UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

First Lieutenant JASON D. DAVIS
United States Air Force

ACM 36652

31 May 2007

Sentence adjudged 21 September 2005 by GCM convened at Osan Air Base, Korea. Military Judge: Eric L. Dillow (sitting alone).

Approved sentence: Dismissal and 2 years confinement.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Captain Christopher L. Ferretti, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Captain Daniel J. Breen, and Captain Jamie L. Mendelson.

Before

BROWN, SCHOLZ, and BRAND
Appellate Military Judges

PER CURIAM:

A general court-martial composed of a military judge sitting alone convicted the appellant, consistent with his pleas, of dereliction of duty, violating lawful general orders and regulations, false official statement, conduct unbecoming an officer, adultery, making racially or ethnically derogatory comments, and drunk and disorderly conduct, in violation of Articles 92, 107, 133 and 134, UCMJ, 10 U.S.C. §§ 892, 907, 933, 934. The military judge sentenced the appellant to a dismissal and confinement for 2 years. The convening authority approved the sentence as adjudged.[1] On appeal, the appellant raises three issues: 1) Whether the appellant's due process right to timely post-trial review has been denied; 2) Whether the Staff Judge Advocate erroneously advised the convening authority by failing to make corrections to the Report of Result of Trial regarding the

[1] The convening authority deferred and then waived mandatory forfeitures for the benefit of appellant's spouse.

appellant's pleas and the Court's findings; and 3) Whether the appellant's pleas to Specifications 7 and 8 of Charge I were provident.

The appellant avers that 181 days elapsed between the end of trial and action being taken by the convening authority; however, in actuality, only 168 days had elapsed.[2] We note this trial occurred prior to our superior court's decision in *United States v. Moreno,* 63 M.J. 129 (C.A.A.F. 2006). Cases tried prior to the *Moreno* decision are reviewed on a case-by-case basis under the *Barker* due process analysis.[3] *Moreno,* 63 M.J. at 143. We conduct de novo review to consider issues of due process and whether constitutional error is harmless beyond a reasonable doubt. *United States v. Young,* 64 M.J. 404, 409 (C.A.A.F. 2007). The appellant maintains that because he was awarded 205 days of pretrial confinement credit, in conjunction with a relatively "short" sentence, the post-trial processing delay created particularized anxiety with respect to the appellant's ability to seek parole.

There is no evidence supporting a due process violation in the post-trial processing of this case. Assuming *arguendo*, the delay was facially unreasonable, the Court need not engage in a separate analysis of each *Barker* factor where we can assume error and proceed directly to the conclusion that any error was harmless beyond a reasonable doubt. *Id.* (citing *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006)). Having thoroughly reviewed the totality of the circumstances and the entire record of trial, we conclude even if there was error, the error was harmless beyond a reasonable doubt.

The Report of Result of Trial and the Court-Marital Order (CMO) are technically incorrect. Both indicate the appellant was found not guilty of the charges and specifications to which he pled not guilty when, in fact, there were no findings entered as to those charges and specifications. They were withdrawn and dismissed with prejudice in accordance with the pretrial agreement (PTA).[4] The convening authority who signed the PTA took action in this case. Additionally, the trial defense counsel, in post-trial submissions, pointed out these inaccuracies but made no showing of harm to the appellant. However, a corrected CMO still needs to be accomplished to properly reflect the results of the appellant's trial.

In determining whether a guilty plea is provident, the test is whether there is 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) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). In order to establish an adequate factual basis for a guilty plea, the military judge must elicit "factual circumstances as revealed by the accused himself [that] objectively support that plea[.]" *Jordan*, 57 M.J. at 238 (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). The providence inquiry must demonstrate

[2] This time includes 35 days from the date of service of the Staff Judge Advocate Recommendation until the last response tendered by the trial defense counsel.
[3] *Barker v. Wingo*, 407 U.S. 514, 530 (1972).
[4] The PTA also limited confinement to no more than 42 months.

the appellant understood the nature of the prohibited conduct. *United States v. Sapp*, 53 M.J. 90, 92 (C.A.A.F. 2000).

We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996) (citing *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995)). The *Care*[5] inquiry and the stipulation of fact support the providency of the appellant's pleas to Specifications 7 and 8 of Charge I, and the military judge did not abuse his discretion in accepting those pleas.

An issue not raised, but addressed by this Court, concerns Specification 5 of Additional Charge I. The appellant was convicted, in accordance with his plea by exceptions and substitutions, of negligent dereliction of duty. The specification at issue, after exceptions and substitutions, states "…was derelict in the performance of those duties in that he negligently conducted 'sting operations' against Songtan-area business establishments, *as it was his duty to do*." (Emphasis added). This Specification fails to state an offense, and is therefore dismissed.

Because we dismissed Specification 5 of Additional Charge I, 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) (citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)). We conclude that we can. The error had no impact on the evidence presented at trial, and only minimal impact on the maximum sentence.[6] Reassessing the sentence, we are convinced beyond a reasonable doubt that the trial judge would have awarded the same punishment regardless of the error: a dismissal and confinement for 2 years. *See Id.* Furthermore, we find the sentence to be appropriate. *See United States v Peagler*, 29 M.J. 426, 428 (C.M.A. 1990).

The findings, as modified, and sentence, as reassessed, are correct in law and fact, and no additional 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). Additionally, based on the foregoing, we order the promulgation of a corrected CMO. Accordingly, the findings, as modified, and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

MARTHA E. COBLE-BEACH, TSgt, USAF
Court Administrator

[5] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).
[6] The maximum sentence, as calculated at trial, included 21 years and 3 months of confinement, rather than the now correct total of 21 years.