UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

First Lieutenant DOUGLAS E. LONG
United States Air Force

ACM 37044

18 December 2009

Sentence adjudged 02 May 2007 by GCM convened at Robins Air Force Base, Georgia. Military Judge: Gary M. Jackson (sitting alone).

Approved sentence: Dismissal and confinement for 77 days.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Major Tiffany M. Wagner.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, Lieutenant Colonel Jeremy S. Weber, Major Brendon K. Tukey, Captain Jason M. Kellhofer, and Captain G. Matt Osborn.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HELGET, Senior Judge:

Contrary to his pleas, the appellant was found guilty by a military judge sitting alone of one specification of assault consummated by a battery and one specification of indecent acts with a child under 16 years of age, in violation of Articles 128 and 134,

UCMJ, 10 U.S.C. §§ 928, 934. The approved sentence consists of a dismissal and 77 days of confinement.[1]

The appellant asserts five assignments of error before this Court: (1) the appellant was denied due process and his conviction should be set aside because the assurances of Air Force officials provided the appellant with de facto immunity from prosecution; (2) the appellant's conviction on all charges and specifications should be set aside and dismissed with prejudice because it was obtained through vindictive prosecution; (3) the military judge abused his discretion in denying the appellant's motion to dismiss for lengthy pretrial delay in violation of the Due Process Clause of the Fifth Amendment;[2] (4) the finding of guilty to Charge II and its Specification was legally and factually insufficient; and (5) the finding of guilty to Specification 3 of Charge I was legally and factually insufficient.[3] In a supplement to the assignment of errors, the appellant requests a post-trial hearing to resolve the first assignment of error stated above.

Background

At the time of trial, the appellant had been on active duty for over 22 years. He served as an enlisted member for over 16 years until he became an officer in November of 2001.

On 30 October 2003, the appellant was arrested by the Houston County, Georgia, authorities, based on allegations that he had sexually assaulted his stepdaughter, EP. He was held in civilian detention from 31 October 2003 until 15 January 2004. Upon his release, the civilian and military authorities engaged in a series of discussions regarding jurisdiction of the case. According to the appellant's commander, Colonel (Col) SB, based on his discussions with the Robins Air Force Base (AFB) legal office, the civilian authorities were going to take jurisdiction and the military would take action, if appropriate, once the civilian authorities completed their process. This included any additional charges as well as initiating an administrative discharge.

The Report of Investigation (ROI) was completed on or about 1 June 2004. On 4-5 July 2004, a widely publicized double-homicide occurred on Robins AFB. Additionally, during the summer of 2004 and continuing into 2005, the base legal office was working on several other complex cases.

On 28 September 2004, the appellant was indicted in Houston County, Georgia, on five counts, including child molestation. All of the charges were for alleged offenses committed on or about 1 October 2003. In late September or early October of 2004,

[1] The military judge awarded the appellant with 77 days of pretrial confinement credit for a closely related charge in civilian court.
[2] U.S. CONST. amend. V.
[3] Issues 3, 4, and 5 are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Captain (Capt) JV from the Robins legal office met with a Houston County assistant district attorney and requested jurisdiction. Approximately two weeks later, Houston County agreed to give the Air Force jurisdiction over the case. In the spring of 2005, the Air Force declined jurisdiction. The assistant district attorney anticipated the appellant would receive about 25 years in jail for the five state charges. Capt JV testified that although he never discussed the issue with the staff judge advocate at Robins AFB, he personally felt the appellant would be administratively discharged after his civilian conviction. He shared this sentiment with the appellant's squadron command.

On 17 November 2005, in The Superior Court of Houston County, Georgia, the appellant, pursuant to a plea agreement, was ultimately convicted of only one of the five charges, child molestation. He was sentenced to probation for 10 years, 90-120 days of confinement, a $1,000 fine, and other conditions as required by his sex offender status. The appellant served 90 days of confinement from 19 December 2005 to 19 March 2006.

According to the post-trial declaration of the appellant's detailed area defense counsel at the time, Capt RA, shortly before the appellant's civilian trial, he contacted Capt MC, who was the chief of military justice in the Robins AFB legal office, to verify that the military was not planning to prosecute the appellant. Capt RA was informed that the civilian authorities were going to prosecute the appellant and once the appellant accepted the plea agreement and was convicted the military intended to pursue an Under Other than Honorable Conditions (UOTHC) discharge. Capt RA shared this information with the appellant. Around the time the appellant was released from civilian detention, Capt RA was informed by the appellant that the military intended to court-martial him. Capt RA contacted Capt MC and was advised that the appellant's commander felt the appellant received a light sentence in civilian court and deserved additional jail time.

