UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class PAUL A. TITCOMBE
United States Air Force

ACM 37618

01 December 2011

Sentence adjudged 3 December 2009 by GCM convened at Grand Forks Air Force Base, North Dakota. Military Judge: W. Thomas Cumbie (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 21 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; and Lieutenant Colonel Frank R. Levi.

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

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

PER CURIAM:

A general court-martial composed of military judge alone convicted the appellant contrary to his pleas of abusive sexual contact, wrongful sexual contact, and unlawful entry, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. § 920, 934, and sentenced the appellant to a bad-conduct discharge, confinement for 21 months, and reduction to E-1. The convening authority approved the sentence adjudged. The appellant asserts as error that: (1) he was denied his right to a speedy trial; (2) his privacy was violated by pretext phone calls and searches which resulted in no incriminating evidence; (3) the pretrial confinement hearing violated due process by finding he committed the offenses

and gave him a "negative name"; (4) he is the victim of a hate crime because the trial counsel "allowed her female gender to influence her judgment," and the victim of racial prejudice because "two of the alleged victims were Caucasian and [he] is African American"; and (5) the evidence is insufficient because the victims were friends who were jealous of him seeing other women. All except the speedy trial error are asserted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). We will also address two additional issues concerning the legality of the guilty findings of unlawful entry and the delay in appellate review.

Speedy Trial

When an accused is held in pretrial confinement, the Government must show reasonable diligence in moving toward trial. Article 10, UCMJ, 10 U.S.C. § 810; *United States v. Schuber*, 70 M.J. 181 (C.A.A.F. 2011). Alleged violations of Article 10, UCMJ, are evaluated using the four factors identified in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) length of delay, (2) reasons for delay, (3) demand for speedy trial, and (4) prejudice. We review de novo whether the appellant was denied the right to a speedy trial as a matter of law and are "bound by the facts as found by the military judge unless those facts are clearly erroneous." *Schuber*, 70 M.J. at 188.

Following allegations of sexual misconduct, the appellant was ordered into pretrial confinement on 20 August 2009, and he was held in pretrial confinement until trial on 1 December 2009 – 103 days later. *See* Rule for Courts-Martial (R.C.M.) 707(b)(1) (computation of time for speedy trial purposes). The military judge denied the appellant's motion to dismiss based on denial of speedy trial. For purposes of the motion to dismiss, the parties stipulated to the essential facts as stated in the appellant's written motion and the Government's reply. The military judge expressly adopted certain paragraphs of the respective pleadings as his findings of fact, and we do not find those stipulated facts clearly erroneous. Based on the stipulated facts, the military judge concluded that "approximately 102 days" had elapsed between imposition of pretrial restraint and arraignment but excluded periods when the defense was not available for the Article 32, UCMJ, 10 U.S.C. § 832, hearing (23 days) and the trial (11 days). He concluded that the entire period of approximately 102 days was reasonable, even without excluding the 34 days of pretrial delay.

Having found the period of delay reasonable the military judge correctly noted that he need not evaluate the remaining *Barker* factors. *Schuber*, 70 M.J. at 188 (unless the period of delay is facially unreasonable, there is no need to evaluate other factors). Nevertheless, out of an abundance of caution, he applied the remaining *Barker* factors and concluded that (1) the complexity of the case and the number of potential witnesses provided legitimate reasons for delay, (2) the demands for speedy trial were pro forma in light of contemporaneous statements of defense counsel's unavailability, and (3) the availability of witnesses and evidence demonstrate the lack of prejudice other than the

confinement itself. Balancing all the factors, the military judge concluded that the Government had moved with reasonable diligence in bringing the appellant to trial.

Reviewing the issue de novo, we find that the appellant was not denied his right to a speedy trial under Article 10, UCMJ. Applying the first of the four *Barker* factors, we do not find the length of delay facially unreasonable. The stipulated facts show that 103 days elapsed between the imposition of restraint and trial, and that trial defense counsel unavailability accounted for 34 of those days. The allegations against the appellant involved multiple complainants and indicated the possible use of drugs that caused his victims to pass out. Substances seized from the appellant's dormitory room were sent to the United States Army Criminal Investigation Laboratory for analysis. Other complainants came forward after the appellant was confined, and two additional charges were preferred on 29 September 2009. We agree with the military judge that this was a complex case requiring many steps to get to trial and that the government took those steps with reasonable diligence. We further note that the appellant was informed of the charges against him as soon as practicable and that the government complied with the requirements for review of pretrial restraint that included reconsideration. Under the circumstances of this case, we do not find a delay of 103 days in bringing the appellant to trial facially unreasonable.

