UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DANIEL J. GREENFIELD
United States Air Force

ACM 34446

12 February 2002

Sentence adjudged 30 November 2000 by GCM convened at Keesler Air Force Base, Mississippi. Military Judge: Sharon A. Shaffer.

Approved sentence: Dishonorable discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Lieutenant Colonel Beverly B. Knott, Lieutenant Colonel Timothy W. Murphy, and Captain Patrick J. Dolan.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major Linette I. Romer.

Before

SCHLEGEL, ROBERTS, and PECINOVSKY
Appellate Military Judges

OPINION OF THE COURT

SCHLEGEL, Senior Judge:

The appellant was convicted, contrary to his pleas, of committing an indecent act with another and an indecent assault, in violation of Article 134, UCMJ, 10 U.S.C. § 934. His approved sentence included a dishonorable discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to E-1. He complains that he was denied a speedy trial in violation of Article 10, UCMJ, 10 U.S.C. § 810, and subjected to illegal pretrial punishment in violation of Article 13, UCMJ, 10 U.S.C. § 813. The appellant also argues his conviction for an indecent act with another should only be affirmed for the offense of indecent exposure, and that the trial judge erred by failing to instruct the members on the defense of accident on this specification. We affirm the

appellant's conviction for indecent assault. We modify the finding of guilty for committing an indecent act to indecent exposure, and reassess the appellant's sentence.

I. Speedy Trial

On 3 May 2000, a female airman at Keesler Air Force Base (AFB), Mississippi, formally complained to the Security Forces that the appellant had sexually assaulted her (Specification 2). During an interview about this incident, the appellant told an investigator that other women had made allegations against him, including a student at Biloxi High School (Specification 1).

The appellant was placed in pretrial confinement on 5 May 2000, and his trial began on 28 November 2000, which means he spent 207 days in pretrial confinement before his court-martial convened. At trial, the appellant moved to dismiss the Charge and Specifications for a violation of Article 10, UCMJ. The parties stipulated to a chronology, which established that the investigation of the appellant began on 3 May 2000 and was completed a little over a month later on 5 June. In mid-June, the parties agreed that the Article 32, UCMJ, 10 U.S.C. § 832, investigation on the allegations against the appellant would be held on 27 July. On 14 July, the special court-martial convening authority ordered a sanity board for the appellant and excluded the time to conduct it for speedy trial purposes (40 days). The Article 32 investigation was held as scheduled, but the investigating officer did not complete his report until the results of the sanity board were known. The sanity board was conducted on 9 August (the report is dated 22 August). The Article 32 investigation report was issued on 14 August. Defense counsel requested a delay until 6 September, to respond to the Article 32 report. However, the report was forwarded to the general court-martial convening authority on 31 August, an exclusion of 15 days. The charge and specifications were referred on 18 September. The prosecution requested a trial date of 9 October, but the defense requested 20 November. The trial judge set trial for 28 November and excluded the time from 9 October for speedy trial purposes (49 days).[1] The appellant never demanded a speedy trial.

After hearing testimony, the trial judge found additional facts and ruled that the prosecution acted with due diligence in bringing the appellant to trial. She specifically found that the length of the investigation was due to the number of requests for assistance that Security Forces sent out to other law enforcement agencies. She also found that during the period the appellant was in pretrial confinement, the base legal office at Keesler AFB was handling 25 other courts-martial cases. After applying the applicable case law to the facts, the judge concluded that the prosecution used reasonable diligence in bringing the appellant to trial. The appellant argues that the trial judge's ruling was

[1] After deducting excludable delays, the appellant was brought to trial in 114 days.

erroneous and that he suffered prejudice because he was entered into a no-pay status on 25 June 2000.

Analysis

If a person "is placed in arrest or confinement prior to trial, immediate steps shall be taken . . . to try him or to dismiss the charges and release him." Article 10, UCMJ. The test for evaluating whether an appellant's right to a speedy trial pursuant Article 10, has been violated is whether the government acted with "reasonable diligence" in bringing him to trial. *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993). It is appropriate "to consider the *Barker v. Wingo* factors—in the context of Article 10's 'immediate steps' language and 'reasonable diligence' standard—in determining whether a particular set of circumstances violates a servicemember's speedy trial rights under Article 10." *United States v. Birge*, 52 M.J. 209, 212 (1999) (citing *Barker v. Wingo*, 407 U.S. 514, 526-29, (1972)). The factors are (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's demand for speedy trial; and (4) prejudice to the appellant. *Barker v. Wingo*, 407 U.S. at 530. We review whether the accused received a speedy trial de novo. *United States v. Doty*, 51 M.J. 464, 465 (1999). The trial judge's findings of fact are given "substantial deference and will be reversed only for clear error." *Id.* (quoting *United States v. Taylor*, 487 U.S. 326, 337 (1988)).

