UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ADAM E. MONAHAN
United States Air Force

ACM 38084

28 August 2013

Sentence adjudged 5 December 2011 by GCM convened at Peterson Air Force Base, Colorado. Military Judge: Scott Harding (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Carl J. Tierney; Major Matthew T. King; and Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Martin J. Hindel; Lieutenant Colonel C. Taylor Smith; Major Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

ORR, HELGET, and WEBER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

WEBER, Judge:

At a general court-martial before a military judge alone, the appellant pled guilty to one charge and specification of communicating a threat, in violation of Article 134, UCMJ, 10 U.S.C. § 934. Contrary to his pleas, he was also convicted of one charge and specification each of using provoking words and assault consummated by a battery,

in violation of Articles 117 and 128, UCMJ, 10 U.S.C. §§ 917, 928.[1] The military judge sentenced the appellant to a bad-conduct discharge, confinement for 6 months, and reduction to the grade of E-1.

On appeal, the appellant alleges four errors: 1) The conviction for using provoking words is legally and factually insufficient because the evidence does not demonstrate that he directed his words toward any particular person or persons; 2) The conviction for using provoking words is legally and factually insufficient because the evidence indicates the appellant used his words in jest; 3) The appellant's speech that formed the basis for the provoking words charge and specification is protected by the First Amendment;[2] and 4) The appellant was wrongfully denied the opportunity to earn time toward his release from confinement because he was not allowed to participate in the trustee program at the civilian confinement facility at which he was held.

Background

On 5 September 2011, the appellant hosted a poker party at his home. He invited five fellow Airmen from the 721st Security Forces Squadron to the party – four Caucasians and one African-American, A1C EC. A1C EC was surprised to get the invitation because he and the appellant argued at work about a month earlier. Even though he was not a poker player, A1C EC accepted the invitation in the hopes it would help him bond with his co-workers, particularly the appellant.

A1C EC did not play poker at the party, but he sat nearby watching television, no more than ten feet from the poker table and well within earshot of the conversation. The appellant and A1C EC consumed alcohol, along with most of the participants that evening. After the poker game got underway, the appellant made two racially derogatory statements concerning African-Americans, words to the effect of, "I don't like n[*]ggers" and, "There are black people and there are n[*]ggers and I don't like either one of them." Testimony conflicted as to whether other Airmen present also made racially derogatory statements. The appellant did not look at A1C EC while he made these statements and he did not physically direct the words toward A1C EC, but he did glance behind his shoulder toward A1C EC after making one of the remarks. A1C EC heard the appellant's comments. He attempted to "let it go" and "laugh it off" in an attempt not to ostracize himself from the group, though he did become more withdrawn and quiet throughout the evening. Neither the appellant nor anyone else present made any other comments about other races or ethnicities besides African-Americans.

[1] The appellant attempted to plead guilty to the assault consummated by a battery charge and specification. However, his plea allocutions raised a possible defense that could not be resolved in the inquiry. Therefore, the military judge rejected the guilty plea and directed a plea of not guilty be entered.
[2] U.S. CONST. amend. I.

About 90 minutes after the appellant's racist comments, the subject of the song "N[*]gger Hatin' Me" came up, raised either by the appellant or one of the other Caucasian Airmen present. Soon after, either the appellant or one of the other Airmen played the song. The song contained explicit lyrics expressing the singer's hatred of African-Americans, including two lines that state, "Stick your black head out and I'll blow it!" According to A1C EC, a video of an African-American singing along accompanied the song at the party, presumably mocking the song and its singer. The appellant, and possibly others, sang along with portions of the song that they knew. Again, A1C EC heard the song but did not visibly react angrily. Instead, in his words, he "kind of stood there uncomfortably, kind of looking down." He stated that he "didn't try to really react to it because I didn't want to cause a problem, but I felt uncomfortable while it was played."

About 30 minutes after the song was played, the appellant and A1C EC got into an argument over the topics of President Obama's effectiveness and whether Black History Month should be observed. The two faced each other across the poker table. A1C EC struck his fists on the table for emphasis but otherwise did not make any aggressive moves toward the appellant. As the conversation grew more heated, A1C EC extended his open hand to shake the appellant's hand and told the appellant he meant no disrespect. The appellant responded by striking A1C EC in the head. The appellant then came around the table to repeatedly punch A1C EC on the top of his head. A1C EC struggled with the appellant to defend himself, and the two wound up on the floor. As the fight broke up, A1C EC had blood streaming down his face. The appellant told A1C EC to get out of his house. A1C EC departed with one of the other Airmen and expressed his frustration with the appellant, the racial comments, and the song. A1C EC was taken to an emergency room, where he received nine staples in his scalp to close the wound.

