UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class MARIO A. FLORES
United States Air Force

ACM 36218

15 December 2006

Sentence adjudged 13 October 2004 by GCM convened at Scott Air Force Base, Illinois. Military Judge: Lance B. Sigmon (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 42 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Sandra K. Whittington, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Carrie E. Wolf, and Captain Donna S. Rueppell.

Before

ORR, MATHEWS, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release

MATHEWS, Judge:

The appellant was charged with a wide range of offenses under the UCMJ,[1]

[1] The appellant was originally charged with rape, in violation of Article 120, UCMJ, 10 U.S.C. § 920, and indecent acts, in violation of Article 134, UCMJ, 10 U.S.C. § 934. He was additionally charged with one specification each of attempting and conspiring to wrongfully use cocaine, in violation of Articles 80 and 81, UCMJ, 10 U.S.C. §§ 880, 881, and one specification each of wrongful use of cocaine and marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A second additional charge alleging a single

including specifications of rape involving two different victims: MW and Airman (Amn) TP. The appellant pled not guilty to both rapes, but guilty to the lesser-included offenses (LIOs) of indecent assault and indecent acts,[2] and guilty to other lesser and ancillary offenses. The military judge found all the appellant's pleas provident and convicted him accordingly. The appellant now claims, *inter alia*, that his pleas to the indecent assault and acts specifications were improvident, and further contends he is entitled to outright dismissal of all the charges and specifications because it took the government too long to bring him to trial. We find no merit to the appellant's claims and affirm.

Providency of the appellant's pleas

The appellant explained the factual basis for his plea to indecent assault thusly: he and several other individuals, including MW, went camping near Scott Air Force Base (AFB), Illinois, where the appellant was assigned and MW was employed. While on the camping trip, the appellant engaged in sexual intercourse with MW in a tent where three other individuals were sleeping. The appellant claimed that he thought he had MW's consent,[3] but admitted that during the act, she lost consciousness.[4] Heedless of her condition, the appellant explained, he continued to engage in intercourse until he felt sated.

The appellant did not indicate why he believed MW consented to the initial act of intercourse, but he acknowledged such consent would not have extended to having sex with her while she was unconscious. He elaborated that MW did not consent to any sexual activity in which she was not "participating," and agreed that once she passed out, MW was not, in fact, participating. Any belief that MW's consent extended to sexual intercourse after she was unconscious, the appellant admitted, was not reasonable.

Regarding the indecent acts specification involving Amn TP, the appellant advised that he entered Amn TP's dormitory room on Scott AFB and that, while he was there, his penis "was placed" in Amn TP's mouth. He admitted that this

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specification of rape was preferred three months after the original charges. A third additional charge, alleging burglary, in violation of Article 129, UCMJ, 10 U.S.C. § 929 was preferred shortly thereafter. Finally, a fourth set of additional charges was preferred on the eve of the appellant's trial, alleging assault on a person performing law enforcement duties, and drunk and disorderly conduct, in violation of Articles 128 and 134, UCMJ, 10 U.S.C. §§ 928, 934. Several specifications were disposed of prior to trial, but both rape specifications remained, along with a number of the drug and other specifications.

[2] Both in violation of Article 134, UCMJ, 10 U.S.C. § 934.

[3] MW's description of events varied considerably from the appellant's. In particular, MW denied consenting to intercourse with the appellant. Nonetheless, in evaluating the providency of the appellant's plea, we look to his admissions, not the claims of others. *United States v. Carr*, 63 M.J. 615, 620 (A.F. Ct. Crim. App. 2006) (citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)).

[4] The appellant informed the military judge that he knew MW was unconscious because her arms fell to her sides and she became "limp" and unresponsive.

act was done for the purpose of his "gratification." He further admitted that his conduct was indecent and prejudicial to good order and discipline because Amn TP was married to another servicemember.

