UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain JYOJI T. BRISTOL
United States Air Force

ACM 36956

11 June 2009

Sentence adjudged 18 November 2006 by GCM convened at MacDill Air Force Base, Florida. Military Judge: Jennifer A. Whittier (sitting alone).

Approved sentence: Dismissal.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Captain Tiffany M. Wagner, and Frank J. Spinner, Esquire (civilian counsel).

Appellate Counsel for the United States: Major Jeremy S. Weber, Captain Coretta E. Gray, and Gerald R. Bruce, Esquire.

Before

FRANICIS, HEIMANN, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

HEIMANN, Senior Judge:

The appellant was tried at MacDill Air Force Base (AFB), Florida before a military judge alone. Contrary to his pleas, he was convicted of absence without leave (AWOL) for two days, willful disobedience of a lawful order of a superior commissioned officer, assault consummated by a battery, and adultery. [1] The charges were in violation of the Articles 86, 90, 128, and 134, UCMJ, 10 U.S.C. §§ 886, 890, 928, 934. The adjudged and approved sentence consisted of a dismissal.

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[1] The appellant was also acquitted of a number of other charges.

The appellant raises two issues on appeal. First, he contends that the evidence is factually and legally insufficient to support any of the findings of guilty. Second, he argues that the sentence is inappropriately severe. Finally, though not raised by the appellant, this Court also examined whether he is entitled to relief because of appellate processing delays. Having considered the briefs of both parties, we affirm the findings for all of the offenses except adultery. Upon reassessment of the sentence, we affirm the sentence as adjudged.

Background

The appellant is a medical doctor. Initially joining as a reservist in 2000, he volunteered to enter the active duty ranks in early 2002 in response to the terrorist attacks of September 11, 2001. His first active duty assignment was at Travis AFB, California, where he completed his residency. His wife and two children joined him at this assignment. While his record at Travis AFB is less than stellar, it contains no records of misconduct. Sometime in 2002, the appellant and his wife of over eight years separated. By all indications, their separation was unremarkable and the couple remained friendly towards each other and was committed to raising their two children in a positive environment.

In the summer of 2004, the appellant met JW, a female. At the time, the appellant told JW that he was divorced. JW worked in the health care industry and had no affiliation with the military. In short order, the couple started dating and began living together in California. By early 2005, the appellant invited JW to join him when he transferred to MacDill AFB. She agreed, and they lived together as boyfriend and girlfriend at various locations near MacDill AFB until the appellant's arrest in July 2006.

The appellant began work at MacDill AFB in early 2005. The first record of any disciplinary problems dates to May 2005, when the appellant was formally counseled for shouting and using profanity towards a co-worker. In early June 2005, the appellant's commander received a call from the appellant's wife in California. She was seeking the appellant's current address so she could send him divorce paperwork. The appellant's wife had filed divorce papers in California in May 2005. While the commander and the appellant's wife differ on the content of this phone call, we are convinced that the appellant's wife mentioned his living arrangements to the commander, but did not complain about them. It is also clear from the wife's testimony that financial support was not an issue because at the time of the call her income was three times that of the appellant. Finally, it is clear from the commander's testimony that he was completely unaware the appellant was living with another woman at the time he received the phone call, and he conducted no investigation into the allegation. The commander, in response to the phone call, called the appellant to his office, and ordered him to cease and desist from living with his girlfriend. The appellant acknowledged the order and told his commander that he understood the order.

The appellant's living arrangements next came to light over 13 months later when he was arrested for domestic assault, on 29 July 2006. On that date, JW decided it was time for the appellant to move out of the trailer they shared. She made this decision after inadvertently overhearing, via an open cell phone line, the appellant discuss her and women in general with a few of his friends. After hearing these comments, JW made clear to the appellant she wanted him out of the trailer immediately. The appellant agreed and began to pack his belongings. At some point, in a period alone in the trailer, the situation became heated and the appellant shoved JW. Several hours later, JW reported to the local police that the appellant had shoved, grabbed, and choked her during an argument.[2] After a preliminary investigation by local police, the appellant was arrested and incarcerated in the local jail for 48 hours. This 48 hour incarceration by civil authorities is the basis for the appellant's AWOL conviction.

