UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain MATTHEW R. BERG
United States Air Force

ACM 36989

24 September 2008

Sentence adjudged 01 March 2007 by GCM convened at Barksdale Air Force Base, Louisiana. Military Judge: Grant L. Kratz (sitting alone).

Approved sentence: Dismissal, confinement for 20 days, and forfeiture of $2,000.00 pay per month for 3 months.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Griffin S. Dunham.

Appellate Counsel for the United States: Colonel Gerald R. Bruce.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

Pursuant to his pleas, a military judge found the appellant guilty of one specification of assault consummated by a battery, three specifications of conduct unbecoming an officer, and one specification of fraternization, in violation of Articles 128, 133, and 134, UCMJ, 10 U.S.C. §§ 928, 933, 934. Contrary to his pleas, the military judge also found the appellant guilty of one specification of conduct unbecoming an officer and one specification of adultery, in violation of Articles 133 and 134, UCMJ. The adjudged and approved sentences consist of a dismissal, forfeiture of $2000 pay per month for three months, and 20 days confinement.

On appeal, the appellant asserts that: (1) the military judge committed plain error when he failed to inquire into whether the appellant had received a speedy trial when the time between preferral and arraignment for Charges I thru III was 288 days and 211 days for Additional Charges I and II; (2) the fraternization and the adultery specifications are multiplicious or, in the alternative, represent an unreasonable multiplication of charges; and (3) his conviction for conduct unbecoming an officer by willfully and wrongfully wiping his testicles with his hand and placing the same hand near the face of Staff Sergeant (SSgt) KL is legally and factually insufficient in that there is no evidence that he wiped his testicles. Finding no error, we affirm.

Background

In late November 2005, the appellant made contact with then-Senior Airman (SrA) RD via a social networking website. Immediately upon talking to her, the appellant knew SrA RD was a senior airman in the United States Air Force yet decided to date her and engage in sexual intercourse with her. At the time the appellant dated and engaged in sexual relations with SrA RD he was married to another individual. On 23 December 2005, the appellant began a deployment to Andersen Air Base, Guam. While deployed, he was the commander of a ten-person advance team.

In an effort to bond with his team members, the appellant crossed the line of propriety. Specifically he: (1) drank alcohol to excess and became drunk and disorderly in his team members' presence; (2) wrestled, tackled, and choked SSgt DD - a subordinate team member; (3) in the presence of others, exposed his genitals next to SrA GJ's face - a sleeping, subordinate team member; (4) in the presence of others, placed his partially uncovered buttocks near SrA MK's face - another sleeping, subordinate team member; and (5) rubbed his testicles with his hand and placed the same hand near SSgt KL's nose.

Discussion

Speedy Trial Inquiry

The appellant, in styling his motion does not complain, at least overtly, of a speedy trial violation. Rather, the appellant avers that military judges have a *sua sponte* obligation to conduct a speedy trial inquiry when the facts suggest a speedy trial violation and that it was plain error for the military judge in this case not to conduct such an inquiry. However the appellant cites no statutory or case authority for his assertions. Additionally, the Rules for Courts-Martial (R.C.M.) make clear that the burden is on appellants not military judges to raise speedy trial issues at trial and that a failure to do so may result in waiver. *See* R.C.M. 707(e), Discussion, and 905(e). In short: (1) the military judge was not required to conduct a speedy trial inquiry with the appellant; (2) the military judge did not err in failing to conduct such an inquiry; (3) any error, if any,

was not plain and obvious; and (4) any error, if any, did not materially prejudice the appellant's substantial rights. *See United States v. Nieto,* 66 M.J. 146, 149 (C.A.A.F. 2008).

Speedy Trial Rights (Unconditional Guilty Pleas)

Assuming *arguendo* the appellant is asserting a violation of his speedy trial rights, the issue is waived with respect to the charges and specifications of which the appellant unconditionally pled and was found guilty. An unconditional guilty plea that results in a finding of guilty waives, as to those offenses, an appellant's right to a speedy trial under R.C.M. 707 and the Sixth Amendment to the United States Constitution. R.C.M. 707(e); *United States v. Mizgala,* 61 M.J. 122, 124 (C.A.A.F. 2005) (citing *Cox v. Lockhart*, 970 F.2d 448, 453 (8th Cir. 1992); *Tiemens v. United States*, 724 F.2d 928, 929 (11th Cir. 1984)). Moreover, an unconditional guilty plea *and* a failure to raise an Article 10, UCMJ, speedy trial issue at trial waives, as to those offenses, an appellant's right to a speedy trial under Article 10, UCMJ. *United States v. Mizgala,* 61 M.J. at 127.

In the case at hand, the appellant unconditionally pled and was found guilty of Charge I and its specification, Charge II and its specifications, and specification 1 of Additional Charge II. Additionally, he failed to raise an Article 10, UCMJ, speedy trial issue at trial. Thus, the appellant waived his speedy trial rights on those offenses.

Speedy Trial Rights (Not Guilty Pleas)

With respect to the appellant's speedy trial rights on Additional Charge I and its specification and specification 2 of Additional Charge II, we find no violation. These charges were preferred on 15 May 2006 and the appellant was arraigned on these charges on 28 February 2007. Thus 289 days elapsed between the date of preferral and arraignment. However, the appellant submitted a resignation in lieu of court-martial package on 24 October 2006 and the case was stayed pending the Secretary of the Air Force action, which occurred on 23 January 2007. The time period between 24 October 2006 and 23 January 2007 is properly excluded for speedy trial purposes; therefore, 211 days arguably elapsed from preferral to arraignment.

