UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant BRIAN D. GARRIGAN
United States Air Force

ACM 37920

15 February 2013

Sentence adjudged 17 February 2011 by GCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: Terry A. O'Brien.

Approved sentence: Dishonorable discharge, confinement for 48 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Anthony D. Ortiz and Major Nathan A. White.

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

Before

GREGORY, HARNEY, and CHERRY
Appellate Military Judges

PER CURIAM:

Before a general court-martial, the appellant entered guilty pleas to one specification each of wrongfully and knowingly possessing, receiving, and distributing child pornography, as well as six specifications of communicating indecent language to another, all in violation of Article 134, UCMJ, 10 U.S.C. § 934.[1] The military judge

[1] The appellant pleaded not guilty to one specification each of indecent exposure and indecent conduct, in violation of Article 120, UMCJ, 10 U.S.C. § 920; and not guilty to three specifications of wrongful solicitation of another to commit an offense, in violation of Article 134, UCMJ, 10 U.S.C. § 934. Upon motion of the Government, the military judge dismissed these specifications with prejudice.

accepted the appellant's pleas as provident. A panel of officer members sentenced the appellant to a dishonorable discharge, 10 years of confinement, forfeiture of all pay and allowances, and reduction to E-1. Consistent with the terms of a pretrial agreement (PTA), the convening authority approved 48 months of confinement and the remainder of the sentence as adjudged. Before this Court, the appellant alleges that (1) his guilty plea was improvident, (2) the addendum to the Staff Judge Advocate's Recommendation (SJAR) was improper, and (3) his court-martial violated Article 10, UCMJ, 10 U.S.C. § 810. We affirm.

Background

The appellant was charged, inter alia, with six specifications of communicating indecent language to another, to which he pled guilty. He stipulated to the pertinent facts of the case, consistent with the terms of his PTA. The stipulated facts revealed that, between on or about 19 May 2010 and 2 August 2010, the appellant engaged in several chat sessions with a user named "activedadFL," using an instant messenger program.[2] The profile "activedadFL" was in fact SAB, an investigator with the Child Predator CyberCrime Unit of the Florida Attorney General's office. The appellant initiated a chat with "activedadFL" by asking him "are you into incest?" He also asked SAB if he had daughters and their ages; "activedadFL" said he had two daughters, one age 11 and one age 13. The appellant then asked if he could have sex with "activedadFL's" daughters, to which "activedadFL" replied "yes." The appellant explained in detail to "activedadFL" how he wanted to have sex with the girls. The appellant and "activedadFL" had chat sessions on 19 May, 2 June, 6 July, 7 July, 12 July, 15 July, and 2 August 2010. Some of the chat sessions occurred while the appellant was deployed to Al Dhafra Air Base, United Arab Emirates; others occurred while the appellant was home in Goldsboro, North Carolina. The appellant told "activedadFL" that he was a military member.

Providency of the Guilty Plea

These events formed the basis for Specifications 4-9 of Charge II, communicating indecent language to another, to which the appellant pled guilty. Prior to beginning the plea inquiry, the military judge asked the appellant if he had a copy of the charge sheet in front of him, stated that she was going to explain the elements of the offenses to which he pled guilty, and instructed the appellant to "be prepared to talk to me about the facts regarding the offenses." Beginning with Specification 4 of Charge II, the military judge set forth the elements of communicating indecent language to another as alleged in the specification. She defined for the appellant the terms "communicated to," "indecent language," "community," "conduct prejudicial to good order and discipline," and "service discrediting." The military judge then asked the appellant if he understood the elements and definitions, and if the elements and definitions taken together accurately

[2] The chat logs were 21 pages in length, and were attached to the stipulation of fact as a sealed exhibit.

and correctly described his conduct. The appellant responded, "Yes, ma'am." For the remaining Specifications 5-9, the military judge again set forth the elements as alleged in the specifications. Because the same definitions applied, the military judge asked the appellant if he wanted them repeated. Each time, he acknowledged, either that he understood the definitions, or did not want them repeated, and that the elements and definitions accurately and correctly described his conduct.

