UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic CHRISTOPHER L. WRIGHT
United States Air Force

ACM S31848

27 June 2012

Sentence adjudged 12 July 2010 by SPCM convened at Eielson Air Force Base, Alaska. Military Judge: Jeffrey A. Ferguson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, and forfeiture of $723.00 pay per month for 7 months.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford and Captain Luke D. Wilson.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Lauren N. DiDomenico; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and HARNEY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

GREGORY, Senior Judge:

A special court-martial composed of military judge alone convicted the appellant in accordance with his pleas of: (1) one specification of drunk on duty in violation of Article 112, UCMJ, 10 U.S.C. § 912; (2) two specifications of wrongful use of marijuana, three specifications of wrongful possession of marijuana, and one specification of wrongful introduction of marijuana onto a government vehicle in violation of Article 112(a), UCMJ, 10 U.S.C. § 912(a); and (3) two specifications of solicitation to obstruct justice in violation of Article 134, UCMJ, 10 U.S.C. § 934. The military judge convicted

the appellant contrary to his pleas of one specification of driving while drunk in violation of Article 111, UCMJ, 10 U.S.C. § 911. The court sentenced the appellant to a bad-conduct discharge, confinement for 6 months, and forfeiture of $723.00 pay per month for 7 months.[1] The convening authority approved the sentence adjudged. The appellant assigns four errors, two concerning the Article 134 charge and two concerning the Article 111 charge.

Legal Sufficiency of the Article 134 Charge

The appellant argues that omission of the terminal element in both specifications of the Article 134 charge renders them insufficient to allege an offense. The appellant did not dispute the legal sufficiency of either specification at trial and entered pleas of guilty to both. Although neither specification expressly alleges the terminal element of an Article 134 offense, the military judge fully advised the appellant of all the elements of each specification to include the terminal element that the alleged conduct must be prejudicial to good order and discipline or service discrediting. The appellant acknowledged understanding of all the elements and explained how his conduct was service discrediting and prejudicial to good order and discipline.

Failure to allege the terminal element of an Article 134 offense is error but, in the context of a guilty plea, the error is not prejudicial where the military judge correctly advises the appellant of all the elements and the providence inquiry shows that the appellant understood to what offense and under what legal theory he was pleading guilty. *United States v. Ballan*, 71 M.J. 28, 34-36 (C.A.A.F. 2012). As in *Ballan*, the appellant here suffered no prejudice to a substantial right: the guilty plea inquiry shows that he knew which terminal elements of Article 134 applied and that he clearly understood how his conduct violated Article 134.

Sufficiency of the Article 134 Plea Inquiry

We review a military judge's decision to accept a plea of guilty for an abuse of discretion. The military judge must elicit from an accused an adequate factual basis to support the plea, an area in which we afford significant deference to the military judge. *United States v. Nance*, 67 M.J. 362, 365 (C.A.A.F. 2009) (citing *United States v. Inabinette*, 66 M.J. 320, 321-22 (C.A.A.F. 2008)). Any factual predicate in the record should be affirmed by the accused herself and should objectively corroborate the guilty plea. *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980). The record of trial must demonstrate that the elements of each offense charged have been explained to the accused and "make clear the basis for a determination by the military trial judge . . . whether the acts or the omissions of the accused constitute the offense or offenses to

[1] The military judge merged Specifications 2 and 5 of Charge III, Specifications 3 and 4 of Charge III, and Specifications 1 and 2 of Charge IV for sentencing purposes. A pretrial agreement capped confinement at six months.

which he is pleading guilty." *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (citing *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969)). "[I]n reviewing a military judge's acceptance of a plea for an abuse of discretion appellate courts apply a substantial basis test: Does the record as a whole show a substantial basis in law and fact for questioning the guilty plea." *Inabinette*, 66 M.J. at 322 (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)) (internal quotation marks omitted).

The appellant argues that the military judge failed to establish a sufficient factual basis to accept his plea of guilty to solicitation to obstruct justice because his actions were intended to obstruct an administrative inspection rather than a search. The two specifications of Charge IV allege that the appellant solicited Airman First Class (A1C) AD to obstruct justice by: (1) retrieving marijuana from the appellant's vehicle; and (2) retrieving marijuana from a cabinet so that it would not be discovered by a military working dog. The military judge correctly advised the appellant that in soliciting A1C AD to hide the marijuana the appellant must have specifically intended that he commit the offense of obstruction of justice. He further advised the appellant that to be guilty of obstruction of justice the solicited acts must be done in the case of someone against whom: (1) he had reason to believe there would be criminal proceedings pending; and (2) with the intent to influence or impede the due administration of justice.

During the plea inquiry the appellant told the military judge that he had been directed to remain in his supervisor's office after a military working dog arrived in his duty location. While in the office he sent text messages to A1C AD requesting him to remove a bag of marijuana that he had stashed in a locker as well as to remove a blunt of marijuana from his vehicle. He told A1C AD to "get rid of it so that way it could not be detected by the drug dog." The appellant had been informed that the dog was conducting a random security sweep, and the trial counsel confirmed that the dog was present for an inspection.

