UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant DANIEL R. BILCZO JR.
United States Air Force

ACM 34078

10 January 2002

Sentence adjudged 28 March 2000 by GCM convened at Eglin Air Force Base, Florida. Military Judge: Robert G. Gibson Jr. and Mark L. Allred (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 14 years, and reduction to E-1.

Appellate Counsel for Appellant: Colonel James R. Wise, Lieutenant Colonel Timothy W. Murphy, and Major Stephen P. Kelly.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major Martin J. Hindel.

Before

BURD, BRESLIN, and HEAD
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

The appellant was charged with two specifications of rape of a child under 12 years of age, one specification of sodomy with a child under 12 years of age, and one specification of committing indecent acts upon a child under the age of 16 years, in violation of Articles 120, 125, and 134, UCMJ, 10 U.S.C. §§ 920, 925, 934. The appellant pled guilty unconditionally to the rape offenses. The appellant moved to dismiss the specifications alleging sodomy and indecent acts. After the military judge denied the defense motion, the appellant entered conditional guilty pleas to these offenses, preserving the litigated issue on appeal. The military judge sentenced the appellant to a dishonorable discharge, confinement for 16 years, forfeiture of all pay and

allowances, and reduction to E-1. The convening authority reduced the sentence, approving a dishonorable discharge, confinement for 14 years, and reduction to E-1.

The appellant alleges the military judge was not properly qualified to serve, and the military judge erred in failing to dismiss the sodomy and indecent acts specifications as barred by the statute of limitations. We find error and take corrective action.

The Military Judge's Qualifications

The appellant maintains the military judge was disqualified because his license to practice law in his home state was in inactive status, and that this is a jurisdictional defect. This Court previously resolved this issue adversely to the appellant. *United States v. Maher*, 54 M.J. 776 (A.F. Ct. Crim. App.), *aff'd*, 55 M.J. 361 (2001) (mem.).

The Statute of Limitations

The appellant was charged with several crimes alleging sexual offenses against two girls, both under 12 years of age. The appellant does not contest the correctness of his conviction for the rape offenses, no doubt recognizing that a charge of rape is not subject to the five-year limitations period. *Willenbring v. Neurauter*, 48 M.J. 152, 180 (1998). However, the appellant contends that his conviction of the two remaining specifications and charges violated the five-year statute of limitations applicable to courts-martial. We agree.

The appellant was charged, inter alia, with committing sodomy upon a child under 12 years of age, not his wife, on divers occasions between about 3 April 1991 and 30 November 1996. The appellant was also charged with committing indecent acts upon the same child during the same time period. The summary courts-martial convening authority received these charges on 3 November 1999.

At a preliminary session of the court-martial, trial defense counsel noted that the specifications in question included time periods outside the five-year limitations period prescribed by Article 43, UCMJ, 10 U.S.C. § 843. The defense counsel moved to dismiss the portions of the specifications outside the five-year period. The military judge denied the motion, relying upon this Court's decision in *United States v. McElhaney*, 50 M.J. 819 (A.F. Ct. Crim. App. 1999).

The appellant then entered conditional guilty pleas to these two specifications. This preserved the issue for appellate review. Rule for Courts-Martial (R.C.M.) 910(a)(2). During the providence inquiry, the appellant only admitted to acts that occurred more than five years before the sworn charges were received by the summary court-martial convening authority. After conducting a thorough inquiry into the basis for the appellant's plea, the military judge accepted the conditional pleas, and found the

appellant guilty of these offenses. The appellant now renews his claim that the statute of limitations bars trial on these two specifications.

Article 43, UCMJ, 10 U.S.C. § 843, sets out the statute of limitations applicable to trials by courts-martial. For the offenses in question, a person is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges by an officer exercising summary court-martial jurisdiction over the command. Article 43(b)(1), UCMJ.

Title 18 U.S.C. § 3283 provides: "No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse of a child under the age of 18 years shall preclude such prosecution before the child reaches the age of 25 years." In *McElhaney*, 50 M.J. at 826, this Court held that 18 U.S.C. § 3283 applied to courts-martial and extended the statute of limitations in this case until the victim reached age 25. However, in *United States v. McElhaney*, 54 M.J. 120 (2000), decided after the trial in this case, our superior court overruled our earlier decision and determined that Article 43, UCMJ, is the controlling statute of limitations for courts-martial.

