UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic ANDREW P. HALPIN
United States Air Force

ACM S31805

01 February 2012

Sentence adjudged 8 April 2010 by SPCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: Joseph S. Kiefer.

Approved sentence: Bad-conduct discharge, confinement for 10 months, and a reprimand.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; and Captain Luke D. Wilson.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Deanna Daly; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

GREGORY, Senior Judge:

At arraignment before a special court-martial, the appellant entered pleas of guilty to one specification of violating a lawful order, one specification of divers wrongful use of a Schedule II controlled substance, one specification of adultery, and one specification of reckless endangerment, in violation of Articles 92, 112a, and 134, UCMJ, 10 U.S.C. §§ 892, 912a, 934, respectively. The military judge accepted the pleas of guilty, and a panel of officers sentenced the appellant to a bad-conduct discharge, confinement for 10 months, and a reprimand. A pretrial agreement capped confinement at the

jurisdictional limit of a special court-martial, and the convening authority approved the sentence adjudged. The appellant asserts that his plea of guilty to reckless endangerment was improvident and that the trial counsel's sentencing argument constituted prejudicial error.[*] We will also address two additional issues concerning whether the Article 134, UCMJ, specifications are sufficient to state an offense in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), and whether delay in post-trial review prejudiced the appellant in light of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006).

Sufficiency of the Reckless Endangerment Guilty Plea Inquiry

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*. (citing *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. *See Jordan*, 57 M.J. at 238. 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).

The plea inquiry and stipulation of fact show that, at the time of the offense, the appellant and his then wife, CH, were separated. On 25 November 2009, CH went to the apartment where the appellant resided. When the appellant renewed his demand for a divorce, CH took a 50-60 pill overdose of Lorazepam and the appellant told her, "[Y]ou're not going to die in my apartment." In response, she told the appellant that he was "going to watch [her] die." Rather than take CH for medical care, the appellant took her back to the home where she lived alone, put her in the bed, placed his Air Force jacket on her, and left. A friend of CH learned of the overdose the next morning and took her to the hospital. Based on these events, the appellant pled guilty to recklessly endangering CH by taking her home and leaving her alone rather than seeking medical attention after observing her attempt suicide.

The military judge began the inquiry into this offense by correctly advising the appellant of the elements of the offense:

[*] The appellant breaks the argument concerning trial counsel's sentencing argument into three separate issues which we will address in the aggregate: (1) whether the argument was improper, (2) whether the military judge should have sua sponte stopped the argument, and (3) whether trial defense counsel was ineffective by not objecting to the argument.

> 1. That at or near Tucson, Arizona, on or about 25 November 2009, you did engage in certain conduct to wit: after witnessing your wife, [CH], attempt to commit suicide by consuming multiple Lorazepam . . . tablets, you failed to seek medical attention for [CH] and instead transported [CH] to a different location where you then left [CH] alone.
>
> 2. That your conduct was wrongful and wanton.
>
> 3. That your conduct was likely to produce death or grievous bodily harm to [CH]. And,
>
> 4. That under the circumstances your conduct was to the prejudice of good order and discipline in the Armed Forces or was of a nature to bring discredit upon the Armed Forces.

The military judge provided detailed definitions of all relevant terms in the elements, and he particularly described how risk of harm and magnitude of harm combine to determine whether the circumstances show a likelihood of grievous bodily harm or death. The appellant told the military judge that he understood all the elements and definitions and that he had no questions about them.

Based on these elements and definitions, the appellant explained why he believed he was guilty of reckless endangerment: "I had attempted suicide by consuming Lorazepam twice and knew from my own experience that there was a likelihood of harm to her system." The military judge probed the appellant's belief that liver damage could result from the overdose taken by CH:

> MJ: I kind of need to get a sense of your understanding of the likelihood of liver damage from taking this many Lorazepam pills.
>
> ACC: Your Honor, in my attempts, which I spoke about in here, I had taken 20 to 30 at a time. I did not suffer liver damage, but since she had taken double that amount, she took 50 to 60, that increased the likelihood in my eyes that, you know, liver damage or some other organ damage can occur.