Relying on *United States v. Turner*, 33 M.J. 40 (C.M.A. 1991), the appellant argues that he only solicited obstruction of an administrative inspection rather than obstruction of justice which requires interference with some type of criminal investigation rather than mere interference with an administrative inspection. In *Turner*, the appellant submitted toilet water as a urine specimen during a unit urinalysis inspection to prevent discovery of her drug abuse. Citing the non-criminal purpose of an inspection, the Court held that interference with an administrative inspection did not meet the elements of obstruction of justice under the facts of that case:

> At the time of the inspection, she was not a suspect in any crime or part of any criminal investigation. There were no other criminal proceedings or other official acts taking place that would lead to disciplinary action…. Appellant merely sought to preclude discovery of her recent drug use; such action does not support an obstruction-of-justice charge.

Id. at 43. Although the evidence in the present case indicates that, like *Turner*, an administrative inspection triggered the charged acts of obstruction, that does not end the inquiry.

In *United States v. Athey*, 34 M.J. 44 (C.M.A. 1992), the Court emphasized subjective intent as critical to the sufficiency of the evidence to support an obstruction of justice conviction:

> The word "intent" seems concerned with an accused's actual state of mind – rather than the mental state of a hypothetical reasonable person. Thus, it imposes a subjective requirement. In the present context, we believe that the words "due administration of justice" contemplate justice as administered in criminal proceedings. This language, then, requires an "intent" to obstruct a potential criminal proceeding.

Id. at 49. In *United States v. Finsel*, 36 M.J. 441 (C.M.A. 1993), the Court focused on the surrounding circumstances of the offense to determine whether the requisite intent existed to support conviction of obstruction of justice. In evaluating those circumstances, the Court noted that obstruction of justice can occur without formal charges pending, during an investigation, and even when an accused "believed that some law enforcement official of the military…*would be* investigating his actions…." *Id.* at 443-44 (citations omitted) (emphasis in original). Distinguishing *Turner*, the Court noted that "the majority found Turner's guilty plea to the obstruction specification was improvident because there was no evidence, under the circumstances, that she had reason to believe that criminal proceedings would emanate from that inspection." *Id.* at 445.

Unlike *Turner*, the appellant's statements during the plea inquiry show that he suspected he was a target of a criminal investigation. He told the military judge he "intended" A1C AD to remove marijuana from his vehicle so it would not be found by law enforcement "hence furthering any investigation." He "believed" there would be "criminal action taken" against him if the marijuana were found and "intended" that A1C AD help him "prevent that criminal action." At the time the drug dog appeared at the appellant's work station, the appellant was already under investigation for drug abuse and, indeed, had recently received punishment under Article 15 for the use of marijuana.

When the appellant was directed to remain in his supervisor's office while the drug dog searched the workplace, he started sending texts to his co-worker asking him to hide his marijuana from what he clearly perceived as a police investigation:

> MJ: So, before you went into Mr. [F]'s office, had you seen the drug…the dogs?

> ACC: Yes, sir, I did.
>
> MJ: Okay, and were you putting basically, two-and-two together?
>
> ACC: Yes, sir.
>
> MJ: So, after seeing the dog and then after being brought into Mr. [F]'s office, and told to sit there, that's when you sent the texts?
>
> ACC: Yes, sir…

The plea inquiry shows no substantial basis to question the appellant's plea. The appellant's responses leave no doubt that he believed law enforcement was or would be investigating his drug abuse and that his actions were intended to obstruct that investigation. Concerning the airman solicited, the appellant stated that had the airman complied with his requests "he would have been a criminal also." Under these circumstances, we find no abuse of discretion in the acceptance of the appellant's pleas of guilty to solicitation to obstruct justice.

Field Sobriety Tests

On the contested charge of driving under the influence, the trial counsel called the police officer who arrested the appellant. After explaining why he stopped the appellant, the officer testified that he administered Field Sobriety Tests. He first described a horizontal gaze nystagmus test which involves six "clues" related to involuntary jerking of the eyes that may indicate alcohol consumption. Trial defense counsel objected based on lack of foundation, and the military judge permitted trial counsel to attempt to establish a foundation before ruling on the objection. After the witness detailed his training and experience, trial defense counsel stated that she had no further objection to the testimony. The witness testified that the number of indicators seen in Field Sobriety Tests correlate to a percentage estimate of blood alcohol content.

Trial defense counsel extensively cross-examined the officer in an effort to show that his conclusions regarding the Field Sobriety Tests were flawed. Specifically, she used the breathalyzer test results to attack the officer's estimate of blood alcohol concentration:

> Q: Now, you said that if you have the jerks on the gaze nystagmus, combined with the walk-and-turn test, that's like a seventy-something percent chance that you're above a .10, right?
>
> A: It's something like that. I'm not sure about the percentage, but the indicator is higher than just the HGN alone.

