IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.A. PRICE **M.J. SUSZAN** **R.C. HARRIS**

UNITED STATES

v.

Peter N. BEYER
Chief Boatswain's Mate (E-7), U.S. Navy

NMCCA 200201128 Decided 8 February 2005

Sentence adjudged 4 May 2001. Military Judge: P.L. Fagan. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Southwest, San Diego, CA.

EUGENE R. FIDELL, Civilian Appellate Defense Counsel
MATTHEW S. FREEDUS, Civilian Appellate Defense Counsel
Capt JAMES D. VALENTINE, USMC, Appellate Defense Counsel
Capt GLEN R. HINES, USMC, Appellate Government Counsel

HARRIS, Judge:

In accordance with his pleas, the appellant was convicted by a military judge, sitting alone as a general court-martial, of attempted indecent acts with a child under the age of 16 years, attempted sodomy with a child under the age of 16 years, using a computer as a facility and means of interstate commerce to attempt to induce or persuade or entice an individual under the age of 18 years to engage in prostitution or "criminally chargeable" sexual activity, and, on divers occasions, possessing, distributing, and receiving child pornography. The appellant's crimes violated Articles 80 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 934, and 18 U.S.C. §§ 2422 and 2252A. The military judge sentenced the appellant to a dishonorable discharge, confinement for 7 years, forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority approved the adjudged sentence and, in accordance with the terms of a pretrial agreement, suspended confinement in excess of 3 years for 40 months from the date of trial.

We have examined the record of trial, the appellant's eight assignments of error,[1] the Government's response, the appellant's reply, and the excellent oral argument of appellate counsel on the issues of the lack of fixed terms of office for Department of the Navy trial and appellate military judges and denial of speedy trial, respectively. We conclude that the providence inquiry conducted by the military judge into Specifications 2, 3, and 4 of Charge II (possess, distribute, and receive child pornography, respectively, all on divers occasions) was defective, as implicitly asserted in the appellant's second assignment of error and explicitly asserted in his third assignment of error. We also conclude that an unreasonable multiplication of charges (UMC) occurred, but not as asserted in the appellant's sixth assignment of error. We hold that, based on the specific facts of the appellant's case, Specifications 1 and 2 of Charge I (attempted indecent acts and attempted sodomy, both with a child under the age of 16 years) represents UMC with Specification 1 of Charge II (using a computer as a facility and means of interstate commerce to attempt to induce or persuade or entice an individual under the age of 18 years to engage in prostitution or criminally chargeable sexual activity). We shall take corrective action in our decretal paragraph. *See* Arts. 59(a) and 66(c), UCMJ.

---

[1] AOEs:

> I. THE EQUAL PROTECTION COMPONENT OF [THE UNITED STATES CONSTITUTION'S] FIFTH AMENDMENT DUE PROCESS [CLAUSE] WAS VIOLATED BELOW AND IS BEING VIOLATED NOW BECAUSE THE MILITARY JUDGES AND THE JUDGES OF THIS COURT SERVE WITHOUT THE PROTECTION OF A FIXED TERM OF OFFICE, WHEREAS THOSE IN THE ARMY ENJOY SUCH PROTECTION BY REGULATION.
>
> II. [THE APPELLANT'S] CONVICTION ON CHARGE II, SPECIFICATIONS 2-4, IS VOID BECAUSE 18 U.S.C. §§ 2256(8)(B) AND (D) ARE UNCONSTITUTIONAL.
>
> III. THE PROVIDENCE INQUIRY WAS DEFECTIVE.
>
> IV. [THE APPELLANT] WAS DENIED A SPEEDY TRIAL AS PROVIDED BY THE [UNITED STATES] CONSTITUTION AND ARTICLE 10, UCMJ.
>
> V. [THE APPELLANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL DEFENSE COUNSEL FAILED TO INVESTIGATE, PREPARE, OR PRESENT AN ADEQUATE SENTENCING CASE NOTWITHSTANDING A POTENTIAL SENTENCE OF 77 YEARS' CONFINEMENT AND A PUNITIVE DISCHARGE THAT WOULD DEPRIVE HIM OF RETIREMENT BENEFITS.
>
> VI. THE MILITARY JUDGE ERRED IN FAILING TO TREAT THE SPECIFICATIONS TO CHARGE I AS UNREASONABLY MULTIPLIED FOR SENTENCING PURPOSES.
>
> VII. A *DUBAY* HEARING IS REQUIRED IN ORDER TO CLARIFY THE CIRCUMSTANCES SURROUNDING THE CONVENING AUTHORITY'S REVIEW OF [THE APPELLANT'S] CLEMENCY [PETITION]. [*United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1967)].
>
> VIII. THE SENTENCE IS UNDULY SEVERE.