Having found the length of delay reasonable, we need not inquire into the remaining *Barker* factors. *Schuber*, 70 M.J. at 189. We agree, however, with the military judge that analysis of the remaining factors confirms that the appellant was not denied his right to a speedy trial under Article 10, UCMJ. First, unlike the relatively straightforward urinalysis case at issue in *Schuber*, where the Court found 71 days from pretrial confinement to trial was not facially unreasonable, this is a complex litigated sexual assault case with multiple complainants and items of physical evidence that required examination. Second, as the military judge noted, the appellant's demands for speedy trial do not favor the appellant when those demands are viewed in the context of trial defense counsel's statements of unavailability. Third, we find that neither the length of delay nor the lawfully imposed pretrial confinement during that delay prejudiced the appellant to such an extent as to tip the balance toward finding a violation of Article 10, UCMJ. Having reviewed de novo whether the appellant was denied his right to a speedy trial under Article 10, UCMJ, we conclude that he was not.

Unlawful Entry as a Lesser Offense of Burglary

Charge III alleges burglary, in violation of Article 129, UCMJ, 10 U.S.C. § 929. The military judge acquitted the appellant of the charged burglary but found him guilty of the named lesser included offense of unlawful entry, in violation of Article 134, UCMJ. *See Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 55.d.(2). In light of *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010), and its progeny, we must set aside the conviction of this lesser offense. Unlawful entry in violation of Article 134, UCMJ,

requires the terminal elements of prejudice to good order and discipline or service discredit that are not present in the charged offense; therefore, unlawful entry cannot be a lesser included offense of burglary. *Id*. at 468 (the strict elements test applies to determine whether one offense is included within another). *See also United States v. Miller*, 67 M.J. 385, 388-89 (C.A.A.F. 2009) (rejecting per se inclusion of the terminal element in enumerated offenses under clause one and two of Article 134, UCMJ); *United States v. Girouard*, 70 M.J. 5, 7 (C.A.A.F. 2011) (negligent homicide under Article 134, UCMJ, is not a lesser included offense of premeditated murder under Article 118, UCMJ, 10 U.S.C. § 918, because negligent homicide contains additional elements, i.e., the terminal elements under clause one or two of Article 134, UCMJ). We therefore set aside and dismiss the conviction under Charge III.

Unlawful Entry as Charged Offense

Additional Charge II alleges unlawful entry, in violation of Article 134, UCMJ. Although the specification does not expressly allege the terminal element under clause one or two, we do not find this omission fatal to the charge in this case. In *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), 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 one or two. 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.

In the present case, the appellant made no motion to dismiss at trial and the trial counsel argued the terminal element of conduct prejudicial to good order and discipline. Further, the military judge is presumed to know the law and apply it correctly when sitting as the trier of fact. *United States v. Phillips*, 70 M.J. 161 (C.A.A.F. 2011) (a military judge is presumed to correctly evaluate evidence required to prove a terminal element in an Article 134, UCMJ, offense). Under this posture of the case, we do not find the charged unlawful entry under Article 134, UCMJ, deficient for failing to expressly allege the terminal element.

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

once again the four factors set forth in *Barker*. *See 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. The appellant's last motion for enlargement of time states that he is no longer confined and does not indicate any potential prejudice resulting from their delays. The post-trial record contains no evidence that the delay has had any negative impact on the appellant in the intervening months since the defense delay requests were granted. 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.

Sentence Reassessment

We have considered the appellant's remaining assignments of error and find them to be without merit. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987) (there is no requirement to specifically address each assigned error so long as each error is considered). However, having set aside the findings of guilty of unlawful entry under Charge III, we must assess the impact on the sentence and either return the case for a sentence rehearing or reassess the sentence. Before reassessing a sentence, we must be confident "that, absent any error, the sentence adjudged would have been of at least a certain severity." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). A "dramatic change in the 'penalty landscape'" lessens our ability to reassess a sentence. *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003). Ultimately, a sentence can be reassessed only if we "confidently can discern the extent of the error's effect on the sentencing authority's decision." *United States v. Reed*, 33 M.J. 98, 99 (C.M.A. 1991). If we cannot determine that the sentence would have been at least of a certain magnitude, we must order a rehearing.

Here, the findings of guilty of unlawful entry under Charge III contributed only six months to the maximum possible confinement of nine years; therefore, setting aside this conviction does not significantly alter the maximum penalty. Further, the underlying facts that established the unlawful entry conviction would have still been before the military judge as part of the facts and circumstances of the wrongful sexual contact conviction under Specification 2 of Charge II. On the basis of the error noted, the entire record, and applying the principles set forth in *Sales*, we determine that we can discern the effect of the error and will reassess the sentence. Under the circumstances of this case, especially considering that the effected charge contributed only six months to the nine year maximum confinement and that the facts underlying the effected charge would have been admissible as part of the facts and circumstances of Specification 2 of Charge II, we are convinced beyond a reasonable doubt that the military judge would have imposed the same sentence. *See United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002).

Conclusion

The finding of guilty under Charge III is set aside and the charge is dismissed. The remaining findings and the sentence, following reassessment, 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 as modified and the sentence as reassessed are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court