Factual and Legal Sufficiency

The appellant attacks all of his convictions on the grounds that they are not factually and legally sufficient. The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M. Crim. Ct. App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Article 66(c), UCMJ, 10 U.S.C. § 866(c). The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, this Court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Article 66(c), UCMJ. We will address the appellant's claims below.

Assault and Battery and Unauthorized Absence

The appellant attacks his battery conviction by highlighting that JW's claims of a more aggravated assault, of which he was acquitted, were disputed by not only the defense's expert witness, but also the appellant's neighbor's testimony regarding a phone conversation between the appellant and JW. The defense expert witness testified that JW's neck should have shown evidence of choking shortly after the alleged assault. It did not. The neighbor testified that the appellant received a phone call from JW in the neighbor's presence, and the neighbor was able to overhear JW's end of the conversation. The neighbor testified he heard JW tell the appellant that she was going to call the police and report the appellant was beating her. The neighbor, seeing the appellant's denial of this threat, believed that JW was making a false report. As we consider JW's testimony, the expert's testimony, and the neighbor's testimony, we agree that JW's testimony alone

[2] The appellant was acquitted of grabbing and choking JW.

will not suffice to satisfy the factual and legal sufficiency of the remaining battery allegation. But this does not end the inquiry.

In addition to JW's testimony, the prosecution also called a local sheriff's deputy. The deputy reported that he was dispatched to a "domestic violence delayed incident." Upon meeting JW, a few hours after the alleged assault, he noticed that she had a bruise on her left arm that was approximately four inches in length. He documented this bruise with a photo that was admitted at trial. The defense also called a physician who testified that bruising will normally occur within 3 to 3½ hours after an assault and may or may not be preceded by redness before the bruising shows. We find this scientific evidence, coupled with the photographs taken by the deputy, provides this Court with the additional corroboration necessary to conclude that the evidence is legally and factually sufficient to prove the appellant did in fact assault JW on the evening in question by pushing her.

Having established that the assault conviction is sound, we are also able to affirm the unauthorized absence conviction. At trial, the parties all agreed that the unauthorized absence charge depends on a conviction for the assault. We agree. In support of this conclusion the parties and this Court rely upon the language in the *Manual for Courts-Martial, United States (MCM)* (2005 ed.). It provides a bright-line rule for situations when an unauthorized absence is the result of civilian arrest. The *Manual* provides that if a service member is absent due to arrest and subsequently convicted of the underlying offense, the absence is not excused and the government can proceed to charge the member with a violation of Article 86, UCMJ. *MCM*, Part IV, ¶ 10.c.(5). At the same time, if the member is acquitted of the civilian offense, the unauthorized absence is excused. *Id.* The relevant provision states: "The fact that a member of the armed forces is convicted by the civilian authorities . . . does not excuse any unauthorized absence, because the member's inability to return was the result of willful misconduct." *Id.* The *Manual's* view has been affirmed by our superior court. *United States v. Dubry*, 12 M.J. 36, 38 (C.M.A. 1981). Having affirmed the assault conviction, relying on this authority, we also find the unauthorized absence conviction legally and factually sufficient.

Adultery

Looking next to the adultery charge, we find it factually insufficient. Conviction of adultery requires proof beyond a reasonable doubt of three separate and distinct elements. The appellant does not generally dispute the first two, that he was married to another person while he engaged in sexual intercourse with JW.[3] The appellant does however dispute the conclusion that his conduct was, "under the circumstances, . . . to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces." *MCM*, Part IV, ¶ 62.b.(3).

