UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Chief Master Sergeant WILLIAM C. GURNEY
United States Air Force

ACM 37905

16 May 2013

Sentence adjudged 28 January 2010 by GCM convened at Scott Air Force Base, Illinois. Military Judge: W. Thomas Cumbie.

Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Appellate Counsel for the appellant: Major Daniel E. Schoeni and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Charles G. Warren; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and SOYBEL
Appellate Military Judges

PER CURIAM:

At arraignment before a general court-martial, the appellant entered mixed pleas. The military judge accepted his pleas of guilty to (1) seven specifications of willful dereliction of duty by failing to maintain professional relationships, (2) one specification of violating a lawful general regulation by using government equipment for other than official business, (3) one specification of indecent conduct, and (4) four specifications of adultery, in violation of Articles 92, 120, 134, UCMJ, 10 U.S.C. §§ 892, 920, 934.[1] Contrary to his pleas, a panel of officers convicted him of two specifications of

[1] The Article 134, UCMJ, 10 U.S.C. § 934, offenses did not expressly allege the terminal element, but we find no prejudice. *United States v. Ballan*, 71 M.J. 28 (2012).

maltreatment of subordinates in violation of Article 93, UCMJ, 10 U.S.C. § 893, and sentenced him to a dishonorable discharge, confinement for 20 months, and reduction to E-1. The convening authority approved a bad-conduct discharge, confinement for 4 months, and reduction to E-1. The appellant raises three issues: (1) the military judge's denial of a requested instruction on mistake of fact as a defense to maltreatment, (2) the sufficiency of the guilty plea to violating a lawful general regulation, and (3) the appropriateness of the sentence.

Mistake of Fact as to Consent as a Defense to Maltreatment

The defense requested that the military judge instruct that mistake of fact as to consent is a defense to maltreatment under Article 93, UCMJ. The military judge declined the request. He explained that because the offense of maltreatment is viewed objectively, consent or mistake as to consent is not controlling. Accordingly, although he declined to instruct that mistake as to consent is a defense, he did instruct that the members must consider evidence of consent: "It is but one factor to consider in determining whether the accused maltreated, oppressed, or acted cruelly towards" either victim. We review de novo whether the military judge correctly instructed the court members. *United States v. Maynulet*, 68 M.J. 374, 376 (C.A.A.F. 2010)

The elements of cruelty and maltreatment are: (1) that a certain person was subject to the orders of the accused; and (2) that the accused was cruel toward, or oppressed, or maltreated that person. *Manual for Courts–Martial, United States* (*MCM*), Part IV, ¶ 17.b. (2008 ed.). "The cruelty, oppression, or maltreatment, although not necessarily physical, *must be measured by an objective standard*. Assault, improper punishment, and sexual harassment may constitute this offense. Sexual harassment includes influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature." *MCM*, ¶ 17.c.(2) (emphasis added). An affirmative defense such as mistake is not available where an accused's knowledge is immaterial to the elements of the offense. Rule for Courts-Martial 916.

Although measured by an objective standard, maltreatment is not a strict liability offense and evidence of the victim's consent is a relevant factor in determining the sufficiency of the evidence to prove maltreatment. *United States v. Fuller*, 54 M.J. 107 (C.A.A.F. 2000). In light of *Fuller*, the Navy-Marine Court reconsidered *United States v. Goddard*, 47 M.J. 581 (N.M. Ct. Crim. App. 1997) [hereinafter *Goddard I*], *vacated upon reconsideration*, 54 M.J. 763 (N.M. Ct. Crim. App. 2000) [hereinafter *Goddard II*] -- the case relied on by the military judge here in denying the requested instruction -- and found the evidence insufficient in light of the victim's consent: "[W]e revisited the sufficiency of the evidence in this case . . . . because we do not believe that the record before us supports the conclusion reached in our earlier opinion that 'the appellant *objectively maltreated* Private S . . . .'" *Goddard II*, 54 M.J. at 767 (emphasis

added) (quoting *Goddard I*, 47 M.J. at 584). As the Navy-Marine Court recognized, *Fuller* requires consideration of *consent of the alleged victim* as a factor in objectively evaluating the proof of maltreatment, but we do not find in *Fuller* that mistake of fact as to consent *by an accused* is a defense to maltreatment.