Constitutional Due Process

In the appellant's first assignment of error, he asserts that the equal protection component of the United States Constitution's Fifth Amendment due process clause was violated at trial and is further violated now because all Navy and Marine Corps trial military judges and all Navy-Marine Corps Court of Criminal Appeals appellate military judges serve without the protection of a fixed term of office, whereas similarly situated trial and appellate military judges in the Army and Coast Guard enjoy such protection by departmental regulation. The appellant avers that this court should set aside his conviction and sentence with leave to conduct further proceedings presided over by a military trial judge who enjoys the same protection of a fixed term of office now enjoyed by Army trial and appellate military judges. We disagree.

"No person shall be . . . deprived of life, liberty, or property without due process of law . . . ." U.S. const. amend. V. Our superior court has held that the equal protection component of the Fifth Amendment's due process clause is applicable to the military system of criminal justice. *See*, e.g., *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994); *United States v. Tuggle*, 34 M.J. 89, 91-92 (C.M.A. 1992); *United States v. Santiago-Davila*, 26 M.J. 380, 389-90 (C.M.A. 1988). Further, the appellant is correct that "[t]he power to 'prescribe regulations providing for the manner in which military judges are detailed,' which Congress conferred on the service secretaries [under] Article 26(a), UCMJ, does not preempt the President's authority either as Commander in Chief or under the terms of Article 36, UCMJ, to require that military judges have the protection of fixed terms of office." Appellant's Brief of 2 Jul 2003 at 15.

The Supreme Court has held, however, that the lack of a fixed term of office for military judges does not violate either the Appointments Clause or the Due Process Clause of the Fifth Amendment. *Weiss v. United States*, 510 U.S. 163, 176-81 (1994). Further, the Court of Appeals for the Armed Forces has also concluded that the differences between Article III courts and military courts do not deprive servicemembers of equal protection under the Fifth Amendment because an appellant is entitled under Article 67a, UCMJ, to seek review by the Supreme Court, which is an Article III court. *United States v. Loving*, 41 M.J. 213, 295-96 (C.A.A.F. 1994), *aff'd*, 517 U.S. 748 (1996).

The appellant concedes there is no fundamental due process requirement that military judges be provided with fixed terms of office. The thrust of the appellant's position rests on the fact that two of our sister services, the Army and Coast Guard, have provided for fixed terms and that the Navy has declined to do so. The appellant then asserts that this alone deprives him of equal protection. We disagree.

Congress has sanctioned distinctions between the services in authorizing each service secretary to prescribe regulations for the manner in which military judges are detailed. Art. 26(a), UCMJ. Congress has also sanctioned distinctions between the services in authorizing each Judge Advocate General to establish a Court of Criminal Appeals and to prescribe uniform rules of procedure for their respective Court of Criminal Appeals. Art. 66(a) and 66(f), UCMJ. "Congress has never required such uniformity among the services, and it has consistently authorized the Secretary of each armed force to promulgate regulations to meet special needs of his service, as determined by him." *United States v. Hoesing*, 5 M.J. 355, 358 (C.M.A. 1978).

We, therefore, conclude that the assignment of error has no merit. Accordingly, we decline to grant relief.[2]

Providence Inquiry

We address the appellant's second and third assignments of error together. In the appellant's second assignment of error, he asserts that his convictions under Specifications 2, 3, and 4 of Charge II are void, because 18 U.S.C. § 2256(8)(B) and (D) are unconstitutional. In the appellant's third assignment of error, he asserts that the providence inquiry was defective. The appellant avers that the findings in their entirety and the sentence should be set aside and a rehearing ordered. We agree only that the findings of guilty to Specifications 2, 3, and 4 of Charge II must be set aside, as well as the sentence, and that a rehearing may be conducted. We do not address Specifications 1 and 2 of Charge I under this assignment of error as we provide relief below on a separate basis. We do not agree that Specifications 2, 3, and 4 of Charge II must be dismissed.

Specifications 2, 3, and 4 of Charge II allege the possession, distribution, and receipt of sexually explicit conduct and/or child pornography, as defined in 18 U.S.C. § 2256(2) and (8), respectively. In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256 (2002), decided after the appellant's trial, the Supreme Court held that the ban on sexually explicit images that *appeared to* depict minors, but were not produced using minors, as child pornography under 18 U.S.C. § 2256(8)(B), is constitutionally overbroad since it proscribes speech which is neither actual child pornography nor obscene and thus abridges the freedom to engage in a substantial amount of lawful speech. The Supreme Court further held that the definition of child pornography under 18 U.S.C. § 2256(8)(D) as depictions of sexually explicit conduct that are described or pandered in a manner that *conveys the impression that* the material is child pornography is substantially overbroad and unconstitutional. *Id*. at 257-58.