About two weeks after the poker party, the appellant and a co-worker had lunch at a local fast-food restaurant. Other squadron personnel were present, including one of the Airmen who had been present at the poker party. The co-worker relayed discussion within the unit about a potential court-martial coming up. The appellant replied by saying words to the effect of, "If I get charged for this, [A1C EC] is going down." The co-worker asked the appellant to clarify, and the appellant said, "I'm going to put a f[*]cking bullet in his head." The appellant later said, "This is a perfect example of why blacks should not be in the military."

The appellant was placed into pretrial confinement following this statement, where he remained until trial 76 days later. He received credit for time served in pretrial confinement plus 14 days of credit the military judge awarded him for illegal pretrial punishment. His pretrial and post-trial confinement was served at the Teller County Jail in Divide, Colorado. The appellant submitted his clemency request on 19 January 2012, asking that he be afforded the opportunity to participate in the jail's "trustee program" so

he could earn extra days of credit toward his release. The staff judge advocate advised the convening authority that this matter was outside her power to grant, as it involved the operation of a civilian confinement program. He did advise her that she could approve a lesser confinement sentence if she so chose. The convening authority approved the sentence as adjudged. The appellant was released from confinement on 19 February 2012.

Legal and Factual Sufficiency

The appellant alleges that his conviction for provoking speech is legally and factually insufficient because his comments were not directed toward A1C EC, and because his comments were made in jest rather than with criminal intent. We have carefully considered the appellant's arguments on these two related issues, as well as the issue of whether the appellant's comments under these circumstances were provoking or reproachful as defined in the *Manual for Courts-Martial, United States* (*MCM*) (2008 ed.). We find that the appellant's conviction for provoking speech is legally and factually sufficient.

We review issues of factual and legal sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987), *quoted in United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *Turner*, 25 M.J. at 324, *quoted in United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

The elements of the offense of provoking speeches or gestures are:

(1) That the accused wrongfully used words or gestures toward a certain person;

(2) That the words or gestures used were provoking or reproachful; and

(3) That the person toward whom the words or gestures were used was a person subject to the code.

MCM, Part IV, ¶ 42.b. The terms "provoking" and "reproachful" are defined as words or gestures that "a reasonable person would expect to induce a breach of the peace under the circumstances." *MCM*, Part IV, ¶ 42.c.(1).

The offense of provoking speech in American military law dates back to 1775, and serves to prevent servicemembers from inducing retaliation. *United States v. Davis*, 37 M.J. 152, 154 (C.M.A. 1993). The Navy court has stated that the historical purpose behind the criminal prohibition is to serve as "a preventive measure designed to reduce clamor and discord among members of the same military force." *United States v. Hughens*, 14 C.M.R. 509, 511 (N.C.M.R. 1954). Likewise, our superior court has held that Article 117, UCMJ, "is designed to prevent the use of violence by the person to whom such speeches and gestures are directed, and to forestall the commission of an offense by an otherwise innocent party." *United States v. Holiday*, 16 C.M.R. 28, 32 (C.M.A. 1954).

Appellate court review of provoking speech convictions largely comes from hostile statements toward military police in the performance of their duties. For example, our superior court has held that a soldier who yelled, "F[*]ck you, Sergeant" and "F[*]ck the MPs" after the military police successfully extricated him from a confrontation was guilty of provoking speech because the appellant's words tended to lead to quarrels, fights, or other disturbances. *Davis*, 37 M.J. at 155. Conversely, this Court held that an Airman who told security policemen while handcuffed, "Here's another n[*]gger" and "I am going to kill you n[*]gger" was not guilty of provoking speech because the words were not likely to cause a security policeman used to dealing with insults and trained to overlook verbal abuse to breach the peace. *United States v. Shropshire*, 34 M.J. 757, 758 (A.F.C.M.R. 1992). In a somewhat similar vein, our superior court found a provoking speech conviction legally insufficient where the appellant in a locked stockade cell told the guard, "Don't yell at me or I'll wring your – neck." *United States v. Thompson*, 46 C.M.R. 88, 89 (C.M.A. 1972) (omission in original). The Court reasoned that the words were not "fighting words," libelous or insulting, and that under these circumstances, the trained guard could not be expected to open the cell door and retaliate. *Id.* at 90. Likewise, in *United States v. Adams*, 49 M.J. 182 (C.A.A.F. 1998), our superior court upheld the Navy-Marine Corps Court of Criminal Appeals in setting aside a provoking speech conviction for an appellant who responded "F[*]ck you" to military police officers who had stopped him and ordered him to raise his hands and

move away from his car. The Court noted that the Navy-Marine Corps court engaged in a permissible exercise of its factfinding power, and noted that "all the circumstances surrounding use of the words should be considered in determining whether certain words are provoking." *Id.* at 185 (citation omitted).