The military judge asked the appellant the same or similar questions for each specification. For example, when the military judge asked the appellant why he communicated the indecent language to SAB, the appellant stated it was for "fantasy" or out of "curiosity." Additionally, when the military judge asked the appellant why his conduct was either prejudicial to good order and discipline or service discrediting, the appellant stated that his actions were "not consistent with Air Force values" or the "standards that society expects" of Air Force members and that his actions tended to "lower the respect of the Air Force" in society. Likewise, the appellant agreed with the military judge that his language about adult males having sexual relations with minors was indecent, offensive, and repugnant to the "community sense of modesty, decency, or propriety." He further agreed that the "average person in the military community" would find the language "grossly offensive."

The appellant asserts that his guilty pleas to the six specifications of communicating indecent language to another were improvident because (1) the indecent communications consisted of a fantasy-based conversation between two consenting adults, (2) the military judge failed to adduce facts to show how his actions were prejudicial to good order and discipline or service discrediting, and (3) the military judge improperly advised him on the definition of indecent language. We disagree.

A military judge must determine whether an adequate basis in law and fact exists to support a guilty plea by establishing on the record that the "acts or omissions of the accused constitute the offense or offenses to which he is pleading guilty." *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969). Acceptance of a guilty plea is reviewed for an abuse of discretion, and questions of law arising from the plea are reviewed de novo. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). We afford significant deference to the military judge's determination that a factual basis exists to support the plea. *Id*.; *see also United States v. Barton*, 60 M.J. 62, 64 (C.A.A.F. 2004); *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002). Among the reasons for giving broad discretion to military judges in accepting guilty pleas is the often undeveloped factual record in such cases as compared to that of a litigated trial. *Jordan*, 57 M.J. at 238-39. Rejection of a guilty plea requires that the record show a substantial basis in law and fact for questioning the providence of the plea. *Inabinette*, 66 M.J. at 322; *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

We find the appellant's guilty pleas provident and conclude that the military judge did not abuse her discretion. That the appellant made the communications for purposes of "fantasy" or "out of curiosity" does not undermine the indecency of the language or render his pleas improvident. "Indecent language" is that which is "grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought." *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 89.c (2008 ed.); *see also United States v. Green*, 68 M.J. 266, 269 (C.A.A.F. 2010). Here, the appellant was fantasizing to another adult about performing sex acts on 11- and 13-year-old girls. The language the appellant used to describe his fantasies to "activedadFL" was, by his own admission, indecent because it was grossly offensive, vulgar, and incited lustful thoughts. We find no substantial basis in law and fact for questioning the providence of the plea. *Inabinette*, 66 M.J. at 322.

Additionally, we find that the military judge adduced sufficient facts to show how the appellant's actions were prejudicial to good order and discipline or service discrediting. The appellant asserts that, during his plea inquiry, he only admitted to an indirect effect on good order and discipline and what he describes as an "unexplained tendency" to be service discrediting. Relying on *United States v. Wilcox*, 66 M.J. 442, 448 (C.A.A.F. 2008), the appellant argues that his private chats with SAB, posing as "activedadFL," failed to show any impact on the military or that the military even knew about his conduct. In *Wilcox*, a litigated case, our superior court held that the appellant's anti-government and disloyal statements were protected speech under the First Amendment.[3] *Id.* at 446-47. As such, our superior court noted that, in order to meet Clause 1 or 2 of the terminal element under Article 134, UCMJ, in the context of the First Amendment, the prosecution was required to show a "'reasonably direct and palpable' connection between an appellant's statements and the military mission." *Id*. at 448.

We find *Wilcox* distinguishable from this case. Unlike *Wilcox*, this appellant's indecent language is not protected as free speech, as he argues. *United States v. Moore*, 38 M.J. 490, 492 (C.M.A. 1994) (finding that specifications alleging indecent language do not violate the First Amendment simply because they were private conversations); s*ee also United States v. Gill*, 40 M.J. 835, 837 (A.F.C.M.R. 1994). Additionally, the appellant pled guilty to the indecent language specifications. A guilty plea inquiry is less likely to have developed facts, and a decision to plead guilty may include a "conscious choice by an accused to limit the nature of the information that would otherwise be included in an adversarial process." *Jordan*, 57 M.J. at 238-39. Even so, the appellant's responses to the military judge provide sufficient facts to find the plea provident. The military judge advised the appellant of the elements of communicating indecent language to another, including the element of prejudice to good order and discipline or of a nature to bring discredit to the armed forces. The military judge defined the elements for the appellant. She asked the appellant why he believed he was guilty of the specifications.