[2] At oral argument, the court suggested that it might take judicial notice of various facts that may assist in resolving this legal issue. After deliberation, the court declines to take judicial notice.

Prior to *Free Speech Coalition*, the knowing possession, receipt, and distribution of child pornography, virtual or actual, was sufficient to establish one of the factual predicates for a guilty plea under 18 U.S.C. § 2252A. As the Court of Appeals for the Armed Forces stated in *United States v. O'Connor*, 58 M.J. 450, 453 (C.A.A.F. 2003), "[t]he 'virtual' or 'actual' character of the images was not, in and of itself, a factual predicate to a guilty plea –- criminal liability could arise under either circumstance." Our superior court went on to hold that "[i]t is no longer enough . . . to knowingly possess, receive[,] or distribute visual depictions that 'appear to be' of a minor engaging in sexually explicit conduct[,]" because "[t]he actual character of the visual depictions is now a factual predicate to any plea of guilty under [18 U.S.C. § 2252A]." *Id*. Therefore, in order for this court to find the appellant's pleas provident, "his plea inquiry and the balance of the record must objectively support the existence of this factual predicate." *Id*. After review of the appellant's plea inquiry and the balance of the record, we conclude that they do not.

Before accepting an appellant's guilty plea, the military judge must explain the elements of each offense and ensure that a factual basis for each guilty plea exists to satisfy every element of each offense. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996); *United States v. Care*, 40 C.M.R. 247, 251-53 (C.M.A. 1969); *see* RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.); *see also* Art. 45(a), UCMJ. Mere conclusions of law recited by the accused are insufficient to provide a factual basis for a guilty plea. *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996). An accused "must be convinced of, and able to describe all the facts necessary to establish guilt." R.C.M. 910(e), Discussion.

The military judge has broad discretion in determining that an appellant's guilty plea has a factual basis. *United States v. Roane*, 43 M.J. 93, 94 (C.A.A.F. 1995). A military judge may not, however, "arbitrarily reject a guilty plea." *United States v. Pennister*, 25 M.J. 148, 152 (C.M.A. 1987). Any rejection of such a guilty plea on appellate review requires that the record of trial show a substantial basis in law and fact for questioning the guilty plea. *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002). Such rejection must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty, and the only exception to the general rule of waiver arises when an error prejudicial to the substantial rights of the appellant occurs. Art. 59(a), UCMJ; R.C.M. 910(j).

The military judge's decision to accept a guilty plea is generally reviewed for abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). So long as the factual circumstances disclosed by the accused objectively support the plea, a military Court of Criminal Appeals will not reject it. *See Faircloth*, 45 M.J. at 174. Only when we find a substantial

conflict, not the mere possibility of conflict, between the plea and the appellant's statement or the evidence of record will we take remedial action. *Id.*

Having carefully reviewed the record of trial and applying the above standards of review, we find no substantial basis in law and fact for questioning the appellant's plea of guilty to Specification 1 of Charge II of using a computer as a facility and means of interstate commerce to attempt to induce or persuade or entice an individual under the age of 18 years to engage in prostitution or criminally chargeable sexual activity. The military judge thoroughly explained the elements of the offense and the appellant admitted, in response to questions from the military judge and in the Stipulation of Fact, Prosecution Exhibit 1, that he knowingly used a computer as a facility in interstate commerce to attempt to persuade, induce, or entice an individual under the age of 18 years to engage in sexual activity, as charged, i.e., prostitution, indecent acts, and sodomy; that he believed that such individual was less than 18 years of age; that if the sexual activity had occurred, he could have been charged with a criminal offense under the law; and, that he acted knowingly and willfully. Based upon the appellant’s admissions, we find that there is more than adequate evidence in the record that appellant was convinced of and able to describe all the facts necessary to establish his guilt as to every element of this offense. Further, we conclude that any attempt by a servicemember using any facility or means, whether of interstate commerce or not, to induce or persuade or entice an individual under the age of 18 years to engage in prostitution or criminally chargeable sexual activity, is service discrediting conduct.

As such, we decline to grant relief as to Specification 1 of Charge II. We do, however, find a substantial basis in law and fact for questioning the appellant's pleas of guilty to Specifications 2, 3, and 4 of Charge II. During the providence inquiry the military judge did not distinguish with specificity which statutory provision each of the charged images fit, or if each image even depicted an actual child. We shall order corrective action in our decretal paragraph.