According to his post-trial declaration, Capt MC states the following concerning his recollection of his conversations with Capt RA: "I advised Capt [RA] that it was our intention, (at the legal office) after [the appellant's] civilian trial was completed, to recommend to [the appellant's] commander and to the convening authority that [the appellant] be administratively discharged. At no time did I promise or imply that a discharge was certain, only that we would recommend that course of action." Capt MC also indicates that in early 2006, the general court-martial convening authority's legal office advised the Robins AFB legal office that the appellant should be court-martialed. Capt MC then interviewed the appellant's ex-wife and stepdaughter whom he understood had previously been uncooperative with the district attorney's office. During these interviews, Capt MC became aware of additional charges, to include charges reflecting misconduct in Florida that the State of Georgia did not prosecute. Capt MC indicates that the appellant's commander felt the sentence the appellant received in Georgia was light but his motivation for preferring the additional charges was not his dissatisfaction with the civilian sentence. Finally, Capt MC indicates Capt RA never complained to him that the military was breaking an agreement not to court-martial the appellant.

While the appellant was in civilian confinement, he wrote two apology letters, one to his ex-wife and the other to a friend. Both of these letters contained admissions that were used by the prosecution in his court-martial. In the appellant's post-trial declaration, he claims that had he known the military was also going to prosecute him, he never would have written the apology letters to his ex-wife and his friend while incarcerated in the Georgia detention center.

Grant of Immunity

The first assignment of error is that the appellant's conviction should be set aside because assurances by Air Force officials provided the appellant with de facto immunity. The appellant asserts that he pled *nolo contendere* in the state court as a result of assurances given to him by the base legal office that if he took the plea agreement, he would receive an administrative discharge rather than being court-martialed. The appellant asserts that he would not have pled *nolo contendere* at his civilian trial if he had known he was going to be court-martialed. The appellant relies on a conversation Capt RA had with Capt MC wherein Capt MC advised that once the appellant was convicted in civilian court the military intended to pursue an administrative discharge. The appellant did not raise this issue at trial.

The government's position is that Capt MC did not have the authority and did not manifest to Capt RA an apparent authority to grant immunity. As Capt MC states in his post-trial declaration, he advised Capt RA that his office planned to recommend to the convening authority the administrative discharge of the appellant after his civilian conviction. Capt MC did not imply or promise Capt RA that a discharge was certain.

Under Rule for Courts-Martial (R.C.M.) 704(c), only a general court-martial convening authority may grant immunity and that authority may not be delegated. However, R.C.M. 704 recognizes in its discussion section other circumstances where de facto immunity may be granted. Specifically, this section states:

> Only general court-martial convening authorities are authorized to grant immunity. However, in some circumstances, when a person testifies or makes statements pursuant to a promise of immunity, or a similar promise, by a person with apparent authority to make it, such testimony or statements and evidence derived from them may be inadmissible in a later trial. Under some circumstances, a promise of immunity by someone other than a general court-martial convening authority may bar prosecution altogether.

R.C.M. 704(c), Discussion.

"A *de facto* grant of immunity arises when there is an after-the-fact determination based on a promise by a person with apparent authority to make it that the individual will not be prosecuted. *De facto* immunity, commonly called 'equitable immunity,' triggers the remedial action of the exclusionary rule and permits enforcement of the agreement." *United States v. Jones*, 52 M.J. 60, 65 (C.A.A.F. 1999) (internal citations omitted).

Courts have found situations where de facto immunity has occurred. *See, e.g., United States v. Kimble*, 33 M.J. 284 (C.M.A. 1991) (promise by special court-martial convening authority was de facto immunity); *Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982) (promise by general court-martial convening authority's staff judge advocate amounted to immunity); *United States v. Spence*, 29 M.J. 630 (A.F.C.M.R. 1989) (finding de facto immunity when Air Force officials expressly and implicitly promised the appellant for eight months that he would be placed in therapy and not prosecuted).

