UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant RICHARD W. VOGLER
United States Air Force

ACM 37231

03 September 2009

Sentence adjudged 13 November 2007 by GCM convened at Eglin Air Force Base, Florida. Military Judge: W. Thomas Cumbie (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 20 years, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Michael A. Burnat, Major Lance J. Wood, and Captain Tiffany M. Wagner.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Major Jeremy S. Weber, Captain G. Matt Osborn, Captain Michael T. Rakowski, and Gerald R. Bruce, Esquire.

Before

FRANCIS, JACKSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

Pursuant to his pleas, a military judge sitting as a general court-martial found the appellant guilty of one specification of divers rape, one specification of divers rape of a child, one specification of divers forcible sodomy, one specification of divers forcible sodomy of a child, one specification of divers indecent acts with a child, one specification of divers indecent assault, and one specification of willfully disobeying a superior commissioned officer, in violation of Articles 120, 125, 134, and 90, UCMJ, 10 U.S.C. §§ 920, 925, 934, 890. The military judge sentenced the appellant to a dishonorable

discharge, thirty years of confinement, and a reduction to the grade of E-1. The convening authority approved the dishonorable discharge, the reduction to the grade of E-1, and, pursuant to a pretrial agreement, twenty years confinement. [1]

On appeal, the appellant asks the Court to, alternatively: (1) order a sentence rehearing; (2) set aside the findings or a portion of the findings; (3) grant administrative credit toward his sentence of confinement; (4) grant meaningful relief by reducing his sentence of confinement; (5) reassess his sentence; and (6) set aside the sentence.

As the basis for his request, the appellant opines that: (1) the staff judge advocate (SJA) erred when he failed to advise the convening authority of the option to order a sentence rehearing pursuant to Rule for Courts-Martial (R.C.M.) 1107 since the dismissal of the divers forcible sodomy of a child specification and the divers indecent acts with a child specification changed the sentencing landscape; (2) a portion of the divers rape of a child specification was barred by the statute of limitations in effect prior to the 2003 amendment of Article 43(b), UCMJ, 10 U.S.C. § 843(b), as interpreted in *United States v. Lopez de Victoria*, 66 M.J. 67 (C.A.A.F. 2008); (3) the military judge, having found knowing violations of Air Force Instruction (AFI) 31-205, *The Air Force Corrections System* (7 Apr 2004), erred in not determining that the violations involved an abuse of discretion warranting credit under R.C.M. 305(k); (4) his approved sentence of twenty years confinement is inappropriately severe because it was based on a pretrial agreement that was reached with an understanding that he would plead and be found guilty of all charges and did not take into account that his convictions for the divers forcible sodomy of a child specification and the divers indecent acts with a child specification were barred from prosecution by the statute of limitations; (5) his guilty pleas to the divers rape, divers rape of a child, divers forcible sodomy, and divers indecent assault are improvident since the military judge failed to establish on the record a factual basis to support the pleas of guilty; (6) the SJA committed post-trial error in failing to provide the convening authority with either an accurate characterization of the appellant's service or accurate information as to what action he was entitled to take on the appellant's sentence; (7) the military judge abused his discretion by relaxing the rules of evidence during the government's sentencing case thereby allowing the prosecution to admit irrelevant evidence; (8) the military judge erred by failing to inform the appellant of his right to assert the statute of limitations; (9) his guilty pleas to divers rape and divers rape of a child are improvident since the military judge failed to provide the appellant with a complete definition of the legal concept of force; (10) the trial counsel committed prosecutorial misconduct by suborning perjury and by allowing Dr. KC to commit professional misconduct; (11) his guilty pleas to the charges and specifications were

[1] The appellant and the convening authority signed a pretrial agreement wherein the appellant agreed to plead guilty to the charges and specifications in return for the convening authority's promise not to approve confinement in excess of twenty years. In taking action in the appellant's case, the convening authority determined that the divers forcible sodomy of a child specification and the divers indecent acts with a child specification were barred by the statute of limitations; he accordingly dismissed those specifications.

improvident because the military judge erred when he created and failed to resolve inconsistencies between the stipulation of fact and the providency inquiry; (12) he was denied effective assistance of counsel by the trial defense counsels' errors; and (13) the trial counsel's sentencing argument was improper.[2] Finding the appellant's assignments of error to be meritless and finding no prejudicial error, we affirm.

