.J. at 471. Rather, the appellant waited until nine months after being transferred to a military confinement facility to file an affidavit outlining his concerns. "An appellant who asks us to review prison conditions, a matter normally not within our appellate jurisdiction, must establish a clear record demonstrating both the legal deficiency in administration of the prison and the

jurisdictional basis for our action." *Miller*, 46 M.J. at 250. We find the appellant has failed to meet this requirement.

Sentence Appropriateness

The appellant contends that his sentence to confinement for 50 years is too severe and asks this Court for relief. We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 283-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of the offense, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007).

While we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). The task of granting clemency, which "involves bestowing mercy—treating an accused with less rigor than he deserves," is assigned to the convening authority and other officials. *Healy*, 26 M.J. at 395-96.

The appellant asserts that his trial defense team did not present a compelling sentencing case. Specifically, he contends his counsel did not sufficiently cross-examine the Government's sentencing witnesses and did not present evidence from his mental health expert to discuss his dissociative identity disorder condition. In the appellant's post-trial clemency submission, that expert tendered his opinion that the appellant would benefit from treatment for his disorder, but did not opine as to an appropriate length of confinement. Without raising a claim of ineffective assistance of counsel, the appellant argues that his defense counsel should have done more to make the sentencing authority aware of his mental health situation, and, because they did not, his sentence was more severe than it might have otherwise been.[4] We disagree.

Based on his guilty plea, the appellant faced a maximum confinement period of 85 years. While 50 years is certainly a lengthy period of incarceration, the appellant's repeated molestation of his daughter, two nieces, and two other children over a multi-year period warrants the punishment received. Having reviewed the record, we are convinced the trial defense counsel's sentencing strategy was warranted and appropriate under the circumstances of this case. Trial defense counsel reasonably pointed out that the appellant took full responsibility for his actions and reiterated that the appellant both

[4] Although not specifically raised as an assignment of error, we note that the appellant's mental competency was an issue at trial. After reviewing the record, we are convinced that the military judge sufficiently discussed the potential defense of lack of mental responsibility with the appellant and his defense counsel. No evidence was presented to suggest that appellant did not understand the nature and quality or the wrongfulness of his actions when committing the offenses. *See United States v. Riddle*, 67 M.J. 335 (C.A.A.F. 2009).

wanted and needed treatment to overcome his problems. Defense counsel's approach to argue for mercy and leniency and not to "revictimize" the girls during an aggressive cross-examination was entirely reasonable and did not violate the norms of professional competence. Having given individualized consideration to this particular appellant, the nature of the offense, his record of service, and all matters in the record of trial, we find the approved sentence is not inappropriately severe.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred.[5] Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[5] Though not raised as an issue on appeal, we note the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).