Speedy Trial

In the appellant’s fourth assignment of error, he asserts that he was denied a speedy trial, as provided by the Sixth Amendment to the United States Constitution and Article 10, UCMJ. The appellant avers that this court should set aside the findings and sentence and dismiss the charges with prejudice. We disagree.

The military judge concluded that the appellant was not denied his Article 10, UCMJ, right to a speedy trial, a decision which we review *de novo*. *United States v. Cooper*, 58 M.J. 54, 57 (C.A.A.F. 2003). Applying this standard of review, we agree with

the military judge that the appellant was not denied his right to a speedy trial under Article 10, UCMJ, or pursuant to the Sixth Amendment.

Once an appellant is placed in pretrial confinement, immediate measures must be taken to notify him of the charges against him and either bring him to trial or dismiss the charges. Art. 10, UCMJ. Although the Government is required to exercise reasonable diligence in bringing an accused to trial, proof of constant motion is not necessary. *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993). Furthermore, for an appellant to prevail on an assertion that he was deprived of his right to a speedy trial, he must in the first instance come forward and make a *prima facie* showing or a colorable claim that he is entitled to relief. *United States v. McLaughlin*, 50 M.J. 217, 218 (C.A.A.F. 1999).

On appellate review, we give substantial deference to the factual findings of the military judge. *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999). The factors we are required to consider include: (1) the length of the delay; (2) the reasons for the delay; (3) the assertion of the right to speedy trial; and (4) the existence of prejudice. *United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999)(quoting *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). We will also consider, as did the *Birge* court, the following specific factors: (1) did the appellant enter pleas of guilty, and if so, was it pursuant to a pretrial agreement; (2) was credit awarded for pretrial confinement on the sentence; (3) was the Government guilty of bad faith in creating the delay; and (4) did the appellant suffer any prejudice to the preparation of his case as a result of the delay. *Id*.

Applying the foregoing factors, we do not afford the appellant relief. When the appellant was initially apprehended and placed in pretrial confinement, the complete scope of his criminal behavior was not entirely obvious. Investigators spent considerable time, over more than a month, processing complex forensic evidence. Once the appellant's culpability was sufficiently clarified and quantified, only then did Government officials prefer charges. Following his placement in pretrial confinement, the appellant was arraigned in 107 days, which included 16 days of defense requested delay, and his trial was completed within 164 days.

Having carefully examined the record of trial, including the extensively litigated pretrial motion, we agree with the military judge that the Government exercised "reasonable diligence" in moving quickly to both bring charges against the appellant and bring him to trial. *See Kossman*, 38 M.J. at 262. We also note that the Government proceeded with due diligence once the appellant was arraigned, the appellant was fully credited for pretrial confinement served, and he never filed a demand for speedy trial. Furthermore, this is a guilty-plea case with a pretrial agreement devoid of any hint of prosecutorial bad faith.

Finally, other than pretrial confinement, the appellant has not alleged, nor do we find, any specific prejudice resulting from the complained of delay. Under these circumstances, we find no violation of the Sixth Amendment or Article 10, UCMJ, and decline to grant relief.

Unreasonable Multiplication of Charges

In the appellant's sixth assignment of error, he asserts that the military judge erred in failing to treat Specifications 1 and 2 of Charge I as UMC for sentencing purposes. The appellant avers that this court should consolidate Specifications 1 and 2 of Charge I and reassess the sentence by approving no more than one year's confinement and a bad-conduct discharge. We conclude that a different UMC occurred.

What is substantially one transaction should not be made the basis for UMC. R.C.M. 307(c)(4), Discussion. In determining whether there is UMC, this court considers five factors: (1) Did the accused object at trial; (2) Are the charges aimed at distinctly separate criminal acts; (3) Do the charges misrepresent or exaggerate the appellant's criminality; (4) Do the charges unreasonably increase the appellant's punitive exposure; and, (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges and specifications? *United States v. Quiroz*, 57 M.J. 583, 585-86 (N.M.Ct.Crim.App. 2002)(*en banc*), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition). In considering these factors, we have indicated that we would grant appropriate relief if we found "the 'piling on' of charges so extreme or unreasonable as to necessitate the invocation of our Article 66(c), UCMJ, authority (to affirm only such findings of guilty and so much of the sentence as we find correct in law and fact and determine, on the basis of the entire record, should be approved)." *Id*. at 585; *see also United States v. Foster*, 40 M.J. 140, 144 n.4 (C.M.A. 1994).

