UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DUSTIN S. HOGELAND
United States Air Force

ACM 37821

10 October 2012

Sentence adjudged 17 June 2010 by GCM convened at Moody Air Force Base, Georgia. Military Judge: Terry A. O'Brien (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 14 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Captain Tyson D. Kindness; and Gerald R. Bruce, Esquire.

Before

ROAN, WEISS, and CHERRY
Appellate Military Judges

PER CURIAM:

Consistent with his pleas, a military judge sitting as a general court-martial convicted the appellant of one specification of wrongful and knowing possession of one or more visual depictions of "what appear to be" minors engaging in sexually explicit conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934.[1] The appellant was sentenced to a bad-conduct discharge, confinement for 14 months, forfeiture of all pay and allowances, and reduction to E–1. The convening authority approved the sentence as adjudged. On appeal, the appellant asserts three errors: (1) that his sentence exceeds the

[1] The military judge dismissed a second specification alleging wrongful and knowing possession of obscene material in violation of Article 134, UCMJ, 10 U.S.C. § 934.

maximum authorized punishment; (2) that he was subjected to unlawful confinement, in violation of Article 12, UCMJ, 10 U.S.C. § 812; and (3) that he is entitled to sentence relief because the Government exceeded the 120-day post-trial processing standard established by our superior court. Finding merit only with respect to issue one, we will reassess the appellant's sentence in our decretal paragraph.

Background

During his providence inquiry, the appellant admitted to downloading thousands of pornographic pictures and Japanese anime cartoons to his phone and computer. Twenty of the pictures, and one video, contained images of what appeared to be children engaged in sexually explicit conduct. Over defense objection, the military judge determined the maximum punishment for the charged offense was a dishonorable discharge, confinement for 10 years, forfeitures of all pay and allowances and reduction to the lowest enlisted grade.[2]

Maximum Authorized Punishment

In *United States v. Beaty*, 70 M.J. 39, 45 (C.A.A.F. 2011), the Court of Appeals for the Armed Forces determined a charge of possessing "what appears to be" child pornography carries a maximum authorized punishment of four months confinement and forfeiture of two-thirds pay per month for four months. Contrary to the Government's argument, we do not find the appellant's case distinguishable from *Beaty*.[3] The decision articulated by our superior court in *Beaty* is controlling and applicable to the offense for which the appellant stands convicted. We also find that "[b]ecause the imposed sentence exceeded the maximum lawful sentence, it materially prejudiced Appellant's substantial rights." *Id.* (citations omitted).

Violation of Article 12, UCMJ

Following his court-martial, the appellant was sent to the Cook County jail in Georgia prior to being transferred to the naval brig at Miramar. In his clemency submission to the convening authority, the appellant complains that he was housed with foreign nationals for 34 days and was assaulted by an inmate he believes was a foreign national. He asked the convening authority to "consider each day under these unusually harsh circumstances [to] count as multiple days toward the completion of my sentence

[2] Trial defense counsel argued the offense was analogous to disorderly conduct, thereby limiting the maximum punishment to four months confinement and forfeiture of two-thirds pay per month for four months.

[3] The Government argues 18 U.S.C. § 1466A(b)(2)(A) is a closely related offense for determining the correct maximum authorized punishment (10 years of confinement) in the appellant's case. We disagree. The Government previously referenced this statute in its petition for reconsideration in *Beaty*, and that rationale was apparently rejected. *See United States v. Beaty*, 70 M.J. 134 (C.A.A.F. 2011) (petition granted). We also note that our superior court reaffirmed its *Beaty* holding in *United States v. St. Blanc*, 70 M.J. 424 (C.A.A.F. 2012).

and reduce my confinement time." On appeal, the appellant argues that his confinement conditions violated Article 12, UCMJ,[4] and asks this Court to disapprove the approved forfeitures and reduction in grade.

We review de novo the question of whether an appellant's post-trial confinement violates Article 12, UCMJ. *United States v. Wise*, 64 M.J. 468, 473 (C.A.A.F. 2007). "'[A] prisoner must seek administrative relief prior to invoking judicial intervention' to redress concerns regarding post-trial confinement conditions." *Id.* at 471 (citing *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001)). The purpose of this requirement is to promote the resolution of grievances at the lowest possible level and to ensure that an adequate record has been developed to aid our appellate review. *Wise*, 64 M.J. at 471. "Since a prime purpose of ensuring administrative exhaustion is the prompt amelioration of a prisoner's conditions of confinement, courts have required that these complaints be made while an appellant is incarcerated." *Id.* (citations omitted). The appellant must show that, absent some unusual or egregious circumstances, he has exhausted the prisoner-grievance system in the confinement facility and that he has petitioned for relief under Article 138, UCMJ, 10 U.S.C. § 938. *Id*. at 472.

