UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JEFFERY L. WHITEHORN
United States Air Force

ACM 34412

5 February 2002

Sentence adjudged 29 November 2000 by GCM convened at Hurlburt Field, Florida. Military Judge: Mary M. Boone (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 16 months, and reduction to E-1.

Appellate Counsel for Appellant: Lieutenant Colonel Timothy W. Murphy and Major Maria A. Fried.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, Lieutenant Colonel Bryan T. Wheeler, and Major Loren H. Duffy.

Before

BRESLIN, HEAD, and BILLETT
Appellate Military Judges

OPINION OF THE COURT

BILLETT, Judge:

Between approximately 29 April 2000 and 26 May 2000, the appellant engaged in sexual intercourse on several occasions with D.D., a fifteen-year-old high school girl. The relationship ended when the girl's father caught the two going out together. A military law enforcement investigation ensued shortly thereafter. During the investigation, the appellant lied to investigators regarding his relationship with D.D. He also told D.D. and two of her friends to provide false information to investigators concerning his relationship with D.D.

At his general court-martial, the appellant pled guilty to a single specification of carnal knowledge under Article 120, UCMJ, 10 U.S.C. § 920. He also pled guilty to one specification of making a false official statement under Article 107, UCMJ, 10 U.S.C. § 907. He then pled guilty to three specifications of obstructing justice under Article 134, UCMJ, 10 U.S.C. § 934. The first obstruction of justice specification involved his conversation with the victim, D.D. The other two involved dialogue between the appellant and D.D.'s two friends. After accepting his pleas and making the requisite findings of guilt, the court, consisting of the military judge, sentenced the appellant to a bad-conduct discharge, confinement for 16 months, and reduction to E-1. The convening authority approved the sentence as adjudged.

For the first time on appeal, the appellant asserts that Specifications 2 and 3 of Charge III (obstruction of justice) must be consolidated as one specification because appellant's statements to D.D.'s two friends constituted one violation of a single provision of military law prohibiting obstruction of justice. He accordingly requests this Court to consolidate the specifications and reassess his sentence. The government concedes error. We do not agree because we find that the appellant's guilty pleas to the specifications waived further consideration of any multiplicity issue. The appellant has not carried his burden of persuading us that the conduct involved in the two specifications was facially duplicative, making his conviction for both plain error.

We are tasked with assessing the propriety of the findings and sentence under Article 66(c), UCMJ, 10 U.S.C. § 866(c). The specifications at issue read as follows:

> Specification 2: [Appellant] did, at or near Fort Walton Beach, Florida, on or about 1 June 2000, wrongfully endeavor to impede an investigation by the Air Force Office of Special Investigations into allegations of carnal knowledge by the said SENIOR AIRMAN JEFFREY L. WHITEHORN, by telling [A.R.] to tell investigators that [D.D.] was picked up by Jason Reed on the evening of 30 May 2000, and not to tell investigators that [D.D.] had sexual relations with SENIOR AIRMAN WHITEHORN or ever went to SENIOR AIRMAN WHITEHORN's apartment.
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> Specification 3: [Appellant] did, at or near Fort Walton Beach, Florida, on or about 31 May 2000, wrongfully endeavor to impede an investigation by the Air Force Office of Special Investigations into allegations of carnal knowledge by the said SENIOR AIRMAN JEFFREY L. WHITEHORN, by telling [J.M.] to tell investigators that [D.D.] was picked up by an individual named Jason on the evening of 30 May 2000, that SENIOR AIRMAN WHITEHORN did not see [D.D.] on 30 or 31 May 2000, and that [D.D.] did not have sexual relations with SENIOR AIRMAN WHITEHORN.

During the guilty plea providence inquiry, the military judge read Specification 2 of Charge III to the appellant. In response to the judge's inquiry, the appellant stated that it accurately described what he did. She then asked the appellant to describe what happened in his own words. He went on to provide those details that were essentially contained in Specification 3, specifically, that he told A.R. that he had told investigators that D.D. was picked up by someone named Jason on the night of 30 May, that he did not see D.D. on 30 or 31 May, that he and D.D. did not have sex, and that their relationship was strictly brother/sister. The appellant then suggested to A.R. that she tell investigators the same story. The military judge repeated the procedure for Specification 3, and the appellant again agreed that it accurately described his actions. He then provided a narrative of what happened that was identical to the narrative he provided with regard to Specification 2, except for the date. When the judge noted the difference in the date, the following discussion ensued:

> MJ: Again, this is on 31 May 2000. So you have one that was 1 June and one 31 May. So this occurred prior to your discussion with [A.R.] right?
>
> ACC: Ma'am, they both occurred at the same time.
>
> MJ: Same time? Okay. I wondered. It seemed like that's what I was reading from the stipulation. So both of these occurred on the 31st. Is that right?
>
> ACC: Correct. I talked to them at the same time, ma'am.
>
> MJ: Okay. So 1 June is on or about, but I just wanted to make sure, because I thought you had said 31 May before. So did you discuss this with them together? Were they both there together or did you talk to each one separately?
>
> ACC: They were both together, ma'am.

The military judge went on to accept the appellant's pleas and made findings of guilt as to both specifications. Other than the date discrepancy, at no time during the inquiry did she question the appellant about the obvious difference between the two specifications—that Specification 2 made reference to the appellant telling A.R. not to tell investigators that D.D. ever went to his apartment and that Specification 3 made reference to the appellant telling J.M. to tell investigators that he did not see D.D. on 30 or 31 May 2000. Additionally, while he made reference to talking to the two girls at the same time, at no point during the inquiry did he indicate that he made a single, simultaneous statement to both of them.