Background

In early 1996, the appellant began a sexual relationship with SNV, his then eight-year-old stepdaughter. Over the course of several years, he fondled her vagina and breasts and forced her to fondle his penis.[3] When SNV turned twelve years old, she and the appellant began to engage in oral sex. Over the course of several years, the appellant performed cunnilingus on SNV, forced SNV to perform fellatio on him, and on at least two occasions anally sodomized SNV.[4]

When SNV turned thirteen years old, the appellant began coercing her to have sexual intercourse with him. His sexual intercourse with SNV continued until she was nineteen years old. On 20 July 2007, SNV, with the encouragement of her boyfriend, reported the appellant to law enforcement officials. On 22 July 2007, agents with the Air Force Office of Special Investigations (AFOSI) summoned the appellant to their office for an interview. After a proper rights advisement, the appellant waived his rights, agreed to answer questions, and admitted to having "consensual" oral and sexual intercourse with SNV since she was sixteen years old. On or about 26 July 2007, the appellant's commander, having been informed of the misconduct, issued the appellant a "no contact" order prohibiting him from having any contact with SNV. On or about 31 July 2007, the appellant violated the "no contact" order by sending SNV two text messages.

Lack of SJA Advice on Option for Sentence Rehearing

Proper completion of post-trial processing is a question of law, which this Court reviews de novo. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000); *United States v. Bakcsi*, 64 M.J. 544, 544 (A.F. Ct. Crim. App. 2006) (citing *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004)). Failure to timely comment on matters in the SJA's Recommendation waives any later claim of error in the absence of plain error. R.C.M. 1106(f)(6); *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005). "To prevail under a plain error analysis, [the appellant bears the burden of showing] that: '(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a

[2] Issues 4-13 are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[3] The convening authority determined that a portion of the appellant's misconduct during this time period was barred by the statute of limitations.
[4] The convening authority determined that a portion of the appellant's misconduct during this time period was barred by statutes of limitations.

substantial right.'" *Scalo*, 60 M.J. at 436 (quoting *Kho*, 54 M.J. at 65). While the threshold for establishing prejudice is low, the appellant must nevertheless make a "colorable showing of possible prejudice." *Id*. at 437.

Since the appellant failed to raise this alleged error in his clemency petition, it is waived absent a showing of plain error. Here, the SJA was not obliged to advise the convening authority of his option for a sentence rehearing. First, the SJA advised the convening authority on all the matters of which he was required under R.C.M. 1106(d). Second, while a sentence rehearing may be appropriate when a significant part of the government's case has been dismissed, such was not the case sub judice. After the convening authority dismissed the divers forcible sodomy of a child specification and the divers indecent acts with a child specification, the appellant remained convicted of the bulk of the charges and specifications. Significantly, the appellant remained convicted of charges that carried a maximum period of confinement of life without the possibility of parole and, contrary to the appellant's assertions, the sentencing landscape did not change. In short, we find no error. Additionally, even assuming error, the error was not plain and the appellant has fallen woefully short of establishing prejudice.

Statute of Limitations on the Divers Rape of a Child Specification

The interpretation of the statute of limitations contained in Article 43, UCMJ, is a matter of law; therefore, we review de novo. *Lopez de Victoria*, 66 M.J. at 73. Contrary to the appellant's assertions, a portion of the divers rape of a child specification is not barred by the statute of limitations. At the time of the earliest alleged child rape, 21 October 2000, there was no statute of limitations because rape was punishable by death,[5] and there was no statute of limitations for offenses punishable by death. *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 45.e.(1) (2000 ed.); Article 43, UCMJ.

