UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JUSTIN C. BEHRENS
United States Air Force

ACM 37657

27 April 2012

Sentence adjudged 17 January 2010 by GCM convened at Joint Base Balad, Iraq. Military Judge: Dawn R. Eflein (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 12 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; Major Phillip T. Korman; and Captain Thomas C. Franzinger.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Scott C. Jansen; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

GREGORY, Senior Judge:

A general court-martial composed of military judge alone convicted the appellant in accordance with his pleas of two specifications of dereliction of duty, one specification of making a false official statement, one specification of aggravated assault with a loaded firearm, and one specification of reckless endangerment, in violation of Articles 92, 107, 128, and 134, UCMJ, 10 U.S.C. § 892, 907, 928, 934, respectively. The court sentenced him to a bad-conduct discharge, confinement for 12 months, and reduction to E-1.

A pretrial agreement capped confinement at 12 months. The convening authority approved the sentence adjudged and directed that the appellant be entered in the Air Force Return to Duty Program. The Air Force Clemency and Parole Board suspended the bad-conduct discharge on 15 December 2010, and it was remitted on 15 December 2011. The appellant argues that the Article 134, UCMJ, charge of reckless endangerment fails to state an offense because it does not expressly allege the terminal element.

The appellant deployed to Joint Base Balad, Iraq, as a member of a Security Forces squadron. The appellant had learned an unauthorized method to prevent an M9 pistol from firing and demonstrated this method to his fellow Airmen in their combined quarters. On another occasion, the appellant entered the quarters, removed his weapon from the holster, held it with the barrel near the knee of Senior Airman CQ, and pulled the trigger. He thought the weapon was unloaded. He was wrong. Senior Airman CQ suffered severe injury to his knee. The appellant falsely told investigators that he drew his weapon to clean it.

Sufficiency of the Article 134, UCMJ, Charge

The appellant argues that the finding of guilt of reckless endangerment, in violation of Article 134, UCMJ, should be set aside because the specification fails to allege the terminal element of the offense. The appellant did not challenge the sufficiency of the specification at trial and entered pleas of guilty to all charges and specifications. The military judge conducted a thorough plea inquiry, which included advising the appellant of the elements of each offense, to include the terminal elements of the Article 134, UCMJ, charge. The appellant acknowledged understanding all the elements and explained to the military judge how his conduct satisfied each element. We also note that the military judge merged the Article 128 and 134, UCMJ, charges for sentencing purposes.

Failure to allege the terminal element of an Article 134, UCMJ, offense is error but, 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 providence inquiry shows that the appellant understood to what offense and under what legal theory he was pleading guilty. *United States v. Ballan*, No. 11-0413/NA, slip op. at 14, 18-19 (C.A.A.F. 1 March 2012); *see also United States v. Watson*, 70 M.J. 54 (C.A.A.F. 2012). 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.

Appellate Delay

We note that the overall delay of over 18 months between the time this 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 reasons 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.

Conclusion

The approved 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 approved findings and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court