The last component of the record that relates to this issue is the stipulation of fact submitted in support of the guilty plea. In it the appellant describes what he told each girl, in separate paragraphs. The language in each paragraph is identical, with the appellant admitting that he told each girl that he told investigators that D.D. was picked up by Jason on the night of 30 May 2000, that he did not see D.D. on 30 or 31 May, that he and D.D. did not have sex, and that the relationship he had with D.D. was strictly a brother/sister relationship, and that he suggested to each that they tell the same story. The stipulation of fact essentially tracks the language of Specification 3.

The concept of multiplicity involves the constitutional and statutory prohibitions against double jeopardy. The Fifth Amendment to the Constitution provides that no person shall "be subject, for the same offense, to be twice put in jeopardy of life or limb." This notion is echoed in Article 44, UCMJ, 10 U.S.C. § 844. Double jeopardy not only prohibits successive trials for the same offense, it also prohibits separate convictions for the same offense at the same trial. *United States* v. *Ball*, 470 U.S. 856 (1985); *United States* v. *Britton*, 47 M.J. 195 (1997). The starting point in any double jeopardy/multiplicity analysis is to determine whether separate charges cover identical conduct. If it can be determined that the acts described in different charges are separate, any double jeopardy concerns are overcome. *See United States* v. *Barner*, 56 M.J. 131 (2001).

Unconditional guilty pleas waive appellate consideration of multiplicity claims, except where the record shows that the challenged offenses are "facially duplicative." *United States* v. *Broce*, 488 U.S. 563 (1989); *United States* v. *Lloyd*, 46 M.J. 19, 23 (1997). Double jeopardy claims, including those founded in multiplicity, are waived by failure to make a timely motion to dismiss, unless they rise to the level of plain error. *Britton*. An appellant may show plain error and overcome waiver by showing that the specifications are "'facially duplicative' that is, factually the same." *United States* v. *Heryford*, 52 M.J. 265 (2000) (quoting *Britton*, 47 M.J. at 198). Whether specifications are facially duplicative is determined by reviewing the language of the specifications and "facts apparent on the face of the record." *Lloyd*, 46 M.J. at 24. Using these guidelines, we must determine whether the appellant's guilty plea to two specifications of obstruction of justice was facially duplicative. *Id.* at 23.

We examine first the specifications in question to see if they are "facially duplicative." The specifications indicate the offenses occurred on different dates. Also, Specification 3 alleges a specific act not included in Specification 2—that the appellant told J.M. to tell investigators that the appellant "did not see [D.D.] on 30 or 31 May 2000." Likewise, Specification 2 alleges a specific act not included in Specification 3—that the appellant told A.R. not to tell investigators that D.D. "ever went to Senior Airman Whitehorn's apartment." Thus, the specifications, though similar, are not "facially duplicative."

We turn to the record to see if the information presented in support of the appellant's guilty plea made it immediately obvious to the military judge that Specifications 2 and 3 described identical misconduct. The appellant told the military judge, in very general terms, that his discussions with A.R. and J.M. occurred at the same time and that he spoke to them together. However, there was little information about exactly what was said, to whom the appellant directed his comments, whether the appellant engaged in separate conversations at any time with either A.R. or J.M., or whether both were present during the entire conversation.

The difference between the specifications on the one hand (or more specifically, Specification 2), and the appellant's guilty plea narrative and his stipulation on the other creates ambiguity. Specification 2, with its assertion that the appellant told A.R. not to tell investigators that D.D. had ever been to the appellant's apartment, is distinctly different from Specification 3 and the record. It also differs from Specification 3 and the record in that it does not make the factual assertion that the appellant told A.R. to tell investigators that he did not see D.D. on 30 or 31 May. These variances are not resolved. In response to the military judge's inquiry, the appellant agreed that each specification accurately described his conduct. He then provided a narrative explanation of that conduct that completely corroborated the factual assertions of one specification but not the other. The military judge never mentioned the inconsistency and consequently, the appellant was never asked to comment on the differences between the specifications, other than the dates.

A conclusion that the appellant engaged in identical conduct when speaking to the girls is also hampered by a lack of specificity in the record. It is apparent that the appellant was giving the two girls a fairly detailed list of suggestions to tell the investigators. In this context it is difficult to establish that the appellant's utterances to each were identical, absent evidence that the girls were in each other's presence and the presence of the appellant for the same uninterrupted period while conversation was taking place and absent a more detailed description of what was said. It is also highly significant that, while he said he spoke to the girls at the same time, the appellant never stated that he made one simultaneous statement to both. He may well have said different things to each. Indeed, the nature of the specifications suggests that this is what happened.

This case is factually distinct from *United States* v. *Guerrero*, 28 M.J. 223 (1989), in that the two obstruction of justice specifications in *Guerrero*, in identical language, alleged the identical conduct. The record in that case also established that the accused made one short statement to two other persons who were with him at the same time in the confined space of an automobile. The *Guerrero* specifications suggest, and the record confirms, that the accused made a single statement to two people at once. The instant case contains no such certainty.

This speculation as to exactly what was said, and to whom, crystallizes the problem in this case. There is insufficient evidence on the record to establish convincingly that separate conversations took place. There is also insufficient evidence to establish that a single conversation took place that delivered an identical, simultaneous message to both girls. Since the record does not take us out of the realm of uncertainty when we attempt to determine whether the appellant engaged in the very same conduct toward the girls, we conclude that he has not carried his burden of persuading us that the specifications are facially duplicative so that the military judge's acceptance of the plea was plain error. Accordingly, we hold that the multiplicity issue was waived.

The approved 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; *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, SSgt, USAF
Chief Court Administrator