Beyond his belief that CH could suffer damage to internal organs as a result of the overdose, the appellant stipulated as fact that he knew on the evening CH took the overdose "there was a chance she might die." The military judge ensured that the appellant understood the risk of death to be a real possibility and not just speculative or fanciful.

The appellant now argues that his conduct added nothing to the danger created by CH taking the overdose. However, during the plea inquiry, the appellant told the military judge how his conduct contributed to the danger created by his wife's overdose: "Due to

the stumbling and the slurring speech, I could tell that she was suffering from an overdose, a large overdose, and by my own choice I decided to take her home instead of calling." The appellant admitted that he knew his wife could suffer serious injury or possibly die from the overdose, but, rather than seek medical attention, he took her to a location where she would not receive medical care and left her – an action which he described to the military judge as "the worst decision of my life." The appellant knowingly and willfully decided to intervene in a way that increased the likelihood of harm, and, having done so, providently pled guilty to reckless endangerment.

The record discloses no substantial legal or factual basis for questioning the appellant's plea, and the military judge is entitled to rely upon the appellant's admissions absent any substantial inconsistencies raised by the plea. In *United States v. Ferguson*, 68 M.J. 431 (C.A.A.F. 2010), the Court reaffirmed that a guilty plea forecloses the opportunity to litigate the offense on appeal: "Appellant could have pled not guilty . . . and challenged the prosecution's theory of the specification. . . . Appellant chose not to. . . . By doing so, Appellant relinquished his right to contest the prosecution's theory on appeal . . . unless the record discloses matter inconsistent with the plea." *Id*. at 435 (internal citations omitted). As in *Ferguson*, the military judge correctly advised the appellant of the elements and definitions of the offense as well as the consequences of pleading guilty. He thoroughly questioned the appellant about the offense and gave him the opportunity to consult with his counsel and ask questions. The appellant described in detail why he believed he was guilty, and we find no substantial basis in law or fact for questioning that belief.

The offense of reckless endangerment is intended to prohibit conduct that creates a substantial risk of death or grievous bodily harm. *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 100a.c.(1) (2008 ed.). Much more than a mere bystander or passerby, the appellant repeatedly acknowledged that his willful, knowing, and intentional acts of transporting and leaving CH alone after he watched her take a dangerous overdose of drugs substantially increased the likelihood that she would suffer death or grievous bodily harm. Under these circumstances, the military judge did not abuse his discretion in accepting the appellant's plea of guilty to reckless endangerment in violation of Article 134, UCMJ.

Trial Counsel's Sentencing Argument

Despite the lack of any objection at trial, the appellant makes a broadside attack on the trial counsel's sentencing argument, claiming that his "improper comments" were so far out of bounds that they (1) constituted prosecutorial misconduct which substantially prejudiced the appellant's right to a fair trial, (2) required sua sponte intervention by the military judge, and (3) showed that the appellant received ineffective assistance of counsel. Failure to object to improper argument before the start of sentencing instructions waives the objection. Rule for Courts-Martial 1001(g). Absent objection,

argument is reviewed for plain error. *United States v. Burton*, 67 M.J. 150, 152 (C.A.A.F. 2009). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice." *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005). Error is not "plain and obvious" if, in the context of the entire trial, the appellant fails to show that the military judge should have intervened sua sponte. *Burton*, 67 M.J. at 153 (citing *United States v. Maynard*, 66 M.J. 242, 245 (C.A.A.F. 2008)).