The appellant first contends that his plea to indecent assault cannot stand because he raised "a possible mistake of fact defense" during his providency inquiry. Specifically, he claims that even if MW did not actually consent to sexual intercourse continuing after she lost consciousness, he mistakenly believed that she did, and -- despite his admissions to the contrary at trial -- argues that this mistake was both honest and reasonable. He also contends that his plea to indecent acts with Amn TP cannot stand because the underlying act of oral sodomy, "falls within a protected liberty interest as expressed in *Lawrence*."[5]

We evaluate the military judge's decision to accept a guilty plea using an abuse of discretion standard. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). Prior to accepting a plea, the military judge must conduct an inquiry into its factual basis. *See* Rule for Courts-Martial (R.C.M.) 910(e); *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969). If, after entering a plea of guilty, the accused sets up a matter inconsistent with his plea, the plea is improvident and cannot be accepted. Article 45(a), UCMJ, 10 U.S.C. § 845(a). Not all inconsistencies render a plea improvident, however; the inconsistency must be of a nature to create "a 'substantial basis' in law and fact for questioning the guilty plea." *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991); *United States v. Lee*, 16 M.J. 278, 281 (C.M.A. 1983).

When such an inconsistency is raised, the military judge must inquire further to determine whether the inconsistency can be resolved, and reject the guilty plea if it cannot. *Prater*, 32 M.J. at 436; *see also United States v. Adams*, 33 M.J. 300, 302-03 (C.M.A. 1991); *United States v. Marcy*, 62 M.J. 611, 613 (A.F. Ct. Crim. App. 2005), *pet. denied*, 63 M.J. 254 (C.A.A.F. 2006). We see no such inconsistency here. The appellant's newfound claim to an honest and reasonable mistake of fact was *expressly disclaimed* by him at trial. The appellant stipulated that "any belief" he may have harbored that MW consented to sexual intercourse while unconscious "was unreasonable," and affirmed that stipulation during the *Care* inquiry.

We concur with the appellant's candid in-court assessment of the situation. No reasonable person would have believed himself entitled to engage in sexual activity with an unconscious person. The appellant's claim is without merit.

[5] *Lawrence v. Texas*, 539 U.S. 558 (2003). The appellant took the position that his sexual activity with Amn TP was consensual. As was the case with MW, however, Amn TP's recollection of events differed substantially from the appellant's.

The appellant's claim to a Constitutionally protected "liberty interest" in the placement of his penis in the mouth of a fellow serviceman's wife likewise does not withstand scrutiny. The appellant admitted during the *Care* inquiry that his conduct was prejudicial to good order and discipline. He explained this was true "because [Amn TP] was married to someone [else]" and agreed that because the 'someone else' was also in the service, his conduct "could result in some kind of breach of discipline." We agree, and find that the appellant's admitted conduct fell outside the liberty interest established in *Lawrence*. *See United States v. Marcum*, 60 M.J. 198, 207-8 (C.A.A.F. 2004) (military's need for discipline may remove even private sexual conduct from the ambit of *Lawrence*); *see also United States v. Orellana*, 62 M.J. 595, 598 (N.M. Ct. Crim. App. 2005), *pet. denied*, 63 M.J. 295 (C.A.A.F. 2006) (*Lawrence* conveys no right to commit adultery). The military judge did not err in accepting the appellant's guilty pleas.

Speedy trial

The appellant next contends that the government violated his speedy trial rights under Article 10, UCMJ, 10 U.S.C. § 810 and the Fifth and Sixth Amendments to the United States Constitution. The appellant's case took 14 months from the preferral of the initial charges until the adjournment of his court-martial. The appellant spent 12 of those 14 months in pretrial confinement. While in pretrial confinement, the appellant moved to sever the drug-related specifications from the sexual misconduct, assaults, and related offenses which made up the remainder of the charges referred to trial. The government opposed the motion and the military judge denied it.

The appellant now contends that the "sheer length of time" that elapsed prior to his trial establishes a lack of effort by the government to respect his right to a speedy trial. He argues that "reason would dictate that the [government] could have moved the case forward much more expeditiously." He admits, however, that he did not seek appropriate relief on this issue at trial, and he did not enter conditional pleas to preserve this issue.