At trial, the appellant failed to raise speedy trial issues under R.C.M. 707. Thus the appellant's R.C.M. 707 speedy trial rights are waived with respect to these offenses. R.C.M. 707(e), Discussion, 905(e), and 907(b)(2)(A). Concerning the appellant's Sixth Amendment and Article 10, UCMJ, speedy trial rights, we look to the four-part test enunciated under *Barker v. Wingo*, 407 U.S. 514, 530 (1972).* Applying the four-part

* While realizing that Article 10, UCMJ, provides for a more exacting and stringent speedy trial standard than the Sixth Amendment, we nonetheless apply the *Barker v. Wingo* test in assessing whether there has been a speedy trial violation under Article 10, UCMJ. *See United States v. Tippit*, 65 M.J. 69, 73 (C.A.A.F. 2007), *cert. denied*, 128 S. Ct. 425 (2007).

test to the case at hand, we note: (1) the delay, on balance, is not lengthy; (2) the appellant made no demand for a speedy trial; (3) the appellant made no motion to dismiss or motion for other appropriate relief predicated on a speedy trial violation; (4) there is no evidence of malicious conduct on the part of the government to create a delay; and (5) the appellant suffered no prejudice as a result of the delay. Put simply, the delay does not amount to a violation of the appellant's speedy trial rights under R.C.M. 707, the Sixth Amendment, or Article 10, UCMJ.

Multiplicity

The appellant asserts that the fraternization and the adultery specifications of which he was convicted are multiplicious for findings or, in the alternative, represent an unreasonable multiplication of charges. We review claims of multiplicity for findings de novo. *United States v. Hudson*, 59 M.J. 357, 359 (C.A.A.F. 2004). "Offenses are multiplicious if one is a lesser-included offense of the other." *United States v. Palagar,* 56 M.J. 294, 296 (C.A.A.F. 2002). They are also multiplicious if the offenses are "facially duplicative," i.e., factually the same. *United States v. Heryford,* 52 M.J. 265, 266 (C.A.A.F. 2000) (quoting *United States v. Britton*, 47 M.J. 195, 198 (C.A.A.F. 1997)).

To determine whether the offenses are facially duplicative, courts apply the elements test. Under this test, the court considers whether each provision requires proof of a fact which the other does not. Rather than adopting a literal application of the elements test, the resolution of multiplicity claims "can only be resolved by lining up elements realistically and determining whether each element of the supposed 'lesser' offense is rationally derivative of one or more elements of the other offense - and vice versa." *Hudson*, 59 M.J. at 359 (quoting *United States v. Foster*, 40 M.J. 140, 146 (C.M.A. 1994)). Stated alternatively, the pragmatic or realistic comparison approach of *Foster* still requires, at the very least, a conclusion that one offense could not possibly be committed without committing the other offense. *Foster*, 40 M.J. at 146.

In the case at hand, each offense requires proof of a fact that the other does not, and thus the offenses are not multiplicious for findings. The fraternization offense requires proof that: (1) the appellant was a commissioned officer; (2) the appellant fraternized on terms of military equality by, inter alia, dating then SrA RD; (3) the appellant knew SrA RD was an enlisted member; and (4) the fraternization violated Air Force custom. The adultery specification does not require such proof. Instead, the adultery specification requires proof of facts not required by the fraternization specification, namely that: (1) the appellant wrongfully had sexual intercourse with a certain person and (2) at the time the appellant or the other person was married to someone else.

Additionally, it was possible to commit the fraternization offense without committing the adultery offense - dating alone would have been sufficient to support a finding of guilty on the fraternization specification. Thus the offenses, notwithstanding their similarities of requiring proof that the appellant engaged in sexual intercourse with then-SrA RD, are not multiplicious for findings. The appellant has failed to meet his burden of showing plain error, much less error. Moreover, assuming *arguendo* that the appellant had been successful in showing plain error, he has failed to show that the error has affected his substantial rights. In this regard, the court notes that the military judge noted the government conceded the offenses might be multiplicious for sentencing and, in his observation, tacitly held so.

Finally, with full cognizance that multiplicity is not synonymous with an unreasonable multiplication of charges, we also find that the charges do not constitute an unreasonable multiplication of charges. Namely we find that: (1) each charge and specification is aimed at distinctly criminal acts; (2) the number of charges and specifications do not misrepresent or exaggerate the appellant's criminality; (3) the number of charges and specifications do not *unreasonably* increase the appellant's punitive exposure; and (4) there is no evidence of prosecutorial overreaching. *United States v. Pauling,* 60 M.J. 91, 95 (C.A.A.F. 2004); s*ee also United States v. Quiroz,* 55 M.J. 334, 338-39(C.A.A.F. 2001).

Legal and Factual Sufficiency

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))).

"[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). We have considered the evidence produced at trial in a light most favorable to the government and find a reasonable fact finder could have found, beyond a reasonable doubt, all of the essential elements of the conduct unbecoming an officer specification of which the appellant complains. Testimony by SSgt KL that the appellant: (1) was her deployed commander; (2) placed his foul smelling hand near her nose; and (3) advised her that his hand was smelly because he was sweating and had recently rubbed his testicles with his hand is legally sufficient to support the appellant's conviction on this specification.

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973). We have carefully considered the evidence under this standard and are convinced beyond a reasonable doubt that the accused is guilty of this specification.

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; *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court