The appellant emphasizes what he describes as the trial counsel's "mastermind theme" to show prosecutorial misconduct by arguing facts not in evidence. Prosecutorial misconduct is "action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996). Trial counsel may, and is indeed required, to make "vigorous arguments for sentencing . . . based on a fair reading of the record." *United States v. Kropf*, 39 M.J. 107, 108 (C.M.A. 1994) (citing A.B.A. MODEL R. PROF. CONDUCT 1.3, Comment (1989); *United States v. Edwards*, 35 M.J. 351 (C.M.A. 1992), *aff'd*, 41 M.J. 87 (C.A.A.F. 1994) (mem.)). Consistent with his duty of zealous advocacy, trial counsel in the present case argued the facts and the reasonable inferences from those facts. For example, salient features of the "mastermind theme" were argued as follows:

> When [the appellant] finally decides to leave that night, [CH] emerges from the bedroom one last time. She begs him not to go and then she collapses on the couch. [The appellant's] response is to pick her up, carry her back in the bedroom, lay her in the bed and put his Air Force jacket on her. . . . You heard from [CH] that she had kept her ring in her purse but somehow that ring got placed on her fingers [sic] as well. And then there were those pill bottles. The pills that she had, prescription medication, everything else in the house that she had kept in medicine cabinets, that she had kept in kitchen cabinets, all those pills somehow ended up lined up in a neat little pile on her dresser. Think about that for a second. Now, there are no eyewitnesses to show that [the appellant] did that but it sure sounds like someone is trying to stage a scene, a scene of a grieving wife, pinning after her estranged husband, alone, wearing her wedding ring, wrapped in his jacket, taking a whole slew of pills. Members, a scene like that would most likely go to show that he wasn't involved in that event.

Contrary to the appellant's assertions, we find the argument is based on a fair reading of the record. The stipulation of fact, the appellant's statements during the plea inquiry, and the testimony of CH provide a sufficient evidentiary foundation for trial counsel's theory. Having considered the entire argument in the context of the record as a whole and giving particular attention to those portions of the argument cited by the appellant, we find that the instances of argument cited by the appellant do not rise to the level of either

prosecutorial misconduct or plain error, and they merit no relief. *See United States v. Doctor*, 21 C.M.R. 252, 261 (C.M.A. 1956) ("It is a little difficult for us to find misconduct which compels a reversal when it purportedly arises out of an argument which had so little impact on defense counsel that they sat silently by and failed to mention it ... at the time of trial.").

Nor do we find trial defense counsel ineffective for not objecting during the argument. We review claims of ineffective assistance of counsel by applying the two-part test established by *Strickland v. Washington*, 466 U.S. 668 (1984), which requires the appellant to show (1) that counsel's performance was so deficient, the errors so serious that the counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and (2) that the errors were such as to deprive the appellant of a fair trial whose result is reliable. We find no error in trial defense counsel's lack of objection that comes even close to overcoming the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Having successfully negotiated a pretrial agreement that limited the charged offenses' combined maximum confinement of 7.5 years to the 12 month maximum of a special court-martial, trial defense counsel elected not to object to the Government's sentencing argument but instead chose to counter the Government's argument with a more sympathetic portrayal of the appellant – a tactic that resulted in adjudged confinement of even less than that authorized by the pretrial agreement. Under these circumstances, even if there was error in not objecting, such error can hardly be seen as causing prejudice so great as to deprive the appellant of a fair trial.

Legal Sufficiency of the Article 134, UCMJ, Specifications

The appellant pled guilty to one specification of adultery and one specification of reckless endangerment alleged under Charge III as a violation of Article 134, UCMJ. Article 134, UCMJ, criminalizes three categories of offenses not specifically covered in other articles of the UCMJ: Clause 1 offenses require proof that the conduct alleged be prejudicial to good order and discipline; Clause 2 offenses require proof that the conduct be service discrediting; Clause 3 offenses involve noncapital Federal crimes made applicable by the Federal Assimilative Crimes Act, 18 U.S.C. § 13. As the specifications at issue do not reference the Assimilative Crimes Act, they necessarily involve Clause 1 or 2. The language of each specification complies with the model specification but does not expressly allege the terminal element that such conduct was either prejudicial to good order and discipline or service discrediting. Because the specifications do not expressly allege the terminal element, we will review de novo whether either is sufficient to allege an offense in light of *Fosler*.

