UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant CORY M. MCGEE
United States Air Force

ACM S31256

17 September 2008

Sentence adjudged 15 December 2006 by SPCM convened at Lackland Air Force Base, Texas. Military Judge: Grant L. Kratz.

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Griffin S. Dunham.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Donna S. Rueppell, Captain Michael W. Grant, and Captain Jamie L. Mendelson.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

THOMPSON, Judge:

Contrary to his pleas, a panel of officer members sitting as a special court-martial convicted the appellant of one charge and specification of violating a lawful general regulation, and one specification of conspiracy to violate a lawful general regulation, in violation of Articles 81 and 92, UCMJ, 10 U.S.C. §§ 881, 892.[1] The adjudged and approved sentence consists of a bad-conduct discharge and reduction to E-1. The

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[1] The general regulation referenced in both specifications is Air Education Training Command Instruction (AETCI) 36-2909, *Professional and Unprofessional Relationships*, ¶ 4.1.3 (12 June 2003).

appellant asserts that the conviction for conspiracy to violate a lawful general regulation is legally and factually insufficient because the evidence of the agreement proved only that the appellant's co-conspirator was deliberately ignorant about the appellant's illegal relationship with SRS and, therefore, did not satisfy the agreement element necessary to prove conspiracy. We do not agree.

Facts

The appellant was a military training instructor (MTI) assigned to Lackland Air Force Base (AFB), Texas, and was responsible for training the new basic trainees entering the Air Force. The victim, a 19-year-old basic trainee (SRS), started her training at Lackland AFB in February 2005. After approximately four weeks, the appellant began kissing, embracing, and touching SRS. At one point, SRS went to the appellant's office with her friend and fellow female trainee (AME) and sat on the appellant's lap. SRS and the appellant kissed in the presence of AME and another MTI, co-conspirator, Technical Sergeant (TSgt) T. After AME and TSgt T left the office, SRS and the appellant continued to kiss and grope each other.

After graduation but before being dismissed from Lackland AFB, SRS and AME traveled to the Riverwalk in downtown San Antonio, Texas. SRS called TSgt T's cell phone to coordinate a meeting with TSgt T and the appellant at the Riverwalk. After the meeting, the appellant and TSgt T drove SRS to a hotel near Lackland AFB and pointed out the room where she would meet the appellant the next day. The appellant and TSgt T left SRS at the hotel and gave her the Lackland AFB transportation office' phone number to get a ride back onto base. They told SRS it would be too risky for a basic trainee to be seen in the car with MTIs. The next day, SRS traveled to the hotel using the Lackland AFB transportation office, knocked on the door of the hotel room, and the appellant opened the door. The appellant and SRS engaged in sexual relations several times that day while in the hotel room.

In April 2005, SRS began her technical school training at Brooks-City Base, San Antonio, Texas. For the next month, SRS primarily made contact with the appellant by calling TSgt T's cell phone. TSgt T would either pass the cell phone to the appellant or he would take messages. During the first weekend following graduation from basic training, SRS traveled to the bowling alley on Lackland AFB, called TSgt T's cell phone, and spoke to the appellant to arrange a meeting. SRS and TSgt T ended up in the parking lot of TSgt T's apartment complex and TSgt T pointed out the exact location of his apartment, and directed SRS to the apartment where the appellant was waiting for her. TSgt T then departed the area. SRS knocked on TSgt T's apartment door and the appellant opened the door. The two engaged in sexual relations in TSgt T's apartment.

For the next several weeks, SRS and the appellant met each Saturday at the bowling alley on Lackland AFB and traveled to TSgt T's apartment, where they had

sexual relations. In addition, the two spoke regularly on the phone during the days between these Saturday liaisons. At one point following a sexual encounter, the appellant told SRS that he knew she was pregnant because he is potent. Finally, during the week after their fourth Saturday meeting at TSgt T's apartment, the appellant told SRS they would need to stop seeing each other because TSgt T was under investigation, and he did not want to take the chance of getting caught with SRS. Although the two continued to talk by phone and e-mail, this was the end of the sexual relationship between SRS and the appellant.

Over the next few weeks, SRS took two home pregnancy tests, both of which indicated she was pregnant. Follow-up tests at a military hospital confirmed she was pregnant. The baby was born in January 2006, and later DNA tests confirmed, with a 99.99 percent accuracy rate, that the appellant is the father of the baby.[2] The case came to light when SRS contacted her first sergeant to assist her in obtaining child support from the appellant.

On appeal, the appellant asserts the specification for conspiracy to violate the lawful general regulation was legally and factually insufficient. We disagree.

Standard of Review

We review each court-martial record de novo to consider its legal and factual sufficiency. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). With regard to legal sufficiency, we ask whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all of the elements of the offense proven beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). For factual sufficiency, we weigh the evidence in the record of trial and, after making allowances for not having personally observed the witnesses, determine whether we ourselves are convinced beyond a reasonable doubt of the appellant's guilt. *United States v. Sills,* 56 M.J. 239, 240-41 (C.A.A.F. 2002); *Turner,* 25 M.J. at 325.

Discussion

The appellant's conviction for conspiracy requires a finding that the appellant and TSgt T entered into an agreement to violate the lawful general regulation, and while the agreement continued to exist, the appellant and/or TSgt T performed an overt act for the purpose of bringing about the object of the conspiracy, which was to enable the appellant to establish, develop, and conduct a personal, intimate, and sexual relationship with SRS, a trainee.[3]

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[2] During sentencing, the government introduced evidence that the appellant also infected SRS with genital herpes, which resulted in her inability to bear children naturally.

[3] *See* AETCI 36-2909, ¶ 4.1.3.

The agreement to enter into a conspiracy need not be in any particular form or manifested verbally. The agreement can be silent, tacit, or only a mutual understanding between the parties. It is sufficient if the minds of the parties arrive at a common understanding to accomplish the object of the conspiracy and this may be shown by the conduct of the parties. Article 81, UCMJ; *see also United States v. Whitten,* 56 M.J. 234, 236 (C.A.A.F. 2002); *United States v. Barnes,* 38 M.J. 72, 75-76 (C.M.A. 1993). Circumstantial evidence can be used to establish the existence of the agreement. *United States v. Billings,* 58 M.J. 861, 869 (Army Ct. Crim. App. 2003), *aff'd,* 61 M.J. 163 (C.A.A.F. 2005). An agreement between the conspirators may be silent and need not be spoken. *Id.*

In this case, there is no evidence of deliberate ignorance. There is sufficient evidence to establish an agreement and sufficient evidence to establish the existence of a conspiracy. Upon our review of the entire record, the evidence clearly establishes that the co-conspirator, TSgt T, entered into an agreement with the appellant to violate the lawful general regulation. TSgt T witnessed the inappropriate behavior in the office shared by the appellant and TSgt T. TSgt T did not report or stop the inappropriate behavior, but further facilitated the inappropriate relationship through the use of his cell phone and apartment. He also went with the appellant to meet SRS in downtown San Antonio, Texas, and traveled with the appellant and SRS to an off-base hotel, where the appellant and SRS would meet the next day to have sexual relations. TSgt T and the appellant encouraged SRS to take military transportation back to the base so that she would not be seen in the company of two MTIs. Further, TSgt T directed SRS to his apartment so that she could meet the appellant there to have sexual relations. Taken together, these actions clearly indicate a knowing, common understanding and agreement by this co-conspirator. Without a doubt, there was no "deliberate ignorance" by TSgt T, as alleged by the appellant. TSgt T's non-verbal actions clearly establish the manifestation of an agreement satisfying the elements of Article 81, UCMJ.

Based on this evidence, we hold that a rational factfinder could have found beyond a reasonable doubt that the appellant and TSgt T entered into an agreement, manifested by their conduct, to violate a lawful general regulation, to wit, Air Education and Training Command Instruction 36-2909, *Professional and Unprofessional Relationships* (12 June 2003). Further, we ourselves are convinced of the appellant's guilt. Accordingly, we hold the evidence is legally and factually sufficient to support the appellant's conviction of conspiracy to violate a lawful general regulation.

Moreno Consideration

In this case, the overall delay of 583 days 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. *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. *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 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 and that no relief is warranted.

Conclusion

The approved 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; *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court