We decide the judge's factual findings and application of the law on Article 10 was correct. Although both victims were in the local area, the security forces had an obligation, based on the information provided to them by the appellant, to ask for assistance from other law enforcement agencies to determine whether he had committed additional offenses. Furthermore, the appellant never demanded a speedy trial. In fact, he agreed with the date for the Article 32 investigation in late July, and requested almost a three-week delay to submit comments about the Article 32 investigation to the convening authority. In September, the appellant changed counsel and this prompted an additional delay until November. The appellant does not allege that his ability to defend himself was damaged in any way during this period. Instead, the appellant's claim of prejudice is grounded in the fact that when his enlistment expired on 25 June, he entered into a no-pay status. The only way around the appellant's pay problem was to conduct the trial before his enlistment expired. However, the appellant agreed the Article 32 investigation would be held over 30 days past that date.

It is difficult to imagine, especially when an attorney represents an accused, that the first complaint about a speedy trial violation comes in the form of a motion to dismiss. Human nature tells us that a person who perceives that they are being harmed by a delay complains loudly and often. This appellant never said "boo" to anyone. We find no violation of Article 10, in view of these facts.

II. Pretrial Punishment

At trial, the appellant moved for additional credit for his pretrial confinement, because he was commingled with sentenced prisoners, denied mail, and publicly humiliated by a prison guard and the wing commander. The trial judge, after hearing the evidence, found that there was no violation of Article 13. Before this court, the appellant argues the judge erred and asks us to set aside the bad-conduct discharge.

Analysis

A review of an alleged violation of Article 13, UCMJ, is a mixed question of law and fact. *United States v. McCarthy*, 47 M.J. 162, 165 (1997) (quoting *Thompson v. Keohane*, 516 U.S. 99 (1995)).

> Article 13 prohibits two types of activities involving the treatment of an accused prior to trial. First, like [Rule for Courts-Martial 304(f)], it prohibits the imposition of punishment or penalty prior to trial. Such an imposition entails a purpose or intent to punish an accused before guilt or innocence has been adjudicated. Purpose and intent, however, are themselves classic questions of fact. For such "basic, primary, or historical facts" we will defer to the trial judge who is in the best position to evaluate them, and on those points, we will reverse only for a clear abuse of discretion.
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> Second, Article 13 proscribes the infliction of unduly rigorous circumstances during pretrial detention which, in sufficiently egregious circumstances, may give rise to a permissible inference that an accused is being punished, or may be so excessive as to constitute punishment.

McCarthy, 47 M.J. at 165 (citations omitted); *see also United States v. Smith*, 53 M.J. 168 (2000).

Commingling of pretrial and sentenced prisoners may violate Article 13 if its purpose is to punish the pretrial prisoner or is unrelated to any legitimate government purpose. *United States v. Palmiter*, 20 M.J. 90, 95 (C.M.A. 1985). Pretrial punishment can involve public denunciation and degradation. *United States v. Stringer*, 55 M.J. 92, 94 (2001).

We address each of the appellant's allegations seriatim. First, he alleged that because he was housed with sentenced prisoners, Article 13 was violated. The evidence showed that at the confinement facility on the base, male pretrial and sentenced prisoners slept in the same open bay. However, they were kept on different sides of the bay. The judge found that this arrangement was dictated by the physical limitations of the facility,

and that there was no evidence it was intended as a punishment for pretrial prisoners. We agree with the judge that the evidence demonstrated that the sleeping arrangements in the open bay confinement facility were not motivated by a desire to punish pretrial prisoners. Rather, the evidence demonstrated that the arrangement was dictated by the physical limitations of the confinement facility. *Palmiter*, 20 M.J. at 95.

The evidence established that the mail service at the confinement facility was interrupted on a number of occasions. This interruption was caused when confinement personnel were not properly authorized to pick-up the prisoner's mail at the postal facility. However, all the prisoners were affected, not just the appellant. The judge found that although the appellant's inability to receive the mail was inconvenient, there was no evidence to suggest these interruptions were part of a plan by officials at the confinement facility to punish the appellant. We agree.

