UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class BOBBY R. RODRIGUEZ
United States Air Force

ACM 37927

02 May 2013

Sentence adjudged 11 February 2011 by GCM convened at Moody Air Force Base, Georgia. Military Judge: Terry A. O'Brien.

Approved sentence: Dishonorable discharge, confinement for 4 years, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Travis K. Ausland.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Lieutenant Colonel C. Taylor Smith; Captain Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and SOYBEL
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of aggravated sexual assault by having sexual intercourse with a substantially incapacitated victim and assault consummated by a battery, in violation of Articles 120 and 128, UCMJ, 10 U.S.C. §§ 920, 928. The court sentenced him to a dishonorable discharge, confinement for four years, and reduction to E-1. The convening authority approved the sentence as adjudged. The appellant assigns five errors: (1) unreasonable multiplication of charges, (2) failure to instruct on mistake of fact as to consent as an affirmative defense, (3) ineffective assistance of counsel, (4) legal and

factual insufficiency of the evidence, and (5) unreasonable post-trial delay. Finding no error materially prejudicial to the substantial rights of the appellant, we affirm.

Background

The victim and her husband, Airman First Class (A1C) PD, planned a weekend trip to Atlanta to buy furniture. A1C PD invited the appellant and Airman Basic AS, both of whom were friends and co-workers, to travel with them in a separate large vehicle to assist in transporting the furniture. A1C PD offered to pay for a single hotel room where all would sleep. They traveled to Atlanta, checked into the hotel and went out for an evening of drinking. After consuming a large amount of alcohol, the victim and her husband returned to the hotel room and went to sleep.

The appellant and AS returned later and attempted to awaken the victim and A1C PD but were unable to do so. AS testified that the appellant got on top of the sleeping victim and began having sex with her. When the victim awoke to the feeling of the appellant inside her, she cried for her husband, who awoke and demanded to know what was happening. He wrapped his wife in a blanket, went to the lobby, and called the police. Following rights advisement, the appellant told a responding detective that he fell asleep on top of the victim and her husband while trying to awaken them, but he did not admit to any sexual contact.

Multiplicity

The Government charged both aggravated sexual assault and assault consummated by a battery based on the same conduct, and the trial counsel argued in the alternative. After the court convicted on both charges, the military judge merged them for sentencing and instructed the members that they must consider them as one offense. Under these circumstances, the appellant clearly suffered no prejudice. We will dismiss the assault consummated by a battery charge, reassess the sentence, and find it nonetheless appropriate. *See United States v. Haywood*, 6 M.J. 604 (A.C.M.R. 1978); *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986).

Instruction on Affirmative Defense

Both sides agreed that the evidence had not raised the affirmative defense of consent, neither side requested the instruction, and the military judge did not instruct on the defense. This view is entirely consistent with the record. The victim testified that she awoke to the appellant penetrating her. When questioned by the police about the sexual assault, the appellant stated that he simply fell asleep on top of the victim and admitted to no sexual contact. A third witness testified that he saw the appellant having sexual intercourse with the sleeping victim and that the appellant whispered to him that he was, in fact, having sex with her. Nothing in the evidence reasonably raises the affirmative defense of mistake of fact as to consent, and the military judge had no duty to instruct on

it. *United States v. Taylor*, 26 M.J. 127 (C.M.A. 1988) (Instruction is not required where the admitted pretrial statement of the appellant, who did not testify, did not rely on mistake of fact as to consent but on a denial of penetration.).

Assistance of Counsel

Claims of ineffective assistance of counsel are reviewed by applying the two-prong test set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012), cert. denied, __ S. Ct. __ (U.S. 15 April 2013) (No. 12-1113) (mem.). Under *Strickland*, an appellant must demonstrate: (1) a deficiency in counsel's performance that is "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment,"[1] and (2) that the deficient performance prejudiced the defense through errors "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. The deficiency prong requires that an appellant show that the performance of counsel "fell below an objective standard of reasonableness," according to the prevailing standards of the profession. *Id*. at 688. The prejudice prong requires "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. Evidentiary hearings are required if there is any dispute regarding material facts in competing declarations submitted on appeal which cannot be resolved by the record of trial and appellate filings. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). Applying these standards, we find that any material conflict in the respective declarations regarding this issue may be resolved by reference to the record and appellate filings without the need for an evidentiary hearing.

The appellant argues that his counsel were ineffective by (1) failing to move to dismiss a multiplicious charge, (2) failing to request additional DNA testing, (3) failing to request a mistake of fact as to consent instruction, and (4) failing to object to two relatively minor statements in trial counsel's closing argument on findings. A responsive declaration by trial defense counsel addresses each of the alleged deficiencies and shows sound tactical reasons for the decisions now questioned by the appellant. First, as discussed above regarding multiplicity, the appellant suffered no prejudice and thus fails to meet the showing of prejudice required by *Strickland*. Second, as stated by his counsel, additional DNA testing would have only hurt the appellant's case, given his pretrial statements. Third, as discussed above regarding instructions, the evidence presented at trial did not reasonably raise an affirmative defense of mistake of fact as to consent. Fourth, as stated by his counsel, the relatively minor nature of the objectionable remarks in the context of the entire argument did not warrant interrupting the argument, and counsel made a reasonable tactical decision not to do so. Specifically and on the whole, we find no ineffective assistance of counsel.

