UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DAVID W. WINTERS
United States Air Force

ACM 37915

31 January 2013

Sentence adjudged 16 March 2011 by GCM convened at Eglin Air Force Base, Florida. Military Judge: W. Thomas Cumbie (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 12 months; and reduction to E-1.

Appellate Counsel for the Appellant: Captain Ja Rai A. Williams.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Captain Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

PER CURIAM:

A general court-martial composed of a military judge convicted the appellant, consistent with his pleas, of dereliction of duty, fleeing apprehension, operation of a motor vehicle while intoxicated, and reckless endangerment, in violation of Articles 92, 95, 111 and 134, UCMJ, 10 U.S.C. §§ 892, 895, 911, 934. The adjudged sentence consisted of a bad-conduct discharge, confinement for 12 months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged, and also approved the appellant for placement in the Air Force Return to Duty program. After the appellant successfully completed that program, the Air Force Clemency and Parole Board (AFCPB) returned the appellant to duty on 17 November 2011 and directed suspension of

the bad-conduct discharge for one year. When the appellant successfully served on active duty for a year, his bad-conduct discharge was remitted by the AFCPB, effective 16 November 2012.[1]

On appeal, the appellant asserts the specification of reckless endangerment fails to state an offense because it omits the required terminal element for Article 134, UCMJ, offenses. Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), he also asserts the military judge erred in not finding certain specifications to be multiplicious and in failing to dismiss one specification after finding it to be an unreasonable multiplication of charges. Finding no error that materially prejudices the appellant, we affirm.[2]

Background

On the night of 13 August 2010, a Security Forces patrolman observed the appellant's pick-up truck driving on Elgin Air Force Base over the posted speed limit. The patrolman activated his overhead lights in an effort to pull the vehicle over so he could issue a verbal warning. The appellant continued to speed through base, left through the base gate, and accelerated even faster. The patrolman continued to follow him, with his light activated, and saw the appellant run a red light at approximately 80 miles per hour.

Because the appellant was attempting to elude him, the patrolman determined he needed to initiate a "high risk traffic stop," where he would order the occupants to exit the vehicle and then apprehend them. The patrolman accelerated to catch up with the appellant's truck, and both were traveling at 100 miles per hour. During this time, the appellant was aware the police officer was pursuing him for the purpose of apprehension. The appellant's vehicle was swerving out of its lane and then attempted to make a right turn at approximately 80 miles per hour. The truck left the road and flipped, striking a tree and wrapping around it.

When the patrolman ran up to the truck, he found a man (later identified to be Airman CD) with his head and arm sticking out of the truck. When Airman CD asked where his friend was, the patrolman looked further inside the truck and saw the appellant. Although both men were conscious and talking, they were injured and pinned inside the

[1] The actions of the Air Force Clemency and Parole Board are reflected on a special court-martial order dated 12 December 2011. We order the inclusion of this document in the official record of trial.

[2] We retain jurisdiction under Article 66(b), UCMJ, 10 U.S.C. § 866(b), by virtue of the approved sentence, which includes a bad-conduct discharge. *United States v. Johnson*, 45 M.J. 88, 90 (C.A.A.F. 1996); *United States v. Boudreaux*, 35 M.J. 291, 293 (C.M.A. 1992). The bad-conduct discharge remains part of the sentence approved by the convening authority. Remission of part of an approved sentence does not affect appellate court jurisdiction. *United States v. Pfleuger*, 65 M.J. 127, 129 (C.A.A.F. 2007) (citing *Steele v. Van Riper*, 50 M.J. 89, 92 (C.A.A.F. 1999)). However, because the bad-conduct discharge has been remitted, it cannot be executed under Article 71, UCMJ, 10 U.S.C. § 871. *Id.* at 131.

truck. It took emergency services almost four hours to extricate them from the truck. Airman CD had extensive injuries, including two broken legs (one of which had a compound fracture) with resultant nerve damage, and he required significant medical treatment and rehabilitation. The appellant's injuries were much less serious.

Prior to driving his truck that night, the 20-year-old appellant drank several beers, a highly caffeinated alcoholic beverage, and a mixed drink. His blood alcohol level after the accident was .133 grams of alcohol per 100 milliliters of blood.

Sufficiency of the Article 134, UCMJ, Specification

The appellant was charged with "wrongfully and recklessly engag[ing] in conduct, to wit: driv[ing] in excess of the posted speed limit . . . after consuming alcoholic beverages, fail[ing] to observe traffic signals, and attempt[ing] a turn at an unsafe speed, conduct likely to cause death or grievous bodily harm to [Airman CD]," in violation of Article 134, UCMJ. This specification omitted the terminal element for Article 134, UCMJ, offenses, which the appellant alleges is error. We disagree.