Considering the case law and the facts of this case, we do not find that the appellant was granted de facto immunity. Capt MC did not promise or indicate with any degree of certainty that the military would not prosecute the appellant if he accepted the plea agreement in civilian court. Additionally, Capt RA knew or should have known that Capt MC did not have the apparent authority to grant immunity. Further, a clemency letter submitted by the appellant's brother states:

> [The appellant] did take a plea bargain in civilian court after being told he would never see his son or family for forty years. His first lawyer charged him eight thousand dollars and suggested the plea bargain. His second lawyer advised against that and two years and twenty plus thousand dollars later, the lawyer was told we had no more money and he advised to plea bargain. [The appellant] had no choice and most people would do the same on the advice of their counsel.

Accordingly, under the circumstances of this case, we find that the appellant was not granted de facto immunity.

Even assuming, arguendo, that there was de facto immunity from military prosecution for the offenses which were the subject of civilian prosecution, such immunity would not preclude later prosecution for other offenses. The charges ultimately referred for trial by court-martial do not include those presented in the civil court indictment. The de facto immunity essentially reiterates the already existing Air Force prohibition on military prosecution for substantially the same offenses tried in state court. Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 2.5 (26 Nov 2003).

Vindictive Prosecution

The appellant's second assignment of error is that the conviction should be set aside and dismissed with prejudice because it was obtained through vindictive prosecution. The appellant asserts that considering the testimony of Col SB the appellant would not have been court-martialed if held accountable in civilian court, the comment from Capt MC to Capt RA that the new commander felt the appellant received a light sentence in civilian court, the assurances by the legal office that the appellant would be administratively discharged, the fact the government was aware of the assault charges in Specifications 1-3 of Charge I at the time the ROI was completed and before it declined jurisdiction, and the strong similarity between the initial charges (which included sodomy, carnal knowledge, and several other indecent acts) and those charged by Houston County, there was a discriminatory intent on the part of the government to prosecute him. The appellant did not raise this issue at trial.

The government asserts that there were three motivating reasons behind the government's decision to court-martial the appellant. First, the Air Force possessed evidence of misconduct by the appellant beyond what was prosecuted by the State of Georgia. Second, at the time of the prosecution by the State of Georgia, the appellant's wife was attempting to reconcile with the appellant, and as a consequence, his wife and stepdaughter were apparently uncooperative. However, by the time the Air Force was considering its options, the appellant and his wife were no longer trying to reconcile; therefore, his spouse and stepdaughter became more willing to assist in the appellant's prosecution. Finally, it is true that the appellant's immediate commander felt the punishment imposed by the State of Georgia was light.

"To support a claim of selective or vindictive prosecution, an accused has a 'heavy burden' of showing that 'others similarly situated' have not been charged, that 'he has been singled out for prosecution,' and that his 'selection . . . for prosecution' was 'invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.'" *United States v. Argo*, 46 M.J. 454, 463 (C.A.A.F. 1997) (quoting *United States v. Garwood*, 20 M.J. 148, 154 (C.M.A. 1985), quoted in *United States v. Hagen*, 25 M.J. 78, 83 (C.M.A. 1987)).

The appellant has not shown that any of the aforementioned impermissible reasons for prosecuting him were present in this case. Accordingly, considering the totality of circumstances of this case, we do not find that the appellant was vindictively prosecuted.

Speedy Trial

The appellant asserts the military judge abused his discretion in denying the appellant's motion to dismiss for lengthy pretrial delay. We review speedy trial issues de novo. *United States v. Cooper*, 58 M.J. 54, 57 (C.A.A.F. 2003); *United States v. Proctor*,

58 M.J. 792, 794 (A.F. Ct. Crim. App. 2003). While doing so we give substantial deference to the military judge's findings of fact and will not overturn them unless they are clearly erroneous. *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005); *Proctor*, 58 M.J. at 795.

Several authorities give rise to an accused's right to a speedy trial. This right has been recognized under the Fifth and Sixth Amendments;[4] Articles 10 and 33, UCMJ, 10 U.S.C. §§ 810, 833; R.C.M. 707; and case law. *United States v. Vogan*, 35 M.J. 32, 33 (C.M.A. 1992). The appellant has raised the issue under the Due Process Clause of the Fifth Amendment. To prevail on a claim that that his right to a speedy trial under the Fifth Amendment has been violated, the appellant must show that there has been an "egregious or intentional tactical delay" on the part of the government and that said delay resulted in "actual prejudice." *United States v. Reed*, 41 M.J. 449, 452 (C.A.A.F. 1995). In proving actual prejudice, mere speculation is not enough; the appellant must show the actual loss of a witness or the loss of physical evidence. *Id*.

