UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class SHAWN M. COOPER
United States Air Force

ACM 37758

28 September 2012

Sentence adjudged 13 August 2010 by GCM convened at Lajes Air Field, Azores, Portugal. Military Judge: Dawn R. Eflein.

Approved sentence: Dishonorable discharge, confinement for 18 months, and reduction to the grade of E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford and Captain Nathan A. White.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Lauren N. Didomenico; and Gerald R. Bruce, Esquire.

Before

STONE, GREGORY, and HARNEY
Appellate Military Judges

PER CURIAM:

In accordance with his pleas, a general court-martial composed of officer and enlisted members convicted the appellant of one specification of the attempted killing of an unborn child and assault consummated by a battery in violation of Articles 119a and 128, UCMJ, 10 U.S.C. §§ 919a, 928, respectively. The court-martial sentenced him to be dishonorable discharged, confined for 2 years, and reduced to the grade of E-1. A pretrial agreement capped confinement at 30 months. The convening authority approved the dishonorable discharge and reduction in grade, but reduced confinement to 18 months.

The appellant assigns four errors: (1) Whether Article 119a, UCMJ, violates Equal Protection[1] because it adopts a gender-based classification; (2) Whether the use of the phrase "unborn child"[2] in Article 119a, UCMJ, is unconstitutionally vague;[3] (3) Whether Article 119a, UCMJ, violates the Eighth Amendment[4] right against cruel and unusual punishment; and (4) Whether Article 119a, UCMJ, is unconstitutional because it adopts a "theory of life" that violates the Establishment Clause.[5] We will also address the impact of appellate delay.

In *United States v. Boie*, 70 M.J. 585 (A.F. Ct. Crim. App. 2011), *pet. denied*, 70 M.J. 416 (C.A.A.F. 2011), we upheld the constitutionality of Article 119a, UCMJ, after addressing essentially the same four issues raised by the appellant in the present case, and we decline the appellant's request to either disregard or reconsider that decision. In the present case, the appellant surreptitiously put abortions pills into a bowl of soup for his pregnant girlfriend, Airman First Class (A1C) SH. Although A1C SH's nausea increased after she consumed the soup, the pills apparently did not harm the baby. Based on his actions, the appellant providently pled guilty to attempting to kill the unborn child of A1C SH, in violation of Article 119a, UMCJ. For the reasons set forth in *Boie*, we reject the appellant's constitutional challenge to that Article.

Post-Trial 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 the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay, (2) the reason for the delay, (3) the appellant's assertion of the right to timely review and appeal, and (4) prejudice. *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 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.

[1] *See* U.S. CONST. amend. V.
[2] We note that the language of Article 119a, UCMJ, 10 U.S.C. § 919a, criminalizes conduct that "causes the death of . . . a child, who is in utero at the time the conduct takes place."
[3] *See* U.S. CONST. amend. V.
[4] U.S. CONST. amend. VIII.
[5] U.S. CONST. amend. I.

Conclusion

The 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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court