Whether a charged specification states an offense is a question of law that we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citations omitted). The failure to allege the terminal element of an Article 134, UCMJ, offense is error. *United States v. Ballan*, 71 M.J. 28, 34 (C.A.A.F.), *cert. denied*, 133 S. Ct. 43 (2012) (mem.). In the context of a guilty plea, such an error is not prejudicial when the military judge correctly advises the appellant of all the elements and the plea inquiry shows that the appellant understood to what offense and under what legal theory he was pleading guilty. *Id.* at 34-36.

During the plea inquiry in the present case, the military judge advised the appellant of each element of the Article 134, UCMJ, offense at issue, including the terminal element. The military judge defined the terms "conduct prejudicial to good order and discipline" and "service discrediting" for the appellant. The appellant explained to the military judge how his misconduct was "prejudicial to good order and discipline," as the loss of two squadron members affected his unit's deployment plans, and that it was "service discrediting" because of the negative publicity his accident had garnered for the Air Force in the local media. Therefore, as in *Ballan*, the appellant here suffered no prejudice to a substantial right, because he knew under what clause he was pleading guilty and clearly understood how his conduct violated the terminal element of Article 134, UCMJ.

Multiplicity

The appellant made a timely motion at trial to dismiss the reckless endangerment specification, arguing it constituted an unreasonable multiplication of charges with the

specification that alleged the appellant drove a motor vehicle while intoxicated. In the alternative, the defense asked that the specifications be "merged for sentencing purposes." The appellant also moved to dismiss the fleeing apprehension specification, arguing it constituted an unreasonable multiplication of charges where the appellant was also charged with dereliction of duty for willfully failing to stop his vehicle while being followed by a law enforcement vehicle with its lights activated.

Although the appellant had not specifically raised the issue, the military judge found the two sets of specifications were not "multiplicious for findings." He noted, however, that there was some factual overlap in the charges and, at the urging of the Government, he determined that the two specifications in each group would be "merged for sentencing," meaning they would be treated as one offense for purposes of sentencing. On appeal, the appellant contends the military judge erred by failing to find the specifications "multiplicious as a matter of law," and asks us to dismiss the reckless endangerment and dereliction of duty specifications.

We review issues of multiplicity de novo. *United States v. Paxton*, 64 M.J. 484, 490 (C.A.A.F. 2007). Multiplicity is an issue of law that enforces the Double Jeopardy Clause. *Blockburger v. United States*, 284 U.S. 299 (1932); *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993); *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012). Accordingly, an accused may not be convicted and punished for two offenses where one is necessarily included in the other, absent congressional intent to permit separate punishments. *See Teters*, 37 M.J. at 376; *see also* Rule for Courts-Martial 907(b)(3), Discussion. Where legislative intent is not expressed in the statute or legislative history, "it can also be presumed or inferred based on the elements of the violated statutes and their relationship to each other." *Teters*, 37 M.J. at 376-77. Thus, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one [] is whether each provision requires proof of an additional fact which the other does not." *Blockburger*, 284 U.S. at 304 (citation omitted); *see also Teters*, 37 M.J. at 377 (The *Blockburger* rule "is to be applied to the elements of the statutes violated."). Accordingly, multiple convictions and punishments are permitted for a distinct act if the two charges each have at least one separate statutory element from the other.

Applying *Blockburger*, we find these specifications are not multiplicious. The offenses of reckless endangerment and driving while intoxicated have multiple elements that are different, and thus each offense requires proof of an element which is different than the other. Similarly, the offenses of fleeing apprehension and dereliction of duty also have different elements. As there are elements of each offense which are not contained within the other and as there is no congressional or presidential guidance to the contrary, we find the specifications are not multiplicious and that the military judge did not err at trial.

Unreasonable Multiplication of Charges

As noted above, the military judge decided to treat the two specifications in each group as one offense for purposes of sentencing and lowered the appellant's maximum punishment exposure from 54 months to 36 months. On appeal, the appellant contends the military judge erred by failing to then dismiss one specification in each group.

A military judge's decision to deny relief for unreasonable multiplication of charges is reviewed for an abuse of discretion. *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004); *see also United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001). When a military judge finds charges to be unreasonably multiplied, dismissal is one remedy available to him. *United States v. Roderick*, 62 M.J. 425, 433 (C.A.A.F. 2006). However, even if we agreed that the charges here were unreasonably multiplied, dismissal is not mandatory as it is within a military judge's discretion to instead merge the specifications for sentencing purposes and adjust the maximum sentence accordingly, as this military judge did. *Campbell*, 71 M.J. at 25.

Conclusion

The findings and sentence, as approved by the convening authority, are correct in law and fact. Article 66 (c), UCMJ; 10 U.S.C. § 866(c). We find no error materially prejudicial to a substantial right of the appellant occurred.[3] Article 59(a), UCMJ, 10 U.S.C. § 859(a). Accordingly, the findings and sentence are

AFFIRMED.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist

[3] 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)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).