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

Legal and Factual Sufficiency

The appellant argues, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), that the evidence is legally and factually insufficient to support his conviction. 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)). "The test for factual sufficiency 'is whether, after weighing the evidence and making allowances for not having personally observed the witnesses, [we ourselves are] convinced of the [appellant]'s guilt beyond a reasonable doubt.'" *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting *Turner*, 25 M.J. at 325). Applying these standards to the evidence as summarized above and making allowances for not having observed the witnesses, we find the evidence legally and factually sufficient to prove guilt beyond a reasonable doubt.

Post-Trial Delay

We review de novo whether an appellant's due process right to a speedy post-trial review has been violated. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). A presumption of unreasonable delay applies if the service court does not issue a decision within 18 months of docketing. *Id*. at 142. The processing time in this case exceeds that standard: trial concluded on 11 February 2011, the convening authority approved the sentence on 2 May 2011, the case was docketed on 18 May 2011, and the appellant submitted his initial assignment of errors on 14 February 2012. Following the allegation of ineffective assistance of counsel, the Government sought affidavits from appellant's counsel and submitted them on 20 March 2012. The Government filed its answer on 30 May 2012.

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. In fact, the appellant argues no particularized prejudice but, citing *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002), he argues that his punitive discharge should be set aside on the basis of unreasonable post-trial delay even without a showing of prejudice.

In *Tardif*, our superior court determined that Article 66(c), UCMJ, 10 U.S.C. § 866(c), empowered the service courts to grant sentence relief for excessive post-trial delay without showing actual prejudice, as is required by Article 59(a), UCMJ, 10 U.S.C.

§ 859(a). *Tardif*, 57 M.J. at 221. Having reviewed the legislative and judicial history of both Articles, the Court concluded that the power and duty to determine "sentence appropriateness" under Article 66(c), UCMJ, is distinct from and broader than that of determining sentence legality under Article 59(a), UCMJ:

> Article 59(a)[, UMCJ,] constrains the authority to reverse "on the ground of an error of law." Article 66(c)[, UMCJ,] is a broader, three-pronged constraint on the court's authority to affirm. Before it may affirm, the court must be satisfied that the findings and sentence are (1) "correct in law," and (2) "correct in fact." Even if these first two prongs are satisfied, the court may affirm only so much of the findings and sentence as it "determines, on the basis of the entire record should be approved."

Id. at 224 (citing *United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998)). The Court remanded the case to the lower court to determine whether relief was warranted for excessive post-trial delay, notwithstanding the absence of prejudice: "[A]ppellate courts are not limited to either tolerating the intolerable or giving an appellant a windfall. The Courts of Criminal Appeals have authority under Article 66(c)[, UCMJ,] . . . to tailor an appropriate remedy [for post-trial delay], if any is warranted, to the circumstances of the case." *Id*. at 225.

In *United States v. Brown*, 62 M.J. 602 (N.M. Ct. Crim. App. 2005), our Navy and Marine Court colleagues identified a "non-exhaustive" list of factors to consider in evaluating whether Article 66(c), UCMJ, relief should be granted for post-trial delay. Among the non-prejudicial factors are the length and reasons for the delay, the length and complexity of the record, the offenses involved, and the evidence of bad faith or gross indifference in the post-trial process. *Id*. at 607. Finding gross negligence in a delay of almost 30 months from adjournment of trial until receipt of the record for review, the court disapproved the adjudged bad-conduct discharge. Although the post-trial processing in this case exceeds the *Moreno* standards, we find no evidence of bad faith or gross indifference to the post-trial processing of the appellant's case sufficient to prompt sentence relief nor do the other suggested factors in *Brown* cause us to exercise our power under Article 66(c), UCMJ, to provide a windfall remedy to the appellant by disapproving an otherwise legal sentence.

Conclusion

The findings of guilty of a violation of Article 128, UCMJ, as alleged in the Specification of Charge II, are set aside and the Charge is dismissed; the findings of guilty of a violation of Article 120, UCMJ, as alleged in Charge I and the Specification thereunder, are approved. We reassess the sentence and determine that the adjudged and approved sentence is appropriate for the remaining offenses. The findings, as modified, and the sentence, as reassessed, are correct in law and fact, and no error prejudicial to the

substantial rights of the appellant remains. Article 66(c), UCMJ. Accordingly, the modified findings and reassessed sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court