UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant ADAM E. SERNA
United States Air Force

ACM 37822

16 November 2012

Sentence adjudged 25 October 2010 by GCM convened at Tinker Air Force Base, Oklahoma. Military Judge: Matthew D. Van Dalen (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 30 years, and reduction to E-1.

Appellate Counsel for the Appellant: Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Scott C. Jansen; Major Roberto Ramirez; Captain Tyson D. Kindness; Captain Brian C. Mason; and Gerald R. Bruce, Esquire.

Before

STONE, GREGORY, and HARNEY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

GREGORY, Senior Judge:

Before a general court-martial composed of military judge alone, the appellant pled guilty to multiple acts of aggravated sexual abuse of a child, indecent liberties with a child, and indecent acts with child, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934. The appellant's daughter is the victim of the charged offenses and all were committed when she was between the ages of three and six years. The court sentenced the appellant to a dishonorable discharge, confinement for 440 months, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. In

accordance with a pretrial agreement that capped confinement at 30 years, the convening authority approved the dishonorable discharge, confinement for 30 years, and reduction to the lowest enlisted grade.[1] He assigns seven errors on appeal.

The Sufficiency of the Article 134, UCMJ, Offenses

The appellant assigns as error that the two specifications of indecent acts alleged under Article 134, UCMJ, fail to state offenses because neither alleges the required terminal elements. Whether a charge and specification state an offense is a question of law that we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citations omitted). "A specification states an offense if it alleges, either expressly or by [necessary] implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *Id*. at 211 (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)); *see also* Rule for Courts-Martial 307(c)(3). In *Fosler*, our superior 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 allege the terminal element of either Clause 1 or 2. *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). While failure to allege the terminal element of an Article 134, UCMJ, offense is error, in the context of a guilty plea, the error is not prejudicial where the military judge correctly advises the appellant of all the elements and the plea inquiry shows that the appellant understood to what offense and under what legal theory he was pleading guilty. *United States v. Ballan*, 71 M.J. 28, 34-36 (C.A.A.F. 2012), *cert. denied*, __ S.Ct.__ (U.S. 25 June 2012) (No. 11-1394).

During the plea inquiry in the present case, the military judge advised the appellant of each element of the charged offenses. For the Article 134, UCMJ, offenses, the military judge included the terminal element of each specification and the appellant explained how his misconduct met the requirements of the terminal element. Therefore, as in *Ballan*, the appellant here suffered no prejudice to a substantial right: he knew under what clause he was pleading guilty and clearly understood how his conduct violated the terminal element of Article 134, UCMJ.

The Remaining Assignments of Error

At trial, the appellant freely acknowledged his guilt. He told the military judge that he began molesting his daughter in the bathroom when she was three years old by pouring water on her vaginal area to, according to the appellant, stimulate and arouse her sexually and also cause him to be sexually aroused "maybe once or twice every two months." When his daughter was four, he took things a step further by carrying her from the bathroom to the bedroom, where he "laid her on her bed, spread her legs, and licked her vagina with [his] tongue" on about seven occasions. The molestation stopped only

[1] Also in accordance with the pretrial agreement, the convening authority disapproved the adjudged forfeitures and waived the mandatory forfeitures for the benefit of the appellant's daughter.

after the appellant's wife discovered the appellant in their daughter's bedroom when she heard laughter and her daughter say, "It's too big." As she stepped into the room Ms. S saw the appellant "on his knees leaning over [the victim]" with her "underwear around her shins" and the appellant "erect." She later asked her daughter if the appellant had touched her and the victim eventually stated that he had "touched her 'girl parts' using his tongue and hands. . . . 'lots of times.'"

The appellant expressed remorse for what he had done to his daughter through his unsworn statement: "I am truly sorry for what I did to you. I should never have done what I did. It was wrong and I regret it greatly." In his clemency statement, the appellant urged the convening authority to consider that he has "always taken responsibility" for what he did and that he had apologized to his wife and daughter.

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant assigns six additional errors attacking his conviction and sentence: (1) that Specifications 2 and 3 of Charge I are an unreasonable multiplication of charges, (2) that the findings of guilt are factually insufficient, (3) that inconsistencies between the stipulation of fact and the plea inquiry render the pleas improvident, (4) that the sentence is inappropriately severe, (5) that "the" specification of Charge I fails to state an offense, and (6) that he was denied effective assistance of counsel. Having considered these remaining assignments of error, we find them utterly without merit. We will, however, comment on each to provide the appellant the basis for our decision. *See United States v. Matias*, 25 M.J. 356, 363 (C.M.A. 1987).

