UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman CHRISTOPHER E. SELISKAR
United States Air Force

ACM 38039

16 April 2013

Sentence adjudged 08 September 2011 by GCM convened at Travis Air Force Base, California. Military Judge: Jeffrey A. Ferguson.

Approved sentence: Bad-conduct discharge, confinement for 15 months, and reduction to E-1.

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

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Jamie L. Mendelson; and Gerald R. Bruce, Esquire.

Before

ROAN, ORR, and HECKER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HECKER, Judge:

At a general court-martial composed of officer members, the appellant pled guilty to attempting to engage in aggravated sexual assault of a child, attempting to transmit indecent pictures to a child, attempting to solicit a child to transmit child pornography, and attempting to communicate indecent language to a child in oral and written form, in violation of Article 80, UCMJ, 10 U.S.C. §§ 880. After the military judge accepted his pleas and entered findings of guilty, the court sentenced the appellant to a bad-conduct discharge, confinement for 15 months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

On appeal, the appellant asserts he should receive sentence relief because the panel members did not know he had been in pretrial confinement with foreign nationals and post-trial inmates and because a delay in transmitting the convening authority's action resulted in a delay in consideration of his case by a parole board. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Background

In May 2011, the appellant made contact in an Internet chat room with someone he believed to be a 13-year-old girl. In fact, that "girl" was an adult volunteer from a non-profit organization who was working with civilian law enforcement to apprehend individuals engaging in inappropriate sexual conversations or contact with minors. During their first Internet chat on 16 May 2011, the appellant asked the "girl" about her sexual experiences and asked her for a bikini photograph. He also asked her sexually explicit questions and sent her photographs of his erect penis. Over the next few days, the appellant engaged in further Internet chat with the "girl," as well as talking to her during two telephone calls. During these communications, he again asked sexually explicit questions and suggested that she engage in specific sexual conduct. He also asked her to send him a nude picture of herself. For this conduct, the appellant pled guilty to attempted communication of indecent language, attempted indecent conduct, and attempted solicitation of the transmission of child pornography.

When the appellant learned where the "girl" lived, he asked if she could skip school if he drove to visit her. He also told her not to tell anyone about their interactions. On 21 May 2011, after the "girl" gave him her home address, the appellant drove four to five hours to that location with the intent to have sexual intercourse with the individual he thought was a 13-year-old girl. On the way there, he purchased condoms at a convenience store for use during that sexual act. Parking on the street outside what he thought was her residence, he used his cell phone to send her a chat message that asked her to come outside. When she responded with an invitation to come inside the house, the appellant became concerned he was being set up by law enforcement and drove away. Civilian law enforcement pulled him over several blocks away. For this incident, the appellant pled guilty to attempting to engage in aggravated sexual assault of a child.

Following his arrest on 21 May 2011, the appellant was held at two civilian detention facilities for 16 days while civilian authorities decided whether to prosecute him. He was released on 5 June 2011. The following day, the civilian prosecutor advised the Air Force that the state would relinquish jurisdiction of the case to the military.

Civilian Confinement

The appellant entered into a pretrial agreement in which he agreed to plead guilty in exchange for a sentence cap of 15 months. As part of this pretrial agreement, the appellant agreed to waive all waiveable motions. Because the defense counsel had mentioned a potential Article 12, UCMJ, 10 U.S.C. § 812, motion stemming from the appellant's pretrial detention with foreign nationals in the civilian detention facility, the military judge explored this issue at trial.

The parties and military judge agreed the appellant's Article 12, UCMJ, motion could be waived as part of a pretrial agreement, relying by analogy on military case law upholding a pretrial agreement provision waiving motions under Article 13, UCMJ, 10 U.S.C. § 813. *See United States v. Felder*, 59 M.J. 444, 446 (C.A.A.F. 2004). Consistent with that case law, the military judge inquired into the circumstances of the pretrial confinement and the voluntariness of the waiver, in an effort to ensure the appellant understood the remedy to which he would be entitled if he made a successful motion.

According to what he told the military judge at trial, the appellant spent 13 days of his civilian confinement in an open bay with 50 other inmates, many of whom he described as "Hispanic" and some people who were not United States citizens.[1] He also testified about hearing conversations that these individuals were "drug runners from Mexico." The military judge advised the appellant that one possible outcome, if he granted such a motion, was to award him additional credit for the time he spent in the civilian facility based on this mingling with foreign nationals. The appellant agreed he was voluntarily waiving that motion in order to get the benefit of his pretrial agreement, acknowledged that he would never know if he would have gotten such credit from the military judge, and recognized he was relinquishing his right to ask the military judge or an appellate court to decide whether he had been subjected to illegal pretrial confinement.

The military judge advised the appellant that, despite his waiver of the motion, he could bring these matters up to the panel so the members could consider them when deciding on his sentence. The defense, however, did not tell the members anything about the conditions of the appellant's pretrial confinement. After being advised the appellant would receive day-for-day credit for the 16 days he spent in civilian confinement, the panel adjudged a sentence that included 15 months of confinement.

