UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman KEVEN N. DUONG
United States Air Force

ACM 37892

16 January 2013

Sentence adjudged 13 January 2011 by GCM convened at Columbus Air Force Base, Mississippi. Military Judge: Terry A. O'Brien (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Shane A. McCammon.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre, Major Charles G. Warren; Major Brett D. Burton; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

PER CURIAM:

A general court-martial composed of a military judge convicted the appellant, consistent with his pleas, of abusive sexual contact with a child, aggravated sexual assault of a child, fraudulent enlistment, dereliction of duty, and breaking restriction, in violation of Articles 120, 83, 92, and 134, 10 U.S.C. §§ 920, 883, 892, 934. The adjudged sentence consisted of a bad-conduct discharge, confinement for 3 years, forfeitures of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged. On appeal, the appellant asserts two errors: (1) the specification of breaking restriction fails to state an offense because it omits the required terminal element for Article 134, UCMJ offenses, and (2) he is entitled to relief pursuant

to *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002), because the Government did not forward the record of trial for appellate review within the 30-day post-trial processing standard established by *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). Finding no merit to the appellant's assignments of error, we affirm the findings and sentence.

Sufficiency of the Article 134, UCMJ, Specification

Between December 2009 and March 2010, the appellant, then 19 years old, initiated a sexual relationship with LC, a 14-year-old girl. After military authorities became aware of this misconduct, the appellant's commander ordered him to have no further contact with LC. After the appellant violated that order, the commander imposed non-judicial punishment, in April 2010, and included a 60-day restriction to Columbus Air Force Base as part of the punishment. A week before the end of that restriction, the appellant violated it by leaving base to spend time with another teenage girl. For this conduct, the appellant was charged with breaking restriction. The specification omitted the terminal element for Article 134, UCMJ, offenses, which the appellant alleges is error.

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). The specification's failure to allege the terminal element of an Article 134, UCMJ, offense is error. *United States v. Ballan*, 71 M.J. 28, 34 (C.A.A.F.), *cert. denied*, 133 S. Ct. 43 (2012) (mem.). In the context of a guilty plea, such an error is not prejudicial when 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. *Id.* at 34-36.

During the plea inquiry in the present case, the military judge advised the appellant of each element of the Article 134, UCMJ, offense at issue, including the terminal element. The military judge defined the terms "conduct prejudicial to good order and discipline" and "service discrediting" for the appellant. The appellant explained to the military judge how his misconduct was prejudicial to good order and discipline, given his violation of a direct order from his commander, and how this conduct would also be service discrediting. Therefore, as in *Ballan*, the appellant here suffered no prejudice to a substantial right, because he knew under what clause he was pleading guilty and clearly understood how his conduct violated the terminal element of Article 134, UCMJ.

Post-Trial Processing Delays

The appellant's record of trial was forwarded to this Court for appellate review 45-days after the convening authority took action. Recognizing he has suffered no prejudice, the appellant cites *Tardif* and argues that, because the delay is facially unreasonable

under the *Moreno* standards, we should reduce his sentence to confinement by 35 days. We also note that more than 18 months have elapsed between the time the case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court.

In *Moreno*, our superior court established guidelines that trigger a presumption of unreasonable delay in certain circumstances, including where the record of trial is not docketed with the service court within 30 days of the convening authority's action and where appellate review is not completed within 18 months of that docketing. *Moreno*, 63 M.J. at 142. Furthermore, Article 66(c), UCMJ, 10 U.S.C. § 866(c), empowers the service courts to grant sentence relief for excessive post-trial delay without the showing of actual prejudice required by Article 59(a), UCMJ, 10 U.S.C. § 859(a). *Tardif*, 57 M.J. at 225.

Because these delays are 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 reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Moreno*, 63 M.J. at 135-36. When we assume error but are able to directly conclude it 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. 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 was harmless beyond a reasonable doubt, and that relief is not otherwise warranted. *United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *Tardif*, 57 M.J. at 224.

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; *United States v.*

[*] We note that the court-marital order (CMO) fails to include the plea and finding for the Specification of the Third Additional Charge. We order the promulgation of a corrected CMO.

Reed, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

LAQUITTA J. SMITH
Appellate Paralegal Specialist