UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CHASE C. MONTGOMERY
United States Air Force

ACM 37556

15 August 2011

Sentence adjudged 18 August 2009 by GCM convened at Presidio of Monterey, California. Military Judge: Don M. Christensen (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 23 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford and Lieutenant Colonel Darrin K. Johns.

Appellate Counsel for the United States: Major Naomi N. Porterfield and Gerald R. Bruce, Esquire.

Before

BRAND, GREGORY, and ROAN
Appellate Military Judges

PER CURIAM:

A general court-martial composed of military judge alone convicted the appellant in accordance with his pleas of one specification of violating a no contact order, one specification of making a false official statement, sixteen specifications of various drug offenses that include use, distribution, and introduction of controlled substances, and one specification of using over-the-counter cough medicine to become intoxicated in violation of Articles 90, 107, 112a, and 134, UCMJ, 10 U.S.C. §§ 890, 907, 912a, 934. A pretrial agreement capped confinement at 24 months. The court-martial sentenced the appellant to a bad-conduct discharge, confinement for 23 months, and reduction to E-1, and the convening authority approved the sentence adjudged. The appellant argues that

the findings are ambiguous because changes to the charge sheet announced on the record as having been made to the charge sheet are not reflected on the charge sheet included in the record. Finding neither ambiguity nor any other error that materially prejudiced a substantial right of the appellant, we affirm.

The appellant both used and distributed marijuana, Ecstasy, and Percocet on multiple occasions. The appellant purchased his Ecstasy pills from a civilian drug dealer for $20 per pill, and would resell pills to his friends either at cost or a small mark-up and often used some of the product with them. Among the many uses and distributions charged, the appellant argues that the findings as to Specifications 13 and 16 are ambiguous.

Before the plea inquiry began, trial counsel announced several changes to the charge sheet which included changes relevant to the issue on appeal. First, Specification 13 alleges use of a Schedule I controlled substance known as "Adam" which was laced with one of the Ecstasy pills used by the appellant and detected during urinalysis. That specification initially alleged divers use between 1 February and 24 April 2009. Trial counsel announced that a "pen-and-ink change" had been made to the specification that deleted the words "on divers occasions between on or about 1 February 2009 and" as well as changing the end date to 19 April 2009, leaving the specification as an allegation of single use on or about 19 April 2009. Second, Specification 16 alleged a distribution of Ecstasy to an "Airman First Class [DM]." Trial counsel announced that a "pen-and-ink change" had been made changing the name to "Airman First Class [CM]" and renumbering the specification to 15 after the deletion of Specification 15. The issue arises because the charge sheet in the record of trial does not reflect the announced changes to Specifications 13 and 16.

Ambiguities in findings are resolved on the basis of the entire record. *United States v. Simmons*, 3 M.J. 398 (C.M.A. 1977). Where ambiguities exist, the appellant must be given the benefit of any remaining uncertainty. Here, examination of the record indicates that the apparent ambiguity was created by the erroneous inclusion of a charge sheet that did not contain all the pen-and-ink changes announced on the record. Examination of the entire record, however, conclusively resolves this apparent ambiguity.

First, before the substantive plea inquiry began, trial counsel stated that he would "like to get on the record some of the changes to the Charge Sheet before [the appellant] explains what he did," and then announced several "pen-and ink" changes to the charge sheet. Neither the military judge nor trial defense counsel questioned the announced changes or indicated that the stated changes had not actually been made to the charge sheet. Second, as further evidence that the charge sheet in the record is not the one used by the parties at trial, additional "pen-and-ink" numbering changes to some specifications were made before entry of findings without objection yet, again, those changes are not shown on the charge sheet included in the record. Third, counsel and the appellant

entered into a stipulation of fact that corresponds to the changes to the charge sheet announced on the record. Fourth, before entry of findings, trial defense counsel reaffirmed to the military judge that he had no objections to any of the "pen-and-ink" changes:

> No, we do not, Your Honor. And, in particular, for the one after referral in Specification 16 changing "[DM]" for "[CM]." We found that to be appropriate under the circumstances as the substitution of the names accurately depicted what Airman Montgomery was actually involved in, whereas, before the charges were not accurately depicted.

Fifth, the Court-Martial Promulgating Order corresponds to the changed version of the charge sheet announced on the record. Finally, in the post-trial clemency phase neither the appellant nor his counsel asserted any ambiguity in findings but focused their efforts on persuading the convening authority to recommend entry into the Air Force Return to Duty Program. Therefore, we find that the record conclusively resolves any ambiguity in findings created by the erroneous inclusion in the record of a charge sheet that does not reflect all the changes clearly announced on the record: in accordance with his plea of guilty to all charges and specifications, the appellant was found guilty of all charges and specifications as modified by the changes clearly announced on the record and agreed to by the appellant.

We note that the overall delay of 21 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 shows 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.

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. 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 the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court