Questions about what statute establishes the statute of limitations for courts-martial is a question of law, subject to de novo review. *McElhaney*, 54 M.J. at 125; 1 Steven Childress and Martha Davis, *Federal Standards of Review*, ¶ 2.13 (3d ed. 1999). Performing our de novo review in light of our superior court's decision in *McElhaney*, 54 M.J. at 126, we must find that the military judge erred as a matter of law in denying the motion to dismiss the specifications alleging sodomy and indecent acts which included periods beyond the five-year limitations period.

We also note that a portion of the affected specifications included brief periods within the five-year limitations period, which would not be subject to dismissal under Article 43, UCMJ. As mentioned above, during the guilty plea inquiry the appellant did not admit that any of the charged conduct occurred within the time period unaffected by the statute of limitations. The prosecution has the burden of proving an accused committed the charged offense within the limitations period. *Grunewald v. United States*, 353 U.S. 391, 396-97 (1957); *United States v. York*, 888 F.2d 1050 (5th Cir. 1989); *United States v. Sills*, 56 M.J. 556, 563 (A.F. Ct. Crim. App. 2001). However, the prosecution presented no evidence that the offenses occurred within this brief period. When the evidence is legally insufficient to support the findings, we must dismiss the affected findings. Article 66(d), UCMJ, 10 U.S.C. § 866(d). We will take action in our decretal paragraph.

Sentence Reassessment

Having set aside the findings of guilt for two specifications, it is necessary for this Court to reassess the sentence. We must determine an appropriate sentence for the offenses of which the appellant stands convicted—raping two very young girls on multiple occasions. Article 66(c), UCMJ.

There is a conflict of opinion concerning the authority of this Court to reassess sentences. The language of Article 66(c), UCMJ, its legislative history, and the decision of the Supreme Court in *Jackson v. Taylor*, 353 U.S. 569 (1957), give this Court the responsibility and unfettered authority to reassess a sentence, even after modifying the approved findings. On the other hand, our superior court holds that the service courts may only reassess a sentence after a finding of prejudicial error if the court was convinced that the sentence, as reassessed, is not greater than the sentence that the original court-martial would have imposed. *United States v. Eversole*, 53 M.J. 132 (2000); *United States v. Taylor*, 47 M.J. 322, 325 (1997); *United States v. Peoples*, 29 M.J. 426 (C.M.A. 1990); *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986); *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985). In *Sills*, 56 M.J. at 571, we analyzed these conflicting precedents, and concluded we are bound by the will of Congress and the decision of the Supreme Court.

We now reassess the sentence. Exercising our authority under Article 66(c), UCMJ, we find that an appropriate sentence for the remaining offenses is a dishonorable discharge, confinement for 14 years, and reduction to E-1.

Even applying the more restrictive tests established by our superior court, we reach the same result. The maximum possible punishment for the offenses now before this Court is exactly the same as it was before the military judge who sentenced the appellant: a dishonorable discharge, confinement for life, forfeiture of all pay and allowances, a fine, and reduction to E-1. The evidence of the appellant's sexual abuse of the small children would have been admissible in findings under Mil. R. Evid. 413. *United States v. Bailey*, 55 M.J. 38 (2001). Most significantly, the evidence relating to the challenged specifications was also relevant in sentencing. *United States v. Nourse*, 55 M.J. 229, 231-32 (2001); *United States v. George*, 52 M.J. 259, 261 (2000); *United States v. Mullens*, 29 M.J. 398, 400 (C.M.A. 1990). Thus, even without the error, the sentencing authority would have heard and considered the same evidence when determining an appropriate punishment. The remaining rape offenses were especially egregious, considering the tender ages of the victims, the appellant's breach of a position of special trust, and the adverse effect upon the children and the family. We are satisfied that, without the error below, the sentence imposed by the military judge would not have been less than a dishonorable discharge, confinement for 14 years, and reduction to E-1.

Conclusion

The findings of guilt for the Specification of Charge II, and Charge II, and the Specification of Charge III, and Charge III, are set aside. 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 occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the findings, as modified, and sentence are

AFFIRMED.

OFFICIAL

LAURA L. GREEN
Clerk of Court