The Court in *Fuller* noted that the conviction was based on "consensual sexual relations" between the appellant and the victim and that the evidence showed "no indication that [the victim] felt unable to resist Fuller's actions. . . . she did not feel threatened by [Fuller] . . . . [and] no evidence that the inherently coercive nature of a typical training environment was present [ ] or a factor in [the victim's] decision to enter into a consensual sexual relationship with [Fuller]." *Fuller*, 54 M.J. at 110-11. Essentially, the Court stated that evidence of the victim's consent should be considered in determining whether maltreatment occurred – not that the appellant's mistake as to her consent would be a defense. Consistent with *Fuller*, the military judge here determined that mistake as to consent was not available as an affirmative defense but that consent was a factor to consider in objectively determining whether maltreatment occurred. We find no error in his ruling.

Providency of the Plea

The appellant pled guilty to violating a lawful general regulation, Air Force Instruction (AFI) 33-119, *Air Force Messaging*, ¶ 3.9.1 (24 January 2005), by wrongfully using his government computer, cell phone, and email account for other than official use. The military judge correctly stated the elements and definitions of the offense, explained that the AFI does not prohibit all personal communication using government resources, and clarified with the appellant that the charged wrongful communications pertained to the flirtatious and sexual communications described during the plea inquiry into the unprofessional relationship charges. The appellant argues that the cited paragraph of the AFI does not prohibit the charged misconduct, focusing on the AFI's distinction between official and authorized use. The appellant's distinction is valid, but so is the plea.

A military judge must determine whether an adequate basis in law and fact exists to support a guilty plea by establishing on the record that the "acts or omissions of the accused constitute the offense or offenses to which he is pleading guilty." *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969) (citations omitted). Acceptance of a guilty plea is reviewed for an abuse of discretion, and questions of law arising from the plea are reviewed de novo. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). We afford significant deference to the military judge's determination that a factual basis exists to support the plea. *Id*. (citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)). *See also United States v. Barton*, 60 M.J. 62 (C.A.A.F. 2004). Among the reasons for giving broad discretion to military judges in accepting guilty pleas is the often undeveloped factual record in such cases as compared to that of a litigated trial. *Jordan*, 57 M.J. at 238. Rejection of a guilty plea requires that the record show a

substantial basis in law and fact for questioning the providence of the plea. *Inabinette*, 66 M.J. at 322; *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

Paragraph 3.9 of the AFI permits official and authorized use of government communications systems. Subparagraph 3.9.1 defines official use and lists specific uses that would not be considered official including sending "inappropriate messages to groups or individuals." Subparagraph 3.9.3 defines authorized limited personal use along with examples. Violation of either subparagraph is punitive. The appellant admitted that his use of government equipment for flirtatious and sexual communications violated paragraph 3.9.1. His argument on appeal might have some merit if he had added during the plea inquiry that he somehow thought these communications constituted authorized personal use under paragraph 3.9.3. But he did not. Rather, he disclaimed any legal justification or excuse for his actions and told the judge that the flirtatious and sexual "e-mails, phone calls, and text messages violated the general regulation pertaining to the approved and appropriate use of these assets." On this record we find no substantial basis in law and fact for questioning the acceptance of the plea.

Sentence Appropriateness

The appellant argues that the approved sentence of a bad-conduct discharge and reduction to E-1 is inappropriately severe based on (1) his prior honorable service and (2) the relative severity of the sentence as compared to "the range of punishments typically meted out" for similar offenses. We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises 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). Applying these standards to the present case we do not find the approved sentence inappropriately severe nor do we find sentence comparison appropriate. *See United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006) (citing *United States v. Wacha*, 55 M.J. 266, 267-68 (C.A.A.F. 2001)), *aff'd in part*, 66 M.J. 291 (C.A.A.F. 2008).

Conclusion

The approved findings and the sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred.[2] Article 66(c), UCMJ, 10 U.S.C. § 866(c). Accordingly, the approved findings and the sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[2] We note that the overall delay of over 18 months 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. The post-trial record contains no evidence that the delay has had any negative impact on the appellant. 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.