UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman JEFFERY D. BOHANNON II
United States Air Force

ACM 37639

08 March 2012

Sentence adjudged 5 November 2009 by GCM convened at Malmstrom Air Force Base, Montana. Military Judge: David S. Castro.

Approved sentence: Dishonorable discharge, confinement for 9 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford and Lieutenant Colonel Darrin K. Johns.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Naomi N. Porterfield; Major Michael T. Rakowski; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

PER CURIAM:

In accordance with his plea of guilty, the appellant was convicted at a general court-martial composed of officer members of one specification of abusive sexual contact by causing bodily harm, in violation of Article 120, UCMJ, 10 U.S.C. § 920. Contrary to his pleas, the appellant was also convicted of one specification of rape by force and one specification of aggravated sexual assault by causing bodily harm, in violation of Article 120, UCMJ.[*] The court members sentenced the appellant to a dishonorable discharge,

[*] The appellant was found not guilty of the Specification of Additional Charge II, assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928.

confinement for 9 years, forfeiture 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 three errors pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), as follows: (1) that by shifting the burden of proof by requiring an accused to prove consent by a preponderance of the evidence in order to raise an affirmative defense to rape and aggravated sexual assault, Article 120, UCMJ, violates the appellant's constitutional right to due process; (2) that the military judge improperly instructed the members about lack of consent; and, (3) that because abusive sexual contact by causing bodily harm and wrongful sexual contact are the same offense, the military judge erred by not applying the rule of lenity and by not entering a finding of guilty to wrongful sexual contact with its lesser authorized maximum punishment.

We find no merit in the constitutional and instructional issues raised by the appellant. Our superior court has already ruled contrary to the appellant's position on related issues that we find are applicable to the appellant's case. *See United States v. Neal*, 68 M.J. 289, 302-04 (C.A.A.F.) (rejecting the view that aggravated sexual contact under Article 120(e), UCMJ, contains an implied element of consent and an unconstitutional element-based affirmative defense), *cert. denied*, 131 S. Ct. 121 (2010); *United States v. Medina*, 69 M.J. 462, 465-66 (C.A.A.F. 2010) (finding that the trial judge's failure to instruct in accordance with the statutory scheme of Article 120(t)(16), UCMJ, was error in the absence of a legally sufficient explanation, but rendered harmless beyond a reasonable doubt when the judge instructed the members that the evidence raised the defense of consent and that the Government had the burden of disproving the defense beyond a reasonable doubt).

We also disagree with the appellant's claim that abusive sexual contact by causing bodily harm and wrongful sexual contact are the same offense. First, the appellant's guilty plea to abusive sexual contact by causing bodily harm waived the alleged error. Rule for Courts-Martial 910(j). Moreover, even if not waived and even if the same conduct could be charged under either provision of Article 120, UCMJ, there is no requirement that the Government charge and sentence under the statutory provision with the lesser punishment, as this is a matter of prosecutorial discretion. *See United States v. Batchelder*, 442 U.S. 114, 123-25 (1979).

We note that the overall delay of more than 540 days between the time the 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. 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 sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court