UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman NICHOLAS E. JOHNSON
United States Air Force

ACM 37970

16 January 2013

Sentence adjudged 26 April 2011 by GCM convened at Grand Forks Air Force Base, North Dakota. Military Judge: Matthew D. Van Dalen (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 27 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Daniel E. Schoeni and Major Tiwana L. Wright.

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

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

PER CURIAM:

A general court-martial composed of a military judge convicted the appellant, consistent with his pleas, of dereliction of duty, communicating indecent language, and possession of child pornography, in violation of Articles 92 and 134, UCMJ, 10 U.S.C. §§ 892, 934. The adjudged sentence consisted of a bad-conduct discharge, confinement for 27 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged**.** On appeal, the appellant asserts two errors: (1) the specification of communicating indecent language failed to state an offense because it omits the required terminal element for Article 134, UCMJ, offenses, and (2) pursuant to *United States v. Grostefon*, 12 M.J. 341 (C.M.A. 1982), the

appellant deserves credit for illegal pretrial confinement because he was commingled with post-trial inmates. Finding no merit to the appellant's assignments of error, we affirm the findings and sentence.

Sufficiency of the Article 134, UCMJ, Specification

The appellant began chatting over the Internet with KH in 2007, when she was 14 years old. He was aware of her age, and she told him she had previously been a victim of sexual assault. While conducting a forensic evaluation of the appellant's computer based on unrelated allegations, agents from the Office of Special Investigations discovered evidence that the appellant had engaged in sexually explicit conversations with KH shortly after she turned 16 years old. For this conduct, the appellant was charged with communicating indecent language to KH. The specification omitted the terminal element for Article 134, UCMJ, offenses, which the appellant alleges is error.[1]

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). The indecent language specification's failure to allege the terminal element of an Article 134, UCMJ, offense is error. *United States v. Ballan*, 71 M.J. 28, 34 (C.A.A.F.), *cert. denied*, 133 S. Ct. 43 (2012) (mem.). In the context of a guilty plea, such an error is not prejudicial when the military judge correctly advises the appellant of all the elements and the plea inquiry shows that the appellant understood to what offense and under what legal theory he was pleading guilty. *Id.* at 34-36.

During the plea inquiry in the present case, the military judge advised the appellant of each element of the Article 134, UCMJ, offense at issue, including the terminal element. The military judge defined the terms "conduct prejudicial to good order and discipline" and "service discrediting" for the appellant. The appellant explained to the military judge how his misconduct was service discrediting, given the subject matter of the conversations. Therefore, as in *Ballan*, the appellant here suffered no prejudice to a substantial right, because he knew under what clause he was pleading guilty and clearly understood how his conduct violated the terminal element.

Pretrial Confinement

Article 13, UCMJ, 10 U.S.C. § 913, prohibits two things: (1) the imposition of punishment prior to trial, and (2) conditions of arrest or pretrial confinement that are more rigorous than necessary to ensure the accused's presence for trial. The first prohibition involves a purpose or intent to punish, determined by examining the intent of

[1] The Article 134, UCMJ, 10 U.S.C. § 934, specification alleging wrongful possession of child pornography included both Clause 1 and 2 as the terminal element and thus stated an offense. *United States v. Ballan*, 71 M.J. 28, 34 (C.A.A.F.), *cert. denied*, 133 S. Ct. 43 (2012) (mem.).

detention officials or by examining the purposes served by the restriction or condition, and whether such purposes are "reasonably related to a legitimate governmental objective." *Bell v. Wolfish*, 441 U.S. 530, 535-39 (1979); *see also United States v. James*, 28 M.J. 214, 216 (C.M.A. 1989). The second prohibition prevents imposing unduly rigorous circumstances during pretrial detention. Conditions that are sufficiently egregious may give rise to a permissive inference that an accused is being punished, or the conditions may be so excessive as to constitute punishment. *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997).

While confined at a civilian county jail in Grand Forks, North Dakota, for three months before his trial, the appellant contends he was comingled with one or more post-trial military inmates. He did not file any motion on this issue with the military judge, nor reference this allegation in his clemency submission. Failure to seek sentence relief at trial waives the issue on appeal absent plain error. *United States v. Inong*, 58 M.J. 460, 465 (C.A.A.F. 2003). Further, failure to complain of such conditions before trial is "strong evidence" that the conditions did not constitute illegal punishment. *United States v. Palmiter*, 20 M.J. 90, 97 (C.M.A. 1985).

Even if true, the fact that the appellant was commingled with post-trial inmates does not entitle the appellant to credit. Commingling with post-trial inmates is a factor to consider when assessing conditions of confinement, but alone it is not a per se violation of Article 13, UCMJ. *United States v. King*, 61 M.J. 225, 228 (C.A.A.F. 2005) (citing Article 13, UCMJ; *Palmiter*, 20 M.J. at 96). On this record, we find neither punishment nor unnecessarily rigorous conditions existed to warrant additional administrative credit.

Conclusion

The 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 sentence are

AFFIRMED.

OFFICIAL

LAQUITTA J.SMITH
Appellate Paralegal Specialist