In clemency, the defense asked the convening authority to disapprove two months of his confinement because, in part, he was illegally punished by being confined with foreign nationals. In making this request, the defense counsel acknowledged the

[1] In a declaration submitted on appeal, the appellant provides additional details about this time in confinement, namely that three of his fellow inmates said they were Mexican nationals and that he shared showers, toilets, recreation time, and sleeping areas with the foreign nationals.

appellant knew he had been illegally punished prior to trial but elected to not raise the motion in order to get the benefit of his pretrial agreement (which prohibited him from raising the motion). No explanation was provided for why the defense failed to present information on these matters to the panel. The convening authority did not grant any clemency to the appellant.

The appellant now contends his sentence is inappropriately severe because the members did not know the appellant spent 13 days in immediate association with foreign nationals. He makes the same argument based on the members not knowing he spent 13 days in pretrial confinement in close association with post-trial prisoners.[2] In making these arguments, he asks us to find he was, in fact, subjected to illegal pretrial confinement under Articles 12 and 13, UCMJ.

Our superior court has held that an appellant's failure to raise the issue of illegal pretrial confinement at trial "waives that issue for purposes of appellate review absent plain error." *United States v. Inong*, 58 M.J. 460, 461 (C.A.A.F. 2003) (citation omitted). However, that Court has also held that an appellant's "express waiver of waivable motions" as part of a pretrial agreement "extinguishe[s] his right to raise these issues on appeal" unless the waiver is of a fundamental right. *United States v. Gladue*, 67 M.J. 311, 314 (C.A.A.F. 2009). Because pretrial punishment under Article 13, UCMJ, is not a fundamental right, and the appellant expressly and knowingly relinquished his right to raise that issue at trial, we decline to address the issue.

Regarding the appellant's related argument that his sentence is inappropriately severe, we disagree. We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). Our determination of sentence appropriateness under Article 66(c), UCMJ, 10 U.S.C. § 866(c), requires us to analyze the record as a whole to ensure that justice is done and that the appellant receives the punishment he deserves. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). In making this important assessment, we consider the nature and seriousness of the offenses as well as the character of the offender. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). We have a great deal of discretion in determining whether a particular sentence is appropriate, but we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *Healy*, 26 M.J. at 395-96. After carefully considering the entire record of trial, the nature and seriousness of these offenses, the matters presented by the appellant in extenuation and mitigation, and the appellant's military service, we find the sentence to be appropriate for this offender and his offenses. *Baier*, 60 M.J. at 384-85; *Healy*, 26 M.J. at 395; *Snelling* 14 M.J. at 268.

[2] The defense told the military judge at trial that the appellant had not been subjected to illegal pretrial confinement under Article 12, UCMJ, 10 U.S.C. § 812, but, through his post-trial declaration, the appellant now contends he was confined with approximately 25 post-trial prisoners and shared showers, toilets, recreation time, and sleeping areas with them.

Delay in Parole Board

The appellant's trial concluded on 8 September 2011 and the convening authority took action in the case on 2 November 2011, as reflected on the court-martial order dated that same day. By this time, the appellant was confined at the Naval Consolidated Brig Miramar. As required by Air Force Instruction 51-201, *Administration of Military Justice*, ¶¶ 10.7.2.1 and 10.11 (21 December 2007), the commander of that confinement facility was included on the distribution list for the court-martial order. The Air Force Clemency and Parole Board was also included on the distribution list.

In his declaration submitted on appeal, the appellant states he was eligible for his first parole board appearance on 23 February 2012 but missed his opportunity because the Brig and Parole Board had not received his court-martial order by that date. He also states the Parole Board denied him parole on approximately 5 April 2012, having received the court-martial order at some point prior to that date. Expressing disappointment that he had missed his first opportunity to apply for parole through no fault of his own, he asks this court to grant meaningful sentence relief under *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

We review de novo claims that an appellant has been denied the due process right to speedy post-trial review and appeal. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). At the outset, we note the "speedy post-trial review and appeal" referenced in that case (and subsequent cases) refers to the time that elapses while an appellant's case transits through the convening authority and the service court. It is not applicable to the time frame involved in the running of collateral processes, although delays in those processes may establish the prejudice suffered by the appellant from post-trial review and appellate delays.

Here, the convening authority's action was taken 55 days after the sentence was announced, well within the 120-day timeline established for that process by *Moreno*. Even assuming the appellant could demonstrate that an unreasonable delay then occurred in the delivery of the court-martial order to the Brig and Parole Board, he has not demonstrated any prejudice from any such delay. He has "not suffered ongoing prejudice in the form of oppressive incarceration, undue anxiety [or concern], or the impairment of the ability to prevail in a retrial." *United States v. Allende*, 66 M.J. 142, 145 (C.A.A.F. 2008). Furthermore, he has "not suffered detriment to his legal position in his appeal as a result of the delay." *Id.*

The appellant's assertion that he was prejudiced because of an inability to appear before the Parole Board at his first opportunity also fails to establish prejudice. In fact, when he was considered, he was denied parole. As such, he cannot establish that he would have been paroled upon first look or released from confinement at any time sooner than the date of his minimum release date, and his assertion of prejudice regarding the

possibility of an early release is nothing more than "mere speculation." *See Moreno*, 63 M.J. at 140-41. Furthermore, we find that relief is not otherwise warranted. *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *Tardif*, 57 M.J. at 225.

Conclusion

The findings of guilty and the sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and the sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court