[3] U.S. CONST. amend. I.

She also asked him if and why his actions were prejudicial to good order and discipline or service discrediting. For each specification, the appellant confessed under oath and in open court that his actions were not consistent with Air Force values and the standards that society expects from members of the Air Force. He admitted that his actions tended to lower the respect of the Air Force in society's eyes. He admitted communicating the indecent language to a civilian and doing so while deployed. He admitted that the "average person in the military community" would find the language "grossly offensive." Again, we find no substantial basis in law and fact for questioning the providence of the plea. *Inabinette*, 66 M.J. at 322.

Finally, it is worth noting that, prior to accepting the appellant's guilty plea, the military judge reviewed with him the Stipulation of Fact. The appellant admitted that all substantive matters in the stipulation were true. Attached to the stipulation were the chat logs from appellant's online conversations. He admitted that the content in the chat logs were correct, in which the appellant identifies himself as a military member to "activedadFL." In our opinion, the military judge elicited sufficient facts to support the guilty plea and did not abuse her discretion. We find no substantial basis in law and fact for questioning the providence of the plea. *Inabinette*, 66 M.J. at 322.

The appellant next asserts that his plea was improvident because the military judge improperly advised him of the definition of indecent language by failing to tell him that it must exceed "customary limits of expression." We disagree. The appellant was charged with communicating indecent language to another. The military judge advised the appellant using the correct legal standard for the indecent language specifications. This definition included, in part, that the indecent language must "violate community standards." *MCM*, Part IV, ¶ 89.c; *see also United States v. Green*, 68 M.J. at 269. Again, we find no substantial basis in law and fact for questioning the providence of the plea. *Inabinette*, 66 M.J. at 322.[4]

Language of SJAR

On 8 April 2011, the staff judge advocate (SJA) for the convening authority prepared the SJAR pursuant to Rule for Courts-Martial (R.C.M.) 1106. The appellant and his trial defense counsel were served with the SJAR on the same day. In response to the SJAR, trial defense counsel prepared a memorandum to the convening authority, which stated in part: "The defense highlights several matters that are mitigating in this case as well as a few issues that explain the unduly harsh sentence that [the appellant]

[4] The appellant also argues that the military judge relied on leading questions during the guilty plea inquiry. The fact that the military judge used some leading questions does not render the plea improvident. *United States v. Nance*, 67 M.J. 362, 366 (C.A.A.F. 2009). We must "examine the totality of the circumstances of the providence inquiry, including the stipulation of fact, as well as the relationship between the accused's responses to leading questions and the full range of the accused's responses during the plea inquiry." *Id.*; *see also United States v. Sweet*, 42 M.J. 183, 185-86 (C.A.A.F. 1995). We have done so in this case and find no abuse of discretion.

received." The "issues" raised by trial defense counsel centered on the alleged misconduct of the Air Force Office of Special Investigations (AFOSI), improper pretrial confinement, speedy trial violations, and misconduct of trial counsel. On 21 April 2011, the SJA prepared an addendum to his original recommendation. In the addendum, the SJA stated as follows: "Although defense alleges no error, counsel does bring up several issues in his submission." After summarizing each of the issues raised by trial defense counsel, the SJA concluded, "I've carefully considered the matters submitted and find them unpersuasive." The convening authority endorsed the addendum by stating that he considered "the attachments before taking action . . . ."

The appellant avers that the addendum to the SJAR was improper because the SJA characterized his allegations as "issues" and not "errors." As a result, the SJA "incorrectly characterize[ed] . . . trial defense counsel's memorandum," "minimized the allegations," and obviated the SJA's role pursuant to R.C.M. 1106(d)(4). The appellant requests that we order new post-trial processing in this case. We decline to do so.