While no case is directly analogous to the instant situation, it is clear that examination into whether certain words are provoking or reproachful is a situation-dependent inquiry into all the circumstances of the matter. Words that may tend to induce a breach of the peace in one situation may not in another. Triers of fact and reviewing courts must consider the context in which the comments are made, the background between the speaker and listener, whether the comments are the sort normally to be expected by the listener, and the logical consequence of the comments. *Cf. Adams*, 49 M.J. at 182 (detained accused to military police); *Davis*, 37 M.J. at 152 (non-detained accused to military police after bar altercation); *Thompson*, 46 C.M.R. at 90 (accused so confined that violence could not result); *Shropshire*, 34 M.J. at 758 (police trained to overlook verbal abuse).

Under this framework, we conclude that the appellant's conviction for provoking speech is legally and factually sufficient. As a starting point, we reject the appellant's contention that the remarks were not directed toward A1C EC. The appellant's remarks concerned a particular race of people, and his comments indicated his dislike for all African-Americans, not just a general viewpoint. A1C EC was the only African-American in the room and was mere feet from the appellant, easily within listening range. Others looked at A1C EC to gauge his reaction, and the appellant himself glanced back over his shoulder to look at A1C EC. We recognize that all the government witnesses – including A1C EC – testified under cross-examination that the comments were not "directed toward" A1C EC. However, we do not consider this testimony dispositive or persuasive, as their testimony merely reflects a general lay assessment that the words were not physically aimed in A1C EC's direction. One need not physically aim his words toward another to be directing his remarks "toward" that person.

Moreover, we conclude that the charged speech was provoking or reproachful. In so doing, we recognize that some testimony indicated the appellant expressed his racist views in a laughing or joking manner, and that A1C EC laughed at some of the remarks in an attempt to get along with his fellow squadron members. However, recognizing that the trial judge heard and observed the witnesses, we have no doubt that a reasonable person observing the remarks would expect them to induce a breach of peace under the circumstances. The appellant and A1C EC already had one confrontation before the poker night, and whether the appellant's comments were serious or an incredibly poor attempt at humor, a reasonable person observing the remarks would expect that A1C EC would be provoked by them, especially given their blunt categorization that the appellant did not like African-Americans and the violent, hateful lyrics in the song the appellant sang. In addition, an examination of the entire series of events that evening unmistakably

indicates that the appellant was looking for a fight with A1C EC. He invited A1C EC to the party as the only African-American there, expressed his racist views for A1C EC to hear in front of his fellow squadron members, and returned to the topic later to take part in singing an offensive racial song. When these efforts to provoke A1C EC failed, he then engaged A1C EC in a debate by arguing that Black History Month is inappropriate and President Obama is a poor president. When these efforts still failed to provoke A1C EC, the appellant reached across the table to strike A1C EC, and then further beat him to the point where he required nine staples in his head. The appellant did not intend his hateful words as humor, political commentary, or as the catalyst for a legitimate debate. He intended to fight A1C EC, and his racial invective was a tool he used toward that end. Viewed through the backdrop of the appellant's entire course of conduct that evening, the charged comments and singing could most definitely be expected to induce a breach of the peace.

Additional support for our conclusion comes from the fact that no other races or ethnicities were discussed that evening. The appellant's comments were not part of a larger philosophical or political debate on matters of race. Furthermore, the fact that A1C EC showed remarkable restraint does not change the characteristic of the remarks and singing as provoking or reproachful. *See United States v. McHerrin*, 42 M.J. 672, 674 (Army Ct. Crim. App. 1995) (where a private, who confronted an noncommissioned officer (NCO) at the Exchange with the NCO's family present, cursed at the NCO, and threatened to "beat your ass and drop you," "[i]t is immaterial that the victim, a professional noncommissioned officer, withstood the appellant's verbal abuse without breaching the peace"). Even if A1C EC was not subjectively provoked by the appellant's words, the test is objective – whether a reasonable person expect them to induce a breach of the peace. However, A1C EC's own statements at the time of the incident show he was agitated by the appellant's words. Immediately before the fight, A1C EC made statements such as, "I'm just trying to stand up for myself . . . this isn't right." After the fight ended, A1C EC was shaken and told the Airman who tended to him that "they were trying to get to him all night, that there was that damn song, [and] they don't know what it's like." He also told attendees during or immediately after the fight that sometimes he hated being black. The appellant's comments may not have succeeded in provoking A1C EC to violence, but they had their intended effect of riling up A1C EC, and in the end, the appellant achieved his goal of inducing a breach of the peace, even if he had to instigate the fisticuffs himself. Drawing every inference in favor of the prosecution, a reasonable factfinder could conclude that the appellant was guilty of using provoking speech. Moreover, we are personally convinced of the appellant's guilt.