In *Fosler*, the Court invalidated a conviction of adultery under Article 134, UCMJ, because the military judge improperly denied a defense motion to dismiss the specification on the basis that it failed to expressly allege the terminal element of either

Clause 1 or 2. While recognizing "the possibility that an element could be implied," the Court stated that "in contested cases, when the charge and specification are first challenged at trial, we read the wording more narrowly and will only adopt interpretations that hew closely to the plain text." *Id*. at 230. The Court implies that the result would have been different had the appellant not challenged the specification: "Because Appellant made an R.C.M. 907 motion at trial, we review the language of the charge and specification more narrowly than we might at later stages." *Id*. at 232.

While narrowly construing the specification in the posture of the case, the Court reiterated that the military is a notice-pleading jurisdiction: "A charge and specification will be found sufficient if they, 'first, contain[ ] the elements of the offense charged and fairly inform[ ] a defendant of the charge against which he must defend, and, second, enable[ ] him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" *Id*. at 229 (citations omitted). Failure to object to the legal sufficiency of a specification does not constitute waiver, but "[s]pecifications which are challenged immediately at trial will be viewed in a more critical light than those which are challenged for the first time on appeal." *United States v. French*, 31 M.J. 57, 59 (C.M.A. 1990). *See also United States v. Bryant*, 30 M.J. 72, 73 (C.M.A. 1990).

Where an appellant did not challenge a defective specification at trial, entered pleas of guilty to it, and acknowledged understanding all the elements after the military judge correctly explained those elements, the specification is sufficient to charge the crime unless it "is 'so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had.'" *United States v. Watkins*, 21 M.J. 208, 210 (C.M.A. 1986) (quoting *United States v. Thompson*, 356 F.2d 216, 226 (2d Cir. 1965), *cert. denied*, 384 U.S. 964 (1966) (citations omitted)). Such is the case here: the appellant made no motion to dismiss the Article 134, UCMJ, charge and entered pleas of guilty to both specifications under the charge. The military judge thoroughly covered the elements of each offense to include the terminal elements of conduct prejudicial to good order and discipline and service discrediting conduct. The appellant acknowledged understanding *all* the elements and explained to the military judge why he believed his conduct violated those elements.

Applying a liberal construction to each specification alleged under Article 134, UCMJ, we find that each reasonably implies the terminal element. The adultery specification identifies the other party as the same Airman with whom the appellant was ordered to have no contact – an order which he providently pled guilty to violating. The military judge advised the appellant during the plea inquiry that a required element of adultery is that it be either prejudicial to good order and discipline or service discrediting, and the appellant acknowledged that, by committing adultery with an Airmen who was the subject of a no-contact order, he engaged in conduct which was prejudicial to good order and discipline. Concerning the second Article 134, UCMJ, offense of reckless endangerment, the military judge likewise advised the appellant that his conduct must

either be prejudicial to good order and discipline or service discrediting to constitute this offense and, again, the appellant acknowledged understanding all the elements and that his conduct met those elements. A specification that alleges recklessly endangering another in a manner likely to produce death or grievous bodily harm reasonably implies that such conduct would be service discrediting and, therefore, charges a violation of Article 134, UCMJ. *See Watkins*.

Appellate Delay

We note that the overall delay of over 18 months between the time the case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine "the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530[] (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 135-36. When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case: the appellant has been released from confinement, the record shows no particularized anxiety or concern beyond that normally experienced by those awaiting appellate resolution of their cases, and we discern no specific impairment to either the appellant's basis of his appeal or his prospects at a rehearing should the case ultimately be reversed. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. 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 findings and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court