UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JAMES R. RIDGE
United States Air Force

ACM 36402

7 May 2007

Sentence adjudged 25 May 2005 by GCM convened at Eielson Air Force Base, Alaska. Military Judge: Anne L. Burman (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 30 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major Anniece Barber.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Daniel J. Breen.

Before

BROWN, JACOBSON, and SCHOLZ
Appellate Military Judges

OPINION OF THE COURT

JACOBSON, Senior Judge:

The appellant was convicted, in accordance with his pleas, of carnal knowledge, sodomy with a child under the age of 16 years, adultery, committing an indecent act, wrongfully enticing a female under the age of 16 years to engage in acts of sodomy for hire and reward, and wrongfully arranging for an underage female to engage in sexual acts with him, in violation of Articles 120, 125, and 134, UCMJ, 10 U.S.C. §§ 920, 925, 934. A military judge, sitting alone as a general court-martial, sentenced him to a bad-conduct discharge, confinement for 36 months, and reduction to E-1. In accordance with a pretrial agreement, the convening authority reduced the adjudged period of confinement to 30 months and approved the remainder of the sentence as adjudged. The appellant

now asserts two errors: (1) Whether Specifications 1, 2, 3, and 4 of Charge III should be dismissed because they are multiplicious with the Specifications of Charges I and II, and (2) Whether the appellant's convictions on Specifications 3 and 4 of Charge III must be set aside because the President's drafting of the enumerated pandering paragraph of Article 134, UCMJ, preempts the application of the General Article with regard to those specifications. We find both arguments to be without merit and we affirm.

Background

At trial, the appellant explained, during his providence inquiry and via a stipulation of fact, the circumstances surrounding his crimes. He said that sometime after he arrived at Eielson Air Force Base (AFB), Alaska, he met Technical Sergeant (TSgt) WM, an Air Force member who lived with his family in the nearby town of North Pole, Alaska. Also living in TSgt WM's household was the couple's foster daughter, CME. The appellant began visiting the family on a regular basis. He became friends with CME, who was 13 years old at the time, and started taking her shopping and to other locations around the area. Unfortunately, one of those locations was the appellant's dorm room on base, where she eventually performed oral sex on him. She later performed the same act upon him four additional times in locations on and near Eielson AFB. On one of the occasions, the appellant told CME that he would pay her $40.00 to perform oral sex on him. She did, and he paid her. On another occasion, CME wanted alcohol, so the appellant provided her with a bottle of alcohol in exchange for oral sex.

The appellant later tried to talk CME into engaging in sexual intercourse, but she told him she was not ready to do so. She was willing, however, to arrange for the appellant to have sex with her friend, AVL. The appellant used his government computer to communicate with CME as they made arrangements for him to pay $300.00 to AVL for sex. AVL was also under the age of 16. Numerous e-mails were exchanged between CME and the accused in an attempt to set up the liaison. Eventually, the appellant and AVL met. Part of the deal was that AVL's friend BW was to be allowed to remain in the room during the sexual act. BW was a male under the age of 18. According to the appellant, the presence of BW sitting on the bed in plain view of the sexual activity caused the accused to be unable to maintain an erection, so the sex was minimal. He did, however, admit that his penis penetrated AVL's vagina before he lost his nerve and gave up.

The e-mails exchanged between CME and the appellant were eventually discovered by TSgt WM, who reported the suspected crimes to his chain of command.

Analysis

Multiplicity

Offenses are multiplicious if one is a lesser-included offense of the other, *United States v. Palagar,* 56 M.J. 294, 296 (C.A.A.F. 2002), or if the offenses are "facially

duplicative," i.e., factually the same. *United States v. Heryford,* 52 M.J. 265, 266 (C.A.A.F. 2000) (quoting *United States v. Britton*, 47 M.J. 195, 198 (C.A.A.F. 1997)). Ordinarily, an unconditional guilty plea waives a multiplicity issue, unless it rises to the level of plain error. The appellant bears the burden of showing that such an error occurred. *United States v. Powell,* 49 M.J. 460, 464-65 (C.A.A.F. 1998). We find that the appellant has not met his burden.

Our superior court recently summarized the rules and standards for assessing multiplicity claims where the appellant first raises the issue on appeal as follows:

> Appellant may show plain error and overcome [waiver] by showing that the specifications are *facially duplicative*, that is, factually the same. The test to determine whether an offense is factually the same as another offense, and therefore lesser-included to that offense, is the elements test. Under this test, the court considers whether each provision requires proof of a fact which the other does not. Rather than adopting a literal application of the elements test, this Court [has] stated that resolution of lesser-included claims can only be resolved by lining up elements realistically and determining whether each element of the supposed lesser offense is rationally derivative of one or more elements of the other offense — and vice versa. Whether an offense is a lesser-included offense is a matter of law that this Court will consider de novo. To determine whether the offenses are factually the same, we review the factual conduct alleged in each specification, as well as the providence inquiry conducted by the military judge at trial.

United States v. Hudson, 59 M.J. 357, 359 (C.A.A.F. 2004) (internal punctuation and citations omitted) (emphasis added).

The appellant first argues that the sodomy specification is multiplicious with the enticement specification. The appellant's argument is misplaced because the enticement crime was completed prior to the second crime, sodomy, taking place. While the appellant would have us focus on the sodomy act itself, it was proper to separately charge the appellant with offering to give the underage girl money and alcohol in exchange for her performing the sexual act. This would have been a crime even if the sexual act had never occurred. Likewise, the sodomy crime would have been complete had the enticement never occurred (as it was here, on at least three occasions, that did not involve prior enticement).

The appellant's second multiplicity argument focuses on the sexual intercourse with AVL. We find that it was certainly not plain error to treat the various aspects of the appellant's encounter with AVL as separate crimes. First, adultery and carnal knowledge are distinct crimes, one requiring the appellant to be married, and one requiring the victim to be underage. Second, the focus of the indecent acts specification is the presence of the

underage boy in the room while the appellant engaged in sexual intercourse with an underage female. As the appellant himself explained in the providence inquiry, the boy is the victim of the indecent acts crime because viewing an adult male servicemember engaging in sexual activity with an underage female could tend to corrupt his morals. Third, the act of arranging to meet with AVL in order to have sex with her, and negotiating a price, is a separate crime from the actual sex act and was completed prior to the time the appellant actually met AVL.

In regard to both the sodomy-related specifications and the sexual intercourse-related specifications, we find that the charges involve differing elements and are predicated on distinct and separate facts, and are therefore not multiplicious. Furthermore, we see no evidence of prosecutorial overreach. *See United States v. Quiroz,* 55 M.J. 334, 338-39 (C.A.A.F. 2001); *United States v. Teters,* 37 M.J. 370, 376-77 (C.M.A. 1993). We further find that the appellant waived his multiplicity claims by pleading guilty unconditionally. *See* Rule for Courts-Martial 907(b)(3) and 910(j). *See also United States v. Harwood,* 46 M.J. 26, 28 (C.A.A.F. 1997).

Preemption

We have conducted a de novo review of the appellant's preemption argument and find it to be without merit. The appellant's crimes involved arranging to pay for his own sexual activity, not acting as a "middle man" for another party. We see no evidence that Congress intended the pandering article to cover this particular type of offense, and hold that it was proper to charge the appellant under the General Article of Article 134, UCMJ. *See United States v. Erickson,* 61 M.J. 230, 233 (C.A.A.F. 2005) (quoting *United States v. Kick,* 7 M.J. 82, 85 (C.M.A. 1979)).

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

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator