UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant JASON K. LEKSE
United States Air Force

ACM 37733

05 September 2012

Sentence adjudged 17 June 2010 by GCM convened at Kadena Air Base, Okinawa, Japan. Military Judge: Mark L. Allred (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 10 years, and reduction to E-1.

Appellate Counsel for the Appellant: Major Michael S. Kerr and Captain Luke D. Wilson.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Scott C. Jansen; Major Naomi N. Porterfield; Captain Tyson D. Kindness; and Gerald R. Bruce, Esquire.

Before

ROAN, WEISS, and CHERRY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

ROAN, Senior Judge:

In accordance with his pleas, the appellant was convicted by a military judge sitting as a general court-martial of one specification of attempted rape of a child between the age of 12 and 16 years, one specification of engaging in a lewd act with a child on divers occasions, one specification of improper sexual contact with a child on divers occasions, one specification of indecent liberties with a child on divers occasions, three specifications of forcible sodomy with a child, and one specification of committing an

indecent act with a child on divers occasions, in violation of Articles 80, 120, 125, and 134, 10 U.S.C. §§ 880, 920, 925, 934. The adjudged sentence consisted of a dishonorable discharge, confinement for 13 years, and reduction to the grade of E-1. In accordance with a pretrial agreement, the convening authority approved only so much of the sentence as provided for a dishonorable discharge, confinement for 10 years, and reduction to the grade of E-1.

The appellant raises four issues for our consideration: (1) whether Charge IV fails to state an offense, (2) whether the military judge erred by accepting the appellant's plea of guilty to attempted rape because the evidence raised a potential defense of voluntary abandonment, (3) whether the appellant was provided ineffective assistance of counsel when his trial defense counsel failed to present evidence of the appellant's retirement eligibility, and (4) whether the military judge erred by failing to request evidence of the appellant's retirement eligibility.[1]

Background

The appellant married C.L. in 1998. At the time of the marriage, C.L. had a three-year-old daughter, CCL. The appellant and CL had a daughter, KL, together in 2001 and a son, KL, in 2003. The appellant legally adopted CCL in 2004. Beginning in 2005, when CCL was 10 years old, the appellant began to sexually abuse her. At various times, the appellant would kiss CCL on her mouth, breasts, and buttocks and would fondle her breasts and vaginal area. He also forced CCL to perform oral sex on him in his bedroom and would occasionally perform oral sex on her. CCL would often try to resist the appellant's demands by grabbing door frames and walls and digging her feet into the floor until the appellant would force her into the room. Such incidents continued to occur over the next four years with varying degrees of frequency. The appellant told CCL to keep the activities between themselves and promised her that it "would never happen again."

Failure to State an Offense

The appellant was charged with committing indecent acts upon a child, in violation of Article 134, UCMJ. The Government did not allege either Clause 1 or Clause 2 of Article 134, UCMJ, in the specification. Our superior court recently held that failure to allege the terminal element of an Article 134, UCMJ, offense is error but, in the context of a guilty plea, the error is not prejudicial where the military judge correctly advises the appellant of all the elements and the providence inquiry shows that the appellant understood to what offense and under what legal theory he was pleading guilty. *United States v. Ballan*, 71 M.J. 28, 35 (C.A.A.F. 2012). Having fully reviewed the entire record of trial, we are convinced the appellant suffered no prejudice to a substantial

[1] Issues three and four were raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

right: he knew under what clause he was pleading guilty and clearly understood how his conduct violated the terminal elements of Article 134, UCMJ.