Concerning the alleged unreasonable multiplication of charges in Specifications 2 and 3 of Charge I, the appellant pled guilty to both specifications and raised no motion at trial regarding multiplicity for findings or sentence. The issue is waived absent "an extreme or unreasonable 'piling on' of charges." *United States v. Butcher*, 53 M.J. 711, 714 (A.F. Ct. Crim. App. 2000), *aff'd*, 56 M.J. 87, 93 (C.A.A.F. 2001). We find no extreme or unreasonable piling on of charges in this case, and we further find that each offense is separately punishable under the criteria set forth in *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001).

The appellant next disputes the factual sufficiency of the evidence, emphasizing the lack of "any forensic evidence corroborating" his guilt. In a guilty plea case, we look to the guilty plea inquiry to determine whether the "factual circumstances as revealed by the [appellant] himself objectively support that plea." *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980). We find that the appellant's sworn admissions during the plea inquiry, coupled with a stipulation of fact that included an attached interview with his daughter, as well as a recorded pretext phone call with the appellant, provides overwhelming evidence of guilt.

As a further attack on his plea, the appellant argues that certain inconsistencies regarding the time periods of the offenses render the plea improvident. The acts of sexual molestation, which occurred prior to 1 October 2007, the effective date of the then new Article 120, UCMJ, are alleged as indecent acts in violation of Article 134, UCMJ. Those which occurred on or after that date are charged under Article 120, UCMJ. During the plea inquiry, the military judge clarified with the appellant the respective time periods for each offense, and we find no substantial conflict between the appellant's statements, the stipulation of fact, and the charged offenses sufficient to support reversing the military judge's finding of a provident plea. *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996).

Turning to his sentence, the appellant argues that it is inappropriately severe because (1) he had a prior enlistment, (2) he deployed to the United Arab Emirates, and (3) a Coast Guardsman received a lesser sentence for more serious acts. The appellant faced a combined total of 64 years in confinement, but used a pretrial agreement to cap confinement at 30 years. After carefully considering the character of the offender, the nature and seriousness of his offenses, and the entire record of trial, we do not find that the appellant's approved sentence is inappropriately severe nor do we find sufficient cause to engage in sentence comparison. *See United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005); *United States v. Wacha*, 55 M.J. 266 (C.A.A.F. 2001); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

The appellant next argues that "the specification" of Charge I fails to state an offense, but the appellant pled guilty to three specifications under Charge I, in violation of Article 120, UCMJ. His *Grostefon* submission clarifies that he is complaining specifically about the offense of Aggravated Sexual Abuse of a Child, the offense alleged in Specification 1 of Charge I. The appellant states that this specification alleges "only the acts" but not an offense. The specification alleges that the appellant on divers occasions engaged in lewd acts by intentionally touching his tongue to the genitalia of MS, a child under 16 years of age. This is clearly sufficient to allege the elements of Aggravated Sexual Abuse of a Child, in violation of Article 120(f), UCMJ. *See Dear*, 40 M.J. at 197.

As a final attack on his conviction, the appellant claims ineffective assistance of counsel in that the "only" reason he pled guilty with a pretrial agreement was to "protect [his] daughter," because his counsel told him that a litigated trial would require her to testify. In his post-trial submission, the appellant faults his counsel for not telling him about "other options" to the testimony of his daughter and states that, had he known of these unspecified other options, he would not have pled guilty. But, that is not what he told the military judge under oath at trial:

> MJ: Staff Sergeant Serna, are you pleading guilty not only because you hope to receive a lighter sentence, but also because you are convinced that you are, in fact, guilty?
>
> ACC: Yes, Your Honor.

This exchange fully supports trial defense counsel's recollection of events surrounding the pretrial agreement negotiations and the appellant's decisions:

> I told him it was his decision whether or not he wanted to take the PTA. He said although he did not want [his daughter] to testify, *he needed to do what was best for him* and would agree to the deal . . . . I reiterated to him, again, he could only plead guilty because he was guilty and not for any other reason.

(Emphasis added.) Further rebutting appellant's claim of "other options" to his daughter's testimony is the Government witness list for a litigated trial which included the appellant's daughter. Considering the appellant's post-trial declarations in the context of his sworn admissions during the plea inquiry, we find no cause to order an evidentiary hearing and no basis to grant relief for his claimed ineffective assistance of counsel. *See United States v. Ginn*, 47 M.J. 236, 244-45, 248 (C.A.A.F. 1997).

Conclusion

The approved findings and the sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[2] Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000).

[2] 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. *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 post-trial record contains no evidence that the delay has had any negative impact on the appellant. 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.

Accordingly, the approved findings and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court