The appellant has the burden of proof to establish entitlement to additional sentence credit when alleging unlawful pretrial confinement, in violation of Article 13, UCMJ, 10 U.S.C. § 813. *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997). The question of whether the appellant is entitled to credit for a violation of Article 13, UCMJ, is a mixed question of fact and law. *United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000). We find the same standard to be applicable in claims for confinement credit involving contravention of Article 12, UCMJ. *See* Rule for Courts-Martial (R.C.M.) 905(c)(2).

In an 8 September 2011 affidavit, the appellant asserts that he shared a prison cell with "7-8 Latin Americans who spoke little or no English, and [to my] understanding . . . were all Mexican nationals." He also alleges a Haitian inmate physically attacked him. The only independent evidence apart from the appellant's allegation is a one-page affidavit submitted by the Cook County jail administrator that corroborates the appellant's claim of an altercation with another inmate. However, the official was unable to identify the nationality of the inmates involved due to a limitation in the jail's record keeping system.

The problem is exacerbated by the appellant's failure to avail himself of the administrative avenues available for redress within the military system that might have permitted an investigation into his allegations in a timely fashion: namely, filing an Article 138, UCMJ, complaint; submitting a grievance with the inspector general; asking

[4] Article 12, UCMJ, 10 U.S.C. § 812 states: "No member of the armed forces may be placed in confinement in immediate association with enemy prisoners of war or other foreign nationals not members of the armed forces."

his chain of command to address the issue while he was at the Cook County jail; or informing his defense counsel of his situation so that he might inquire into the problem with military authorities. Rather, the appellant waited until four months after being transferred to the military brig to notify the convening authority and eight months after final action to file a detailed affidavit. We find the appellant has not met his burden of proof to show that he was subjected to an Article 12, UCMJ, violation.

We further conclude that a post-trial fact finding hearing pursuant to *United States v. Dubay*, 37 C.M.R. 411, 413 (C.M.A. 1967), would not be warranted because the jail administrator already attested in an affidavit that the Cook County jail did not have a system in place to track inmates by nationality. Therefore, further inquiry into the matter would not be constructive to resolving the appellant's complaint.

Appellate Delay

The appellant's court-martial concluded on 17 June 2010 and the convening authority approved the findings and sentence on 3 January 2011, a period of 200 days. The appellant argues that he is entitled to sentence relief because the Government failed to adhere to the post-trial processing standards established by *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006).

We review de novo claims that an appellant has been deprived of his due process right to a speedy appellate review. *Id*. at 135. Delays of 120 days or more between the completion of trial and the convening authority's action is presumed to be facially unreasonable. *Id*. at 142. Such is the case here. Consequently, we must examine the factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), to determine if the appellant is entitled to relief: (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. *Moreno*, 63 M.J. at 135; *United States v. Arriaga*, 70 M.J. 51, 55-56 (C.A.A.F. 2011). 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.

Based on a review of the record, to include the appellant's clemency and appellate submissions, we find post-trial sentencing relief is not warranted. Much of the delay can be attributed to a problem with the court reporting equipment that was thought to have resulted in a loss of two hours of trial proceedings being recorded. The missing electronic files were eventually located and the record of trial was transcribed verbatim, ensuring the convening authority could review the complete record of trial before taking final action. Moreover, we do not find the appellant suffered any prejudice as a result of the delay. Our superior court did not decide *Beaty* until 26 April 2011, well after the convening authority took action. Therefore, the delay did not cause the appellant to be

held in confinement longer than necessary. Additionally, we do not find that the appellant suffered oppressive incarceration or anxiety and concern beyond that normally experienced by any prisoner awaiting an appellate decision, and the delay did not impair the appellant's ability to present a defense at a rehearing if one were ordered. *See Moreno*, 63 M.J. at 138-41.

Having considered the totality of the circumstances and entire record, we conclude that any denial of the appellant's right to speedy post-trial review was harmless beyond a reasonable doubt and that no relief is warranted.

Sentence Reassessment

The appellant was incarcerated for 11 months and 5 days, well in excess of the maximum period authorized for a simple disorder. He requests that this Court set aside his entire sentence in order to grant him "meaningful relief" for the additional time he spent confined. Because we are bound by the decision in *Beaty*, the maximum sentence the appellant could receive was 4 months of confinement and forfeitures of two-thirds pay per month for four months. We must first determine whether we can reassess the appellant's sentence to purge the error in calculating the maximum authorized confinement. *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002). To do so, 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. *Id.* at 88 (citing *United States v. Poole*, 26 M.J. 272, 274 (C.M.A.1988)).

Although the appellant's maximum punishment is substantially reduced as a consequence of the error, the evidence upon which the sentence was determined is unchanged, and we are confident that, absent the error, the military judge would have adjudged the maximum punishment authorized for a simple disorder based on the facts presented in this case. Considering the evidence in the record, we find that a reassessed sentence of confinement for four months, forfeiture of two-thirds pay per month for four months, and reduction to the grade of E-1 cures the error. We also find, after considering the appellant's character, the nature and seriousness of the offense, and the entire record, that the reassessed sentence is appropriate.

Conclusion

The approved findings and the sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant remains. 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 approved findings and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court