[3] We expressly reject the appellant's argument that the prosecution did not prove the appellant and JW engaged in sexual intercourse during the time they lived together. We are satisfied the testimony of JW sufficiently establishes that their relationship included sexual intercourse throughout the period for which he was convicted of adultery.

The *Manual* further explains the element of prejudice to good order and discipline:

> "To the prejudice of good order and discipline" refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense. . . . It is confined to cases in which the prejudice is reasonably direct and palpable.

MCM, Part IV, ¶ 60.c.(2)(a). The *Manual* also defines service-discrediting conduct: "'Discredit' means to injure the reputation of. This clause of Article 134[, UCMJ] makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem." *MCM*, Part IV, ¶ 60.c.(3).

In addition to the above guidance, Paragraph 62 of the *Manual* includes a lengthy explanation of the third element as it applies to adultery and sets forth a list of various factors that should be considered in determining whether or not the adultery was prejudicial to good order and discipline or service discrediting. The following factors are but an example of those applicable to the appellant's case:

> (a) The accused's marital status . . . [and] grade . . .;
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> (b) The co-actor's . . . [military] grade . . .;
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> . . . .
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> (d) The impact, if any, of the adulterous relationship on the ability of the accused, [or] co-actor . . . to perform their duties . . .;
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> . . . .
>
> (f) Whether the conduct persisted despite counseling or orders to desist; the flagrancy of the conduct . . .; [and]
>
> . . . .
>
> (h) Whether the accused or co-actor was legally separated[.]

MCM, Part IV, ¶ 62.c.(2); *see also United States v. Perez*, 33 M.J. 1050, 1054 (A.C.M.R. 1991).

The government makes essentially two arguments in support of this charge. First, they contend that because the appellant asked JW to be more circumspect about the relationship after he received the order to stop cohabitating in June of 2005, this somehow supports the conclusion that it was criminal. This argument is illogical. By

cautioning his girlfriend that they needed to be more circumspect about their relationship, the appellant was minimizing the potential that the relationship would bring discredit upon the military or impact the unit. The government's second argument is that, but for the adulterous relationship, the assault and arrest would not have occurred, which were themselves service discrediting. The problem with this argument is that the appellant was only convicted of criminal adultery for a period ending a year prior to the assault and arrest. While the government's argument may have been persuasive if the adultery conviction overlapped the period of the arrest, we need not decide that issue. *See United States v. Collier*, 36 M.J. 501, 511-12 (C.M.A. 1992) (adultery charge was valid where adultery was concomitant with other acts for which appellant was court-martialed).

As we consider the guidance in the *Manual* and the facts of this case, we agree with the appellant's argument that the charge cannot stand. First, the military judge found the appellant only guilty of the charge from July 2004 to July 2005. In this period, there was no evidence presented that anyone, prior to the single phone call to the commander, was aware of the appellant's living arrangement. Significantly, this call was for the sole purpose of obtaining the appellant's address so as to serve him with divorce paperwork. It is also clear that his prior marriage had long been over and that his spouse was not upset with the appellant's living arrangements. The commander himself testified that he was completely unaware of the living arrangement and that he conducted no investigation into the allegation when it was made. He offered no evidence that the arrangement was having any impact on the unit or that he had any evidence that the arrangement was affecting the appellant's status or duty performance in any manner. Finally, we find it significant that JW had no affiliation with the base at any time during the charged period. Considering all of the above, we find that the adultery conviction is not factually sufficient. We will address the impact of this decision below.

Willful Disobedience of a Superior Commissioned Officer

The appellant makes two distinct attacks against the conviction for willfully disobeying an order from his commander. As he did at trial, he contends first and foremost that he never violated the order. Specifically, he argues the order only sprung into effect *if* he was engaged in a criminal violation of adultery or wrongful cohabitation under Article 134, UCMJ, and since he was doing neither, he did not violate the order. In making this argument the appellant relies on the elements of adultery and cohabitation under Article 134, UCMJ, and on the wording of the written order provided to the appellant.