First Amendment

At trial, the appellant did not move for a dismissal or any other relief on the grounds that his speech was protected by the First Amendment. However, on appeal, he alleges that Article 117, UCMJ, is unconstitutional as applied to him because his

statements were not "fighting words" and therefore constituted protected speech with no demonstrated real and palpable danger sufficient to outweigh his First Amendment rights.[3]

Whether a statute is constitutional as applied is an issue this Court reviews de novo. *United States v. Goings*, 72 M.J. 202, 205 (C.A.A.F. 2013) (citing *United States v. Ali*, 71 M.J. 256, 265 (C.A.A.F. 2012)). To determine if a statute is unconstitutional as applied, we conduct a "fact-specific inquiry." *Id*. However, where an appellant alleges constitutional errors for the first time on appeal, given the "presumption against the waiver of constitutional rights," and the requirement that a waiver "clearly establish[] . . . an intentional relinquishment of a known right or privilege," reviewing courts will often apply a plain error analysis rather than consider the matter waived. *Id.* (quoting, in part, *United States v. Sweeney*, 70 M.J. 296, 303-04 (C.A.A.F. 2011) (quoting *United States v. Harcrow*, 66 M.J. 154, 157 (C.A.A.F. 2008))). Upon plain error review, to prove that a facially constitutional criminal statute is unconstitutional as applied, the appellant must point to particular facts in the record that plainly demonstrate why his interests should overcome Congress' and the President's determinations that his conduct be proscribed. *Id.* (citing *United States v. Vazquez*, 72 M.J. 13, 16-21 (C.A.A.F. 2013); *Ali*, 71 M.J. at 266).

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This Amendment protects the expression of ideas, even ideas that "the vast majority of society finds offensive or distasteful." *United States v. Wilcox*, 66 M.J. 442, 446 (C.A.A.F. 2008) (citations omitted). "While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections." *Parker v. Levy*, 417 U.S. 733, 758 (1974). As a result, "[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." *Id*. Nonetheless, our superior court has observed:

> First Amendment rights of civilians and members of the armed forces are not necessarily coextensive, but, in speech cases, our national reluctance to inhibit free expression dictates that the connection between the statements or publications involved and their effect on military discipline be closely examined. As in other areas, the proper balance must be struck between the essential needs of the armed services and the right to speak out as a free American. Necessarily, we must be sensitive to protection of "the principle of free thought – not free thought for those who agree with us but freedom for the thought that we hate."

[3] The appellant does not argue that Article 117, UCMJ, 10 U.S.C. § 917, is facially unconstitutional.

United States v. Priest, 45 C.M.R. 338, 343-44 (C.M.A. 1972) (quoting *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929)). Because of this balance, in the context of the First Amendment, our superior court has required the Government to demonstrate a "reasonably direct and palpable" connection between the military member's statements and the military mission or the military environment in order to punish conduct under Article 134, UCMJ. *Wilcox*, 66 M.J. at 449.

Even in the context of civilians, not all speech falls under the protection of the First Amendment. The Supreme Court has held that "certain well-defined and narrowly limited classes of speech" may be prevented and punished without raising a Constitutional issue, including "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). Such utterances "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940).