Providence of Plea

During his providence inquiry, the appellant admitted that he attempted to have sexual intercourse with CCL when she was 14 years old. In both the stipulation of fact and during the colloquy with the military judge, the appellant explained that he forced CCL into his bedroom and locked the door before he and CCL removed their clothing. He laid CCL on the bed and began to kiss and fondle her. He then positioned himself on top of CCL, resting his body weight against her and prevented her from escaping. The appellant placed his erect penis around CCL's vaginal area and attempted to guide it into her vagina. CCL felt the appellant's penis and moved from side-to-side, shifting her body to prevent the appellant from penetrating her. She told him, "no, please don't." The appellant told her to "stop moving" and told her that she could not get pregnant. He again tried to penetrate CCL's vagina. CCL began to cry and said "ow," at which point the appellant stopped and got off of CCL. Approximately one month later, the appellant again tried to force CCL into his bedroom. She resisted and eventually was able to leave the house.

During his plea discussion, the appellant expressly admitted to the military judge that he had the specific intent to rape CLL. He further admitted that he had taken a substantial step towards the completion of the act. He now argues that his guilty plea to attempted rape was not provident because the military judge failed to inquire into the potential affirmative defense of voluntary abandonment. Specifically, the appellant contends that a "substantial conflict" exists between his plea and the evidence presented at his trial. He further maintains that the military judge's failure to resolve this inconsistency was an abuse of discretion.

This Court reviews a military judge's acceptance of a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). We use a "substantial basis" test for appellate review of the providence of guilty pleas. *United States v. Phanphil*, 57 M.J. 6, 10 (C.A.A.F. 2002) (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991) (internal quotation marks omitted)). A statement raising an affirmative defense to a charged offense may constitute a matter in substantial conflict with a guilty plea. *United States v. Smauley*, 42 M.J. 449, 450 (C.A.A.F. 1995). This Court will not, however, overturn a guilty plea because of a "mere possibility" of a defense. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996). If the record in its entirety reflects the appellant knew the elements of the offense to which he pleaded guilty and admitted them freely and there is a factual basis for his plea, the plea will stand. *United States v. Jones*, 34 M.J. 270 (C.M.A. 1992).

Voluntary abandonment is an affirmative defense to a completed attempt. The defense is raised when the accused abandons his effort to commit a crime under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The defense is available only when the accused abandons the intended crime solely because of the person's own sense that it was wrong prior to the completion of the crime. Thus, where the abandonment results from fear of immediate detection or apprehension, the decision to await a better opportunity for success, or inability to commit the crime, the defense is not available. *United States v. Byrd*, 24 M.J. 286, 292-93 (C.M.A. 1987); *Manual for Courts–Martial, United States*, Part IV, ¶ 4.c.(4) (2008 ed.). Our superior court has held the defense is not available where the acts committed have caused a substantial harm to the victim, *Smauley*, 42 M.J. at 451, where the accused postpones his criminal enterprise until a more advantageous time, or where his criminal purpose is frustrated by external forces beyond his control. *United States v. Rios*, 33 M.J. 436, 441 (C.M.A. 1991).

The appellant argues that he completely abandoned his attempt to rape CCL after she started crying. He further submits that the substantial harm doctrine recognized by our superior court in *Smauley* is no longer applicable. We need not address the appellant's contention that the substantial harm principle has been overturned because we are convinced without hesitation that the evidence procured at trial makes it clear that the appellant did not abandon his attempt because he suddenly thought his actions were improper or because of some other altruistic reason. Rather, the stipulation of fact, the appellant's responses to the military judge, and the facts of the case make it clear that he only abandoned his attempt to rape CLL because she actively resisted. But for her moving around as he tried to penetrate her and but for her crying out that he was hurting her, we are convinced beyond a reasonable doubt that the appellant would have continued to try and rape his daughter – as he clearly told the military judge was his intent from the beginning. We find that he did not stop his efforts because his conscience got the better of him; rather his daughter was successful in stopping him. Consequently, the requirements of the affirmative defense have not been met. The military judge had no duty to inquire about a defense that did not apply.

We have considered the appellant's remaining assignments of error and find them to be without merit. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987) (there is no requirement to specifically address each assigned error so long as each error is considered).

Appellate Delay

Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time this case was docketed with 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." *United States v. Moreno*, 63 M.J. 129, 135–36 (C.A.A.F. 2006) (citations omitted). 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.

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.

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 the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court