While objections not made at trial are usually deemed waived, R.C.M. 905(e), this court has a statutory obligation to affirm only such findings of guilty and the sentence it believes, on the basis of the entire record, should be approved. *United States v. Joyce*, 50 M.J. 567, 568-69 (N.M.Ct.Crim.App. 1999)(citing Art. 66(c), UCMJ). We have not felt constrained in the past from finding UMC even though the appellant pled guilty without objection to the offenses at trial and only raises UMC for the first time on appeal. *Id*. at 569. Nor do we feel constrained from finding UMC where the appellant raised a different UMC on appeal, or does not even raise UMC on appeal. Art. 66(c), UCMJ.

For the military judge to find the appellant guilty under Article 80, UCMJ, of attempted indecent acts with a child, it must be established:

(1) That the appellant committed a certain overt act or acts;

(2) That the act or acts was done with the specific intent to commit the certain offense of indecent acts with a child;

(3) That the act or acts amounted to more than mere preparation; and

(4) That the act or acts apparently tended to effect the commission of the intended offense, except for a circumstance unknown to the appellant at the time.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 4b. The elements of the underlying offense of indecent acts with a child, in violation of Article 134, UCMJ, are:

(1) That the appellant committed a certain act or acts upon or with the body of a certain person;

(2) That the person was under 16 years of age and not the spouse of the accused;

(3) That the act or acts of the appellant was or were indecent;

(4) That the appellant committed the act or acts with intent to arouse, appeal to or gratify the lust, passions or sexual desires of the accused, the victim, or both; and

(5) That under the circumstances, the conduct of the appellant was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Id. at ¶ 87b(1). For the military judge to find the appellant guilty under Article 80, UCMJ, of attempted sodomy with a child, it must be established:

(1) That the appellant committed a certain overt act or acts;

(2) That the act or acts was done with the specific intent to commit the certain offense of sodomy with a child;

(3) That the act or acts amounted to more than mere preparation; and

(4) That the act or acts apparently tended to effect the commission of the intended offense, except for a circumstance unknown to the appellant at the time.

Id. at ¶ 4b. The elements of the underlying offense of sodomy with a child are:

> (1) That the appellant engaged in unnatural carnal copulation with a certain other person; and
>
> (2) That the act was done with a child under 16 years of age.

Id. at ¶ 51b. For the military judge to find the appellant guilty of attempted inducement or persuasion or enticement of a person under the age of 18 years to engage in prostitution or any other criminally chargeable sexual activity, a violation of 18 U.S.C. § 2422, as charged under Article 134, UCMJ, it must be established:

> (1) That the appellant committed a certain overt act or acts amounting to inducement or persuasion or enticement;
>
> (2) That the act or acts of inducement or persuasion or enticement was done with the specific intent to commit the certain offenses of prostitution, sodomy, and indecent acts with a person under the age of 18 years;
>
> (3) That the act or acts of inducement or persuasion or enticement amounted to more than mere preparation;
>
> (4) That the act or acts of inducement or persuasion or enticement apparently tended to effect the commission of the intended offenses, except for a circumstance unknown to the appellant at the time; and
>
> (5) That under the circumstances, the conduct of the appellant was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Id. at ¶ 60c(4)(b).

After applying the five non-exclusive factors we have established to examine claims of UMC, we are convinced that the appellant's specific misconduct reflected in Specifications 1 and 2 of Charge I is the same misconduct charged, in part, in Specification 1 of Charge II. Our holding is based on the fact that the attempted indecent acts and attempted sodomy, both with the same putative child, as charged under Article 80, UCMJ, represent the same attempted sexual activity, with the same putative child, as charged under 18 U.S.C. § 2422. Therefore, we will take corrective action in our decretal paragraph.

Conclusion

The findings of guilty of Charge I and Specifications 1 and 2 thereunder, and Specifications 2, 3, and 4 of Charge II, and the sentence, are set aside. We affirm the remaining finding of guilty to Specification 1 of Charge II. Charge I and Specifications 1 and 2 thereunder, are dismissed. A rehearing is authorized as to Specifications 2, 3, and 4 of Charge II and the sentence. The record of trial is returned to the Judge Advocate General of the Navy for remand to an appropriate convening authority who may order a rehearing as to Specifications 2, 3, and 4 of Charge II and the sentence. If a rehearing as to Specifications 2, 3, and 4 of Charge II is impractical, the convening authority can dismiss Specifications 2, 3, and 4 of Charge II and order a rehearing on sentencing as to Specification 1 of Charge II. If a rehearing on sentencing is impractical, the convening authority must approve a sentence of no punishment. Upon completion of the new post-trial action, the record will then be returned to this court for further appellate review. Our action moots assignments of error V, VII, and VIII.

Senior Judge PRICE and Judge SUSZAN concur.

For the Court

R.H. TROIDL
Clerk of Court