Under this framework, the appellant's conviction presents no First Amendment concern even under a de novo review. Under a plain error review, this conclusion is all the more obvious, as the appellant's forfeiture of this issue leaves no "particular facts in the record" that demonstrate why his First Amendment interests in this situation should overcome the Congressional determination to criminalize provoking speech. The appellant's words were not an attempt to spark a discussion on racial issues. Rather, they were part of an effort to isolate A1C EC, insult him, and provoke him to violence. As for the song, the accompanying video may have been a parody mocking the song;[4] however, the appellant sang along with the song, thereby adopting its racially abusive and violent language as his own. Viewed in the context of his entire course of conduct that evening, it is apparent that the appellant's comments and singing constituted "epithets or personal abuse," words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

Moreover, even if the appellant's comments fell under the umbrella of First Amendment protection generally, there remains a direct and palpable connection between his speech and the military mission or military environment, allowing Congress to constitutionally prohibit the appellant's speech. The appellant chose to use the vilest

[4] We agree with the appellant that the record is not well-developed as to the nature of the video that accompanied the song.

words to insult a fellow squadron member in an attempt to provoke him to violence in front of a gathering of squadron members. Under the facts of this case, we join our fellow service courts in finding that there is no First Amendment protection for provoking speech. *See United States v. Peszynski*, 40 M.J. 874, 879 (N.M.C.M.R. 1994) (setting aside the appellant's sexual harassment conviction on due process grounds, but stating that provoking words and other types of speech are "forms of expression whose criminal nature is easily determined"); *United States v. Peak*, 44 C.M.R. 658, 661-62 (C.G.C.M.R. 1971) (holding that Article 117, UCMJ, is not impermissibly vague such as to tread on First Amendment protections and "will withstand attack on constitutional grounds").[5]

Article 58(a), UCMJ

The appellant finally alleges that he was wrongfully denied the opportunity to earn time toward his release from confinement through the civilian confinement facility's trustee program, and that this denial violated Article 58(a), UCMJ, which states that military members sentenced to confinement at a court-martial and who are confined in a civilian confinement facility "are subject to the same discipline and treatment as persons confined or committed by the Courts of the United States or of the State, District of Columbia, or place in which the institution is situated." We find that this issue warrants no relief.

"A prisoner must seek administrative relief prior to invoking judicial intervention to redress concerns regarding post-trial confinement conditions." *United States v. Wise*, 64 M.J. 468, 471 (C.A.A.F. 2007) (citing *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001)). "In this regard [the] appellant must show us, absent some unusual or egregious circumstance, that he has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under Article 138, UCMJ." *United States v. Coffey*, 38 M.J. 290, 291 (C.M.A. 1993). "In addition to promoting resolution of grievances at the lowest possible level," this exhaustion requirement "is intended to ensure that an adequate record has been developed with respect to the procedures for considering a prisoner grievance and applicable standards." *United States v. Miller*, 46 M.J. 248, 250 (C.A.A.F. 1997). The ultimate question of whether an appellant has exhausted his or her administrative remedies is reviewed de novo, as a mixed question of law and fact. *Wise*, 64 M.J. at 471.

[5] Even had we set aside the appellant's conviction for provoking speech, we would have reassessed his sentence to the same sentence as that adjudged and approved. The provoking speech charge carried with it a maximum sentence to confinement of six months, whereas the remaining two charges carried a total of 42 months confinement. In addition, the appellant's statements would have been admissible as part of the facts and circumstances of the assault consummated by a battery charge. Under the facts of this case, we are confident that the military judge would have imposed the same sentence. *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986); *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006).

We cannot determine under the record in this case whether the appellant has been unlawfully denied the opportunity to participate in a program that could have led to his release sooner, as the record is simply inadequate to address the appellant's claims. The only evidence in the record concerning this issue is a memorandum the appellant's defense counsel submitted to the convening authority in the clemency process. Left unanswered and undocumented in the record are basic matters such as who qualifies for the trustee program, the likelihood of achieving credit toward release through this program, and how much credit the appellant could have earned through this program. While we recognize that the appellant's short period of post-trial confinement would have made pursuing a grievance and an Article 138, UCMJ, complaint difficult, this difficulty does not provide a basis for this Court to step in and act where insufficient facts exist that indicate that the appellant suffered any wrong. We decline to find that "unusual or egregious" circumstances exist in this case to excuse the appellant from his requirement to exhaust his administrative remedies. His time in post-trial confinement may have been relatively short (about eleven weeks), and pursuing these remedies may or may not have granted him significant relief given his imminent release from confinement, but had the appellant properly built the record and developed the facts in this case, this Court would have a basis to evaluate the appellant's claim. Instead, no such record exists, and we decline to offer the appellant his requested relief (15 days of confinement credit or setting aside his punitive discharge) based solely on speculation about what credit toward release he might have been able to obtain.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[6] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are

AFFIRMED

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[6] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). Moreover, we find that the delay in this case does not render the appellant's sentence inappropriate under Article 66(c), UCMJ, 10 U.S.C. § 866(c). *See United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).