In 2003, Congress amended Article 43, UCMJ, to except certain "child abuse" offenses from the general five-year statute of limitations and this amendment had the unintended effect of establishing a statute of limitations for child rape. *See* National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 551, 117 Stat. 1392, 1481 (2003). That statute of limitations barred prosecution after the victim reached twenty-five years of age. *Id.* In 2006, however, Congress once again amended Article 43, UCMJ, and in so doing allowed prosecution for child rape during the life of the child or within five years after the date on which the offense was committed, whichever provides for a longer period of time. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 553, 119 Stat. 3136, 3264 (2006). Thus, in this case, there

[5] The fact that the rape charge was not referred capital is of little consequence for statute of limitations purposes because the rape charge, whether referred capital or not, is still an offense which subjects the accused to death. *See United States v. Stebbins*, 61 M.J. 366, 369 (C.A.A.F. 2005) (citing *Willenbring v. Neurauter*, 48 M.J. 152, 179-80 (C.A.A.F. 1998)).

was never a lapse in the statute of limitations,[6] and on 22 August 2007, the day the summary court-martial authority received the rape specification, the specification was not barred by any statute of limitations.

Credit for AFI 31-205 Violation

Axiomatically, "a government agency must abide by its own regulations where the underlying purpose of such regulations is the protection of personal liberties or interests." *United States v. Adcock*, 65 M.J. 18, 23 (C.A.A.F. 2007) (quoting *United States v. Dillard*, 8 M.J. 213, 213 (C.M.A. 1980)). However, confinement in violation of AFI 31-205 does not create for the appellant a per se right to sentencing credit; it only provides the military judge with the discretion to award additional sentencing credit for abuse of discretion by pretrial confinement authorities. *Id*. at 23-24. "[U]nder R.C.M. 305(k), a service-member may identify abuses of discretion by pretrial confinement authorities, including violations of applicable service regulations, and on that basis request additional confinement credit." *Id*. at 24. "A military judge's decision in response to this request is reviewed, on appeal, for abuse of discretion." *Id.*

We now turn to whether the military judge abused his discretion in declining to award the appellant additional sentencing credit for AFI 31-205 violations. The military judge made detailed findings of fact and conclusions of law. While he noted technical non-compliance with AFI 31-205, he also noted that the non-compliance was done to achieve legitimate, non-punitive, governmental objectives. The military judge's findings of fact are not clearly erroneous and his conclusions of law are correct. The award of additional confinement credit was clearly a matter within his sound discretion, and he did not abuse his discretion in refusing to award additional confinement credit.

Inappropriately Severe Sentence

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *See United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

[6] SNV was born on 21 October 1987, and thus will be twenty-five years of age on 21 October 2012. Since she was not older than twenty-five years of age when there was a statute of limitations for child rape, the statute of limitations for the child rape specification never lapsed.

Over the course of many years, the appellant sexually assaulted, raped, and sodomized a child whom he was entrusted to protect. His crimes rank among the most heinous crimes recognized by society and severely compromise his standing as a non-commissioned officer, a military member, and a member of society. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offenses of which the appellant was found guilty, we do not find the appellant's sentence, one which includes twenty years of confinement, inappropriately severe.[7]

Providency of the Appellant's Pleas

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996) (citing *United States v. Gallegos*, 41 M.J. 446, 446 (C.A.A.F. 1995)). An accused may not plead guilty unless the plea is consistent with the actual facts of his case. *United States v. Moglia*, 3 M.J. 216, 218 (C.M.A. 1977); *United States v. Logan*, 47 C.M.R. 1, 3 (C.M.A. 1973). An accused may not simply assert his guilt; the military judge must elicit facts *as revealed by the accused himself* to support the plea of guilty. *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (emphasis added) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)); *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996). Where there is "a substantial basis in law and fact" for questioning the appellant's plea, the plea cannot be accepted. *United States v. Hardeman*, 59 M.J. 389, 391 (C.A.A.F. 2004) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