The written order given the appellant provided, "Wrongful cohabitation and adultery are offenses under Article 134, Uniform Code of Military Justice (UCMJ), and will not be tolerated. *If you are* wrongfully cohabiting or in an adulterous relationship, you are hereby ordered to cease and desist from that behavior. Failure to cease such

behavior could be punishable under Article 92, UCMJ, Failure to Obey Order or Regulation." (Emphasis added).

Second, the appellant contends that the order was not an order given under the authority of Article 90, UCMJ, but instead constituted an order solely under the provisions of Article 92, UCMJ, 10 U.S.C. § 892.[4] Here again the appellant relies upon the language contained in the written order to the exclusion of all other facts. The government counters the appellant's arguments by asking this Court to look beyond the language of the written order and consider all of the facts and circumstances of when it was given. The government specifically relies upon the commander's testimony in their arguments that the order was violated and was a personal order by the commander himself.

In concluding first that it was a valid order under the provisions of Article 90, UCMJ, we look to the testimony of Colonel (Col) RW. Col RW had over 24 years of service and was serving as the appellant's squadron commander at the time of the order. He testified that he unexpectedly received a call from the appellant's wife in which he learned that the appellant was living with another woman, despite still being married. As a result of this information, Col RW was concerned about maintaining good order and discipline in his unit and, after conferring with the legal office, decided he needed to issue an order to the appellant. He called the appellant into his office for the express purpose of giving him an order to stop living with another woman while he remained married. Col RW testified that he explained the recent phone call from the appellant's wife and read him the order. He discussed the order with the appellant, and the appellant indicated he understood the order. It is clear from this testimony that the order given the appellant was a personal order from his commander and that disobedience of the order would be in intentional defiance of his commander's authority. *Cf. United States v. Ranny*, 67 M.J. 297 (C.A.A.F. 2009); *United States v. Byers*, 40 M.J. 321, 323-24 (C.M.A. 1994).

As for the appellant's argument that he did not violate the order, we disagree with this argument was well. We reject the appellant's narrow interpretation of the scope of the order. It is clear from the facts and circumstances surrounding the order that the commander advised the appellant that he was to stop cohabitating with his girlfriend while he remained married. Equally significant is the testimony of JW, who testified that the appellant told her that they needed to be more circumspect in their relationship as a result of the order. Taken as a whole, we are confident that the appellant understood the order was an order to stop cohabitating with his girlfriend until his divorce was final. This is the order that he was charged with violating, and this is the order he in fact violated.

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[4] We also considered whether the order in this case constituted merely an order to obey the law. We find that it did not. *See United States v. Bratcher*, 39 C.M.R. 125, 128 (C.M.A. 1969).

Having found the appellant's conviction for disobeying the order to be factually and legally sound, while at the same time reaching an opposite conclusion regarding the appellant's conviction for adultery, we must finally address whether these two conclusions are factually and legally inconsistent. We find they are not.

We accept that "an order purporting to regulate personal affairs is not lawful unless it has a military purpose." *United States v. Padgett*, 48 M.J. 273, 276 (C.A.A.F. 1998). At the same time, it is well settled that the military has a "legitimate interest in protecting its reputation with the civilian community." *Id* at 278. The *Manual* recognizes that an order may have a preventive or protective function, to "safeguard or promote the morale, discipline, and usefulness of members of a command." *MCM*, Part IV, ¶ 14.c.(2)(a)(iii). We believe that is exactly what the commander had intended with his order. He wanted to ensure that knowledge or problems associated with the appellant's cohabitation with a woman not his wife did not impact good order and discipline in his unit or bring discredit on the Air Force. Considering the appellant's status as an officer, we find the commander's decision to issue an order not only legally sound, but also prudent. Therefore, the order was valid and violated, even absent evidence the adulterous relationship had arisen to the level of being criminal adultery at the time the order was given.