At trial, the military judge, after considering witness testimony and documentary evidence, specifically found the delay in this case was neither egregious nor an intentional tactic. The military judge also found the defense failed to show actual prejudice to the appellant. In fact, the defense actually conceded it had no evidence to suggest the government had delayed in order to gain a tactical advantage and the defense stated it could not show any direct evidence of prejudice. Reviewing the record, the briefs, the military judge's findings and conclusions, and applying the applicable law, we likewise find the appellant was not denied a speedy trial under the Fifth Amendment.

Legal and Factual Sufficiency

In his final two assignments of errors, the appellant claims the evidence is factually and legally insufficient to sustain the convictions for assault and battery and indecent acts with a child under 16 years of age. In accordance with Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

[4] U.S. CONST. amend. VI.

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

There is ample evidence in the Record of Trial that the appellant committed the charged offenses. Concerning the assault charge under Specification 3 of Charge I, the appellant's ex-wife, ML, testified at trial that the appellant assaulted her on two occasions. On the first occasion, the appellant had been arguing with ML and went outside. A short time later, the appellant came into the house, slammed the door, and shoved ML by placing his hands on both of her shoulders causing her to fall on the bed. ML was uninjured on this occasion. The second time occurred after the appellant had been fighting with his stepdaughter, EP. He grabbed ML by both of her shoulders and threw her towards her bedroom causing her to fall. As she fell, her head hit the box spring mattress of the bed resulting in ML becoming disoriented. Accordingly, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements of the offense alleged under Specification 3 of Charge I beyond a reasonable doubt. Further, we are ourselves convinced of the appellant's guilt beyond a reasonable doubt.

Concerning Charge II, indecent acts, EP testified that on one occasion the appellant bent her over his knee and stuck one of his fingers in her bottom when he was spanking her. On a separate occasion, EP described how the appellant came into her bathroom while she was taking a shower. At some point, EP ended up bent over and the appellant used his hands to rub her vaginal area with shampoo. EP was approximately between the ages of 10-12 during the time these incidents occurred. According to the testimony of ML, the appellant told her that the reason the incidents occurred with EP was that EP was a smaller version of ML.

Accordingly, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements of the offense alleged under the specification of Charge II beyond a reasonable doubt. Further, we are ourselves convinced of the appellant's guilt beyond a reasonable doubt.

Dubay Hearing

In a supplement to the assignment of errors, the appellant requested that this Court order a post-trial hearing pursuant to *United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1967). The appellant believes that the assignment of error regarding de facto immunity cannot be resolved based on the declarations submitted to this Court and, therefore, a

Dubay hearing should be ordered in accordance with *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997). Applying the *Ginn* factors to this case, we hold that a *Dubay* hearing is not warranted. Considering the declarations as a whole, there is no factual dispute as to what was said by Capt MC to Capt RA. Additionally, even if Capt MC had the authority to grant immunity, using words such as "plan" or "intend" do not amount to a promise of immunity. Further, the clemency letter submitted by the appellant's brother suggests that the appellant did not plead guilty in the civilian court based upon an alleged promise by Capt MC, but instead based upon advice of his civilian defense counsel due to other reasons. Accordingly, we deny the appellant's request for a post-trial hearing.

Post-Trial Delay

Though not raised as an issue on appeal, we note that the overall delay of over 880 days between the time this case was docketed at this Court and completion of our review 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. *United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). 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.

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. Considering that the appellant was credited with 77 days for pretrial confinement in the Houston County jail and that the adjudged and approved confinement was 77 days, the net effect is that the appellant received a dismissal. Also, the appellant was required to register as a sex offender pursuant to his civilian conviction so mitigating the finding of guilty to a lesser included offense would not provide him any relief from his sex offender status.

Pursuant to *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002), we have the power, under Article 66, UCMJ, to grant relief even in the absence of a showing of prejudice. *Tardif*, 57 M.J. at 224-25. However, the only meaningful relief we could grant in this case is disapproval of the dismissal. Weighing the seriousness of the offenses committed by the appellant against any possible harm generated from the delay, we believe that no further relief is warranted. *See United States v. Rodriguez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006).

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court

[5] Although not affecting the legal sufficiency of the findings or sentence, the court-martial order (CMO), dated 2 July 2007, erroneously states the sentence was adjudged on 5 May 2007 vice 2 May 2007. We order the promulgation of a corrected CMO.