At trial, the appellant testified that a staff member at the confinement facility asked him who was his attorney and how he was going to plead to the charges. After the appellant indicated he was going to plead not guilty, and revealed the identity of his attorney, the staff member indicated that the appellant might as well plead guilty if he was going to be represented by that attorney. The appellant said the staff member's comments made him feel that his attorney did not have a "good record" and left him without "any sign of hope." The appellant also testified that the wing commander visited the confinement facility on 12 September and told the pretrial and sentenced prisoners that he had no sympathy for them because they had gotten themselves into trouble. According to the appellant, the wing commander went on to state that most of them would get into trouble again after they separated from the Air Force and that they had no respect for the law. The appellant said this speech was degrading. Although the judge found the guard's comments to be inappropriate, she determined they were not sufficiently egregious to amount to pretrial punishment. The judge also found that the wing commander did not single-out the appellant and that his comments were not made in a public forum. As a result, the judge concluded these comments did not violate Article 13, UCMJ.

We agree that these comments were inappropriate, but find that they do not rise to the level of pretrial punishment. *United States v. Cruz*, 25 M.J. 326, 330 (C.M.A. 1987); s*ee also United States v. Fogarty*, 35 M.J. 885, 891 (A.C.M.R. 1992). The guard's comments to the appellant were more juvenile than humiliating. Nevertheless, confinement personnel should only interact with prisoners in a professional manner. The wing commander's comments are more bothersome, and we are left to wonder what his purpose was in painting this bleak picture. Nevertheless, he addressed his remarks to all those present in the confinement facility, they were not made in a public forum, and the appellant was not identified for any special attention. Neither of these incidents approach the debasing behavior found to be a violation of Article 13, UCMJ, in *Cruz*.

III. Indecent Acts with Another

The appellant was charged with committing an indecent act with a high school student "by exposing his penis to her and then masturbating in front of her." However, the court members, in finding him guilty of this specification, excepted the language about masturbation. The convening authority approved the finding. The appellant argues that because he was only found guilty of exposing his penis to the girl, his conviction should be affirmed "for the lesser included offense" of indecent exposure. The government concurs. A brief discussion of the facts on this specification is necessary.

The victim was a 16-year-old female attending Biloxi High School. On 28 April 2000 the appellant volunteered to serve as a testing proctor at the school. The appellant was wearing jeans and a t-shirt but his shirt was not tucked into his pants. The victim had never seen the appellant before that day.

In the morning during a test, the appellant escorted the victim to the bathroom and remarked that she should let her hair down. During lunch, the appellant offered the victim and one of her female friends some pretzels and inquired why the friend was upset. He also offered that the victim "should do her best" on the test. During the afternoon, the victim was taking another test with a number of other students. The appellant was one of two proctors in the room. The victim testified that during the course of the test, the appellant would come over to where she was sitting and kneel close to her. Eventually, the other proctor asked him to stop. At some point, the victim was one of only two students in the room because the others had finished taking the test. The appellant walked over to where the victim was sitting and tapped her on the foot. She looked at the appellant briefly, then back to her test. The appellant tapped her foot again. When she looked, the appellant lifted his t-shirt and she saw his penis protruding from between the zipper on his pants. The appellant asked the victim if this bothered her. The victim responded that the appellant was crazy and that she had a boyfriend. The victim testified the appellant said "So" and then came closer and whispered something like they could "fuck all night." The appellant then moved to the front of the room, behind the other proctor. The victim testified this is when she believed he was masturbating with his back to her. After the victim completed her test, she left the room and reported the incident to a school employee.

The appellant did not testify on the merits. However, his oral and written statements to investigators were admitted into evidence. He denied that the incident occurred, but admitted that he did bump the victim's foot. When asked how the victim could have seen his penis, the appellant said he might have forgotten to close his zipper after going to the bathroom during lunch and that she might have seen his penis when he put books back on a bookshelf and his t-shirt came-up. The appellant also said that although he was wearing underwear, his penis comes out of his underwear "all the time" when he is in his room. When asked if he wanted to add any information, the appellant

composed a paragraph in which he apologized for spending too much time around the victim. He then wrote about the victim's "form fitting jeans" and "skin tight" bodysuit that fit "very snug on her breast[s]."

Analysis

The elements of committing an indecent act with another are:

(1) That the accused committed a certain wrongful act with a certain person;

(2) That the act was indecent; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Manual for Courts-Martial, United States (*MCM*), Part IV, ¶ 90b (2000 ed.).

The indecent act with another must be done in conjunction or participation with another person. *United States v. Thomas*, 25 M.J. 75 (C.M.A. 1987). In addition, although the act need not involve actual physical contact with a person, it must involve more than involuntary observation. *United States v. Eberle*, 44 M.J. 374, 375 (1996). The maximum punishment for this offense is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years. *MCM*, Part IV, ¶ 90e (2000 ed.). Indecent exposure is not listed as a lesser-included offense. *Id*. at ¶ 90d. However, indecent exposure is a lesser offense of indecent acts with another. *Thomas*, 25 M.J. at 76; s*ee also United States v. Daye*, 37 M.J. 714, 717 n.3 (A.F.C.M.R. 1993).