Our superior appellate court recently addressed the question of waiver in the context of speedy trial claims under the Constitution and Article 10, UCMJ. *See United States v. Mizgala*, 61 M.J. 122 (C.A.A.F. 2005). An Article 10, UCMJ, issue is preserved for appellate review, even in the face of an unconditional guilty plea, provided the appellant raises the issue prior to entry of pleas. *Id.* at 127. Because no such motion was made prior to the adjournment of the appellant's trial, we find this issue was waived. *See* R.C.M. 905(e). The

waiver extends also to the appellant's Sixth Amendment[6] claims. *See Mizgala*, 61 M.J. at 124.

Even were we to entertain the appellant's belated speedy trial claims, we would grant no relief. Inasmuch as the issue was not litigated at trial, there were no findings of fact entered by the military judge, nor was there a complete chronology of events placed in the record. However, a partial chronology, prepared in connection with the defense motion to sever the drug charges and covering the first six months after preferral of the initial charges, shows a steady stream of activity to bring the appellant's case to trial. The remaining record is adequate for us to ascertain that the appellant's case was legally and factually complex, and that its progress to trial, while prolonged, was not delayed by either malice or neglect.

There were a total of five separate preferrals as a result of the appellant's ongoing misconduct. The case involved extensive DNA testing (including supplemental tests of eight individuals, requested by the appellant after the initial round of testing was completed), as well as other forensic examinations. Additional factors and events served to complicate the pretrial process, such as the sanity board held after a blood-smeared document, apparently authored by the appellant and purporting to offer his soul to Satan in exchange for a full acquittal and a large sum of money, was discovered in the appellant's cell.[7]

In sum, we find the government exercised the "reasonable diligence" required by Article 10, UCMJ, in bringing the case to trial. *See United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993) (citing *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965)). We further find that the appellant's prosecution did not violate the Sixth Amendment standards set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *see also United States v. Birge*, 52 M.J. 209, 211-12 (C.A.A.F. 1999) (examining *Barker* factors in the context of military criminal practice); nor was the appellant deprived of his right to due process of law under the Fifth Amendment.[8]

Other issues

The appellant's remaining assignment of error alleges that the military judge erred by permitting MW and Amn TP to testify that they did not consent to

[6] U.S. CONST. amend. VI.

[7] The appellant's trial defense counsel initially requested the sanity board but subsequently withdrew their request. Calling the request "quick" and "off-the-mark," they asserted that the appellant did not actually believe he was in communication with "the Devil or any other such entity." The military judge nonetheless ordered the sanity board, citing the Satanic contract solicitation as well as the appellant's "history of self-mutilation" and attempted suicide.

[8] U.S. CONST. amend. V.

the appellant's sexual acts. MW stated that, contrary to the appellant's version of events, she never consented to sex with him but rather awoke to find the appellant apparently engaged in sexual intercourse with her. Amn TP similarly testified that she awoke in her dormitory room to find the appellant on top of her, engaging in sexual intercourse, and that he told her he would stop only if she performed oral sodomy on him.

Their testimony was proper aggravation evidence under R.C.M. 1001(b)(4). Although this evidence certainly suggested that the appellant's culpability was more than he admitted in his *Care* inquiry, military judges are vested with "broad discretion" in determining what evidence they will consider under R.C.M. 1001(b)(4), and we do not overturn their judgments lightly. *United States v. Wilson*, 47 M.J. 152, 155 (C.A.A.F. 1997). We see no abuse of discretion here. The scope of evidence otherwise admissible in sentencing is not constrained by the facts the appellant chooses to admit are true. *United States v. Glazier*, 26 M.J. 268, 270-71 (C.M.A. 1988) (citing *United States v. Martin*, 20 M.J. 227, 230 (C.M.A. 1985)). Further, we are confident the military judge punished the appellant only for those offenses of which he was found guilty. *See* Department of the Army Pamphlet 27-9, *Military Judges' Benchbook* , ¶ 2-6-9 (15 Sep 2002).

Conclusion

The 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 findings and sentence are

AFFIRMED.

Senior Judge ORR participated in this decision prior to his reassignment.

OFFICIAL

LAQUITTA J. SMITH
Documents Examiner