In the case sub judice, sufficient evidence exists to support the military judge's findings that the appellant committed the offenses of which he was convicted. First, with respect to the appellant's assertions that his "yes" and "no" responses to the military judge's leading questions are insufficient to support his guilty plea, we note that our superior court has recently rejected that notion. *United States v. Nance*, 67 M.J. 362, 365 (C.A.A.F. 2009) (holding that, while leading questions are disfavored, a military judge's use of leading questions does not automatically result in an improvident plea and the sufficiency of a providency inquiry must be determined by examining the totality of the circumstances).

Concerning the appellant's claims that his plea is improvident because the military judge failed to provide a complete definition of the legal concept of force, we likewise

[7] We likewise reject the appellant's claim that his sentence is inappropriately severe because the convening authority approved the same sentence that would have been approved had the convening authority not dismissed the divers forcible sodomy of a child specification and the divers indecent acts with a child specification. On this point, we note that it is within the sound discretion of the convening authority to approve the sentence he deems most appropriate, that the convening authority considered the fact that he dismissed the aforementioned specifications and thought it appropriate to approve twenty years of confinement, and that the appellant received the generous benefit of his pretrial agreement.

find this claim meritless. The appellant acknowledged, in no uncertain terms, his understanding of the elements of and the definitions that accompanied the offenses, to include his specific understanding of constructive force. He stated that the elements and definitions taken together accurately and correctly described what he did, and that through his parental authority over SNV, he constructively forced her to engage in oral and anal sodomy and sexual intercourse. Put simply, there is little doubt that the appellant understood the elements of the offenses and the definitions, including the definition of force, and that he provided sufficient evidence, either through his inquiry with the military judge or the stipulation of fact, to support his guilty plea.[8]

SJA's Alleged Error on Service Characterization

This issue, as the first issue, is a question of law, which this Court reviews de novo. *Kho*, 54 M.J. at 65. Similarly, failure to timely comment on this issue waives any later claim of error in the absence of plain error. R.C.M. 1106(f)(6); *Scalo*, 60 M.J. at 436. The same three-part "plain error" test that was applicable to the first issue also applies to this issue. The appellant failed to raise this alleged error in his clemency petition, so the alleged error is waived absent a showing of plain error. In the case at hand, the SJA characterized the appellant's record as "average" and his duty performance as "acceptable." This description was appropriate given the fact that the appellant's command had made such a characterization and the appellant's commander, more than anyone, should know the appropriate characterization of the appellant's service. Moreover, even if it were error for the SJA to characterize the appellant's service as "average," the appellant has nonetheless failed to show prejudice. The record makes it abundantly clear that the convening authority considered the appellant's performance reports and personal data prior to taking action and opted to approve the sentence he later approved.

Remaining Alleged Errors

We have considered the additional assertions of error, find them to be without merit, and find them to be without worthiness of further discussion. *United States v. Straight*, 42 M.J. 244, 248 n.4 (C.A.A.F. 1995) (citing *United States v. Clifton*, 35 M.J. 79, 81-82 (C.M.A. 1992); *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987)).

[8] Additionally, we find his claim that his pleas are improvident because of unresolved inconsistencies between his providency inquiry and the stipulation of fact to be meritless. Minor inconsistencies in the use of language do not disrupt an otherwise provident inquiry.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[9] 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 are

AFFIRMED.

OFFICIAL

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

[9] We note that the court-martial order (CMO) erroneously lists Colonel Stephen Woody as the military judge whereas Colonel W. Thomas Cumbie was the military judge. Additionally, the CMO lists the Article 90, UCMJ, 10 U.S.C. § 890, charge as "Additional Charge I" rather than "Additional Charge." Preparation of a corrected CMO, properly reflecting Colonel W. Thomas Cumbie as the military judge and the Article 90, UCMJ, charge as the "Additional Charge" is hereby directed.