The elements of indecent exposure are:

(1) That the accused exposed a certain part of the accused's body to public view in an indecent manner;

(2) That the exposure was willful and wrongful; and

(3) That, under the circumstances, the accused's conduct was 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, ¶ 88b (2000 ed.).

The offense of indecent exposure does not require participation by another person. *Thomas*, 25 M.J. at 76 (citing *United States v. Caune*, 46 C.M.R. 200 (C.M.A. 1973)); *United States v. Stackhouse*, 37 C.M.R. 99 (C.M.A. 1967); *United States v. Conrad*, 35 C.M.R. 411 (C.M.A. 1965). The maximum punishment for this offense is a bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months. *MCM*, Part IV, ¶ 88e (2000 ed.).

The appellant was charged with a two-part indecent act: exposing his penis to the student and then masturbating in front of her. The members found that the exposure was proved beyond a reasonable doubt but were unconvinced that the appellant actually engaged in masturbation because the victim testified she could only see his back and some movement of his arm. As a result, the appellant stands convicted of committing an indecent act by exposing his penis to the female student.

We agree with the appellant and appellee that finding should be modified because other than exposing his penis to the victim, there was "no participation with her" within the meaning of that term. Furthermore, the evidence establishes the elements of indecent exposure. The testimony of the victim shows that the appellant willfully exposed his penis to her in a room at Biloxi High School while she was taking a test. It also shows that while escorting her to the bathroom and during lunch, the appellant attempted to interact with her on a social level at every opportunity. This is consistent with the appellant's written statement that he found her to be provocatively dressed.

The appellant was placed on notice by the specification that he was charged with exposing his penis to the victim. The offense of indecent exposure is closely related to the offense of indecent acts with another. Both offenses involve indecency and conduct that is either prejudicial to good order and discipline or service discrediting. Both acts must be wrongful. Indecent exposure only criminalizes conduct that is willful. *MCM*, Part IV, ¶ 88c (2000 ed.); *see also United States v. Conrad*, 35 C.M.R. 411 (C.M.A. 1965) (citing *United States v. Manos*, 25 C.M.R. 238 (C.M.A. 1958)). In view of these facts, we exercise our authority under Article 66(c), UCMJ, 10 U.S.C. § 866(c), to modify the finding of guilty for Specification 1 of the charge from indecent acts to indecent exposure. *United States v. Bivins*, 49 M.J. 328 (1998); *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

During our consideration of this issue, we have also been mindful of the appellant's allegation of instructional error concerning the affirmative defense of accident. However, our modification of the finding moots this issue because we find the appellant's action to be willful, as required by the second element of indecent exposure. In addition, there was no evidence before the court that the exposure occurred by accident. The appellant flatly denied that he exposed himself to the victim. He never told the investigators that after proctoring the afternoon examination, he discovered his penis was protruding from his pants because he had forgotten to zip-up his fly. A zipper

does not zip itself, and a penis does not find its own way back inside pants and underwear. People remember when a part of their body that shouldn't be exposed to public view is exposed through inadvertence when an article of clothing is left unzipped or unbuttoned. The appellant's hypothetical answer that "it could have been a possibility," without more, does not constitute evidence that it did, especially when he denied it happened at all.

In his brief, the appellant asks us to set aside his sentence in the event that we only affirm a conviction for indecent exposure. We see no need to order a rehearing on sentence because we are confident that we can determine the sentence that would have been imposed at the trial level if this discrepancy had been identified before sentencing. *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986) (citing *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985)). Additionally in *United States v. Sills*, 56 M.J. 556, 567-71 (A.F. Ct. Crim. App. 2001), *set aside on other grounds*, No. 02-0048/AF (15 Jan 2002) (per curiam), we held that this Court has the responsibility and authority to reassess a sentence, regardless of whether we can determine what the original trial court would have done.

Although none of the operative facts concerning the appellant's conduct change as a result of our decision, the maximum confinement for the offenses is reduced from 10 years to 5 years and 6 months. Our experience in these cases convinces us that the court members would have adjudged confinement for 15 months. Accordingly, we modify the sentence to a dishonorable discharge, confinement for 15 months, forfeiture of all pay and allowances, and reduction to E-1.

The approved findings and sentence, as modified, 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. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the findings and sentence, as modified, are

AFFIRMED.

OFFICIAL

LAURA L. GREEN
Clerk of Court