The standard of review for determining if post-trial processing was properly completed is de novo. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000). After conducting a de novo review, we find no error. The SJA prepared and forwarded a recommendation to the convening authority in accordance with R.C.M. 1106(d)(1)-(3). Trial defense counsel's memorandum responding to the SJAR identified a "few issues" for the convening authority to consider. Although the trial defense counsel failed to couch the matters he raised to the convening authority as "errors," the SJA essentially treated them as such in the addendum to the SJAR. The SJA acknowledged the "issues" identified by trial defense counsel, addressed how each "issue" had been resolved at trial, and concluded by stating that he found these matters "unpersuasive." The convening authority stated that he considered the matters submitted by the appellant before taking action. Contrary to the appellant's argument, the SJA did not minimize the allegations or mischaracterize trial defense counsel's memorandum. R.C.M. 1106(d)(4) states that the SJA is not required to provide any analysis or rationale for his statements concerning "legal error," or in this case "issues." Under the facts of this case, we find that the addendum to the SJAR was proper and the SJA did not err in how he advised the convening authority.

Article 10, UCMJ, Violation

Prior to entering his pleas, the appellant filed a motion to dismiss all charges and specifications on the grounds he was denied a speedy trial because his court-martial was conducted 185 days after he was placed in pretrial confinement, in violation of Article 10, UCMJ. After considering the written motion and answer thereto, as well as the testimony, documentary evidence, and arguments of counsel, the military judge denied the appellant's motion. The military judge issued detailed findings of fact and conclusions of law to support her finding that the Government acted with reasonable diligence in

bringing the appellant to trial. The appellant now raises this issue for our review. We find no error.

Whether an appellant was denied his right to a speedy trial in violation of Article 10, UCMJ, is a legal issue we review de novo. *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007). We will give substantial deference to the findings of fact and conclusions of law rendered by the military judge and will reverse those findings only if they are clearly erroneous. *Id*. Moreover, when "reviewing claims of denial of speedy trial under Article 10, UCMJ, [courts] do not demand 'constant motion, but reasonable diligence in bringing the charges to trial.'" *Id.* (quoting *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005)). Brief inactivity is not fatal to an "otherwise active, diligent prosecution." *Cossio*, 64 M.J. at 256. When "examining the facts and circumstances surrounding an alleged Article 10[, UCMJ,] violation," we will apply the factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *Cossio*, 64 M.J. at 256 (quoting *Mizgala*, 61 M.J. at 127). Those four factors are: "(1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant." *Mizgala*, 61 M.J. at 129 (citing *Barker*, 407 U.S. at 530).

We have applied the *Barker* factors to the facts of this case and find that the Government proceeded with reasonable diligence in bringing the appellant to trial. Regarding the first factor, we agree with the military judge that 185 days from when the appellant was placed in pretrial confinement to his trial date was "considerable." Turning to the second factor, we also agree with the military judge that the delay was not unreasonable. At the outset, the military judge cited the negligence of the lead AFOSI agent, who forwarded the electronic media from the appellant's computer to the wrong e-mail address at the Defense Computer Forensic Laboratory (DCFL) for analysis and then failed to follow-up in a timely manner. The military judge also noted, however, that the trial counsel exercised initiative in "thinking outside the box" to speed up the process when he secured an alternate company to complete the forensic analysis independent of AFOSI and DCFL. Regarding the third factor, the appellant made four requests for a speedy trial, but he did not demand a speedy trial during arraignment. With respect to the fourth factor, we agree with the military judge in that "there is no prejudice in this case beyond the inherent prejudice of sitting in pretrial confinement." We find no evidence of oppressive pretrial incarceration, no evidence of excessive anxiety or concern, and no evidence that the defense was impaired. *Barker*, 407 U.S. at 532.

We have given substantial deference to the findings of fact and conclusions of law rendered by the military judge; those findings and conclusions are not clearly erroneous. The military judge correctly ruled, after weighing the *Barker* factors that the Government proceeded to trial with reasonable diligence and, therefore, did not violate the appellant's Article 10, UCMJ, right to a speedy trial.

Conclusion

We have reviewed the record[5] in accordance with Article 66, UCMJ, 10 U.S.C. § 866. The findings and the sentence are determined to be correct in law and fact and, on the basis of the entire record, should be approved. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings of guilty and the sentence, as approved below, are

AFFIRMED.

FOR THE COURT

LAQUITTA J.SMITH
Appellate Paralegal Specialist

[5] Although facially unreasonable, after considering the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *United States v. Moreno*, 63 M.J. 129, 135–36 (C.A.A.F. 2006) (reviewing claims of post-trial and appellate delay using the four-factor analysis in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).