Finally, we do not believe that the issue here is one that requires a *Marcum* analysis, because the disobedience charge does not rely upon the sexual activity of the appellant, but rather the potential impact of his cohabitation, while married to another, on the reputation of the armed forces and the good order and discipline of the appellant's unit. *See United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004).

Sentence Reassessment

Based upon our dismissal of the adultery specification, we next analyze the case to determine whether we can reassess the sentence. *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002). Before reassessing a sentence, this Court must be confident "that, absent any error, the sentence adjudged would have been of at least a certain severity." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). A "dramatic change in the penalty landscape" gravitates away from our ability to reassess a sentence. *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003). Ultimately, a sentence can be reassessed only if we "confidently can discern the extent of the error's effect on the sentencing authority's decision." *United States v. Reed*, 33 M.J. 98, 99 (C.M.A. 1991). In *United States v. Harris*, 53 M.J. 86 (C.A.A.F. 2000), our superior court decided that if the appellate court "cannot determine that the sentence would have been at least of a certain magnitude," it must order a rehearing. *Harris*, 53 M.J. at 88 (citing *United States v. Poole*, 26 M.J. 272, 274 (C.M.A. 1988)).

As we consider the charges for which the appellant was found guilty, we are satisfied that the adultery specification was clearly the least aggravating of the offenses for which he was convicted. It only increased the maximum confinement the appellant faced by one year. Our conclusion above, that we could find no impact of the adultery on the unit, further supports this assessment. Considering the evidence in the record, we are confident that the military judge would have still imposed a dismissal for the remaining offenses in light of the appellant's checkered military career and his disobedience of an order, and reassess the sentence accordingly. *See United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990) (appellate court must put itself "in the shoes" of the sentencing authority when reassessing the sentence).

Inappropriately Severe Punishment

Finally, the appellant asks this Court to approve a fine in place of the dismissal. He argues that the offenses of which he was ultimately convicted do not warrant the equivalent of a dishonorable discharge. The government disagrees, highlighting the appellant's apparent lack of remorse for his offenses and his full disciplinary record, which includes nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815, for conduct unbecoming an officer, a letter of reprimand for failing to pay his government travel card, and a letter of counseling for using profanity in the work place.

We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ. We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *See United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Rangel*, 64 M.J. 678, 686 (A.F. Ct. Crim. App. 2007). Our superior court has concluded that the Courts of Criminal Appeals have the power to, "in the interests of justice, substantially lessen the rigor of a legal sentence." *United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002) (quoting *United States v. Lanford*, 20 C.M.R. 87, 94 (C.M.A. 1955)).

Our duty to assess the appropriateness of a sentence is "highly discretionary," but does not authorize us to engage in an exercise of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). Matters submitted in clemency may be considered in evaluating sentence appropriateness, including items found in the allied papers. *Peoples*, 29 M.J. at 428; *Healy*, 26 M.J. at 396; *Lanford*, 20 C.M.R. at 95.

In considering the appropriateness of the appellant's sentence, we are mindful of our conclusion that we must assess its appropriateness in light of our dismissal of the adultery specification. Considering this fact, we agree the imposition of a dismissal in this case is a severe punishment, but we do not find it inappropriately severe in light of

the appellant's full military record. When we consider all of his performance reports, his prior disciplinary record and his commander's testimony regarding his "very, very little" rehabilitative potential, we are satisfied that the sentence is not inappropriately severe. This conclusion rests almost entirely on the fact that the appellant disobeyed the order of his commander. This disobedience, over the period of more than a year, was in deliberate, open defiance of his commander's authority. Such disobedience by an officer is nothing short of dishonorable.

Post-trial Delay

We note that this case has been with this Court in excess of 540 days. In this case, the overall delay between the trial 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. *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, the lack of any objection by defense, 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 and that no relief is warranted.

Conclusion

Specification 3 of Charge II is dismissed. The remaining findings and sentence, as reassessed, 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 remaining findings and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

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