Q: But [appellant] was not a .10, in this case, was he?

A: No, he wasn't.

Trial defense counsel argued the apparent ambiguity in the Field Sobriety Test results to show that the appellant was not sufficiently impaired to convict him of driving under the influence.

The appellant argues that the military judge committed plain error by allowing the officer to testify concerning a correlation between Field Sobriety Test results and estimates of blood alcohol concentration. The Government counters that the appellant waived the issue by expressly declining further objection after the witness provided the foundation for his opinion. When an appellant does not object to evidence later complained of on appeal, we distinguish between "forfeiture" and "waiver" of a known right. "A forfeiture is basically an oversight; a waiver is a deliberate decision not to present a ground for relief that might be available in the law." *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009) (quoting *United States v. Cook*, 406 F.3d 485, 487 (7th Cir. 2005)).

To determine whether a right has been forfeited or waived, we consider whether the trial defense counsel's failure to object "constituted an intentional relinquishment of a known right." *Id.* Generally speaking, forfeited issues are reviewed for plain error, whereas waived issues are not subject to appellate review. *Id.* (citing *United States v. Pappas*, 409 F.3d 828, 830 (7th Cir. 2005)). When a right has been forfeited, "Military Rule of Evidence 103(d) allows appellate courts to recognize plain errors that materially prejudice an [appellant's] substantial rights…" *Id.* at 332 n.2.

The record here shows that trial defense counsel made a deliberate decision to waive further objection to the officer's conclusions from the Field Sobriety Tests: she conducted a thorough cross-examination that impeached the officer's blood alcohol estimates with the results of the breathalyzer test and argued to the military judge the officer's erroneous conclusions at the scene of the arrest show that the appellant was not impaired. Allowing the officer to state conclusions which could be attacked with the breathalyzer test result was a sound trial tactic and, in this case, presented perhaps the best chance for acquittal – that it didn't work does not change the decision from one of waiver to one of forfeiture.

Destruction of Video Evidence

The appellant argues that the military judge abused his discretion in denying relief for the destruction of videotaped evidence of the traffic stop which resulted in the appellant's arrest for driving under the influence. The arresting officer testified that his

patrol car was equipped with a dashboard video camera that automatically begins recording when the emergency lights are activated and continues recording until the engine switch is turned off. In the present case the camera would have continued to record throughout the administration of Field Sobriety Tests and initial interview of the appellant. At the station the officer downloaded the video from the camera's hard drive to a disk, and submitted the disk as evidence.

Some months later when the video was requested as evidence, the evidence custodian discovered that the disk was blank and, by that time, the hard drive in the camera had overwritten the original recording of the stop. The arresting officer explained that a technical error likely caused the loss of the video: "[T]he file probably just didn't transfer and I took the disk out before it was done, or there was an error that I didn't realize, but it just didn't transfer to the disk." The officer testified that nothing would have been on the video that he did not personally observe. The military judge denied the motion, concluding that: (1) the lost video had no apparent exculpatory value before it was destroyed; (2) the arresting officer could testify to all the events that were recorded; (3) a second officer at the scene could also testify concerning the events on the video; and (4) the officer did not destroy the evidence in bad faith.

We review a military judge's ruling on the admission of evidence for an abuse of discretion. *United States v. Harris*, 55 M.J. 433, 438 (C.A.A.F. 2001) (citations omitted). An abuse of discretion occurs where the findings of fact are clearly erroneous or the conclusions of law are based on an erroneous view of the law. *Id.* The findings and conclusions in the present case are sufficient to show no abuse of discretion in denying relief for the missing video.

The appellant bases his argument on Rule for Courts-Martial (R.C.M.) 703 which requires "appropriate relief" when evidence of "central importance" is lost or destroyed and there is no "adequate substitute." R.C.M. 703(f)(2). The appellant essentially argues that the military judge applied the wrong standard and that application of the stricter standard of R.C.M. 703 should have resulted in some relief at trial because the video recording was of central importance that had no adequate substitute.

Although the military judge did not cite R.C.M. 703 in his ruling, his findings and conclusions are sufficient to determine that he did not abuse his discretion in denying relief under R.C.M. 703. The military judge clearly concluded that the officer's testimony was an adequate substitute for the missing video:

> If Officer [W] were to testify in findings, based on his testimony regarding the various types of tests used during FSTs, what constitutes a failure of the FSTs, and the [appellant]'s actual responses, the court will still be able [to] evaluate Officer [W]'s credibility, decide how much weight to give his

> testimony and independently determine if the [appellant] was indeed too impaired to drive…
>
> ….
>
> The [appellant] is also able to obtain comparable evidence by other reasonably available means. Officer [W] was present for the entire sequence of events. Based on his testimony during the hearing on the motion, he appears to have sufficient recall of the night's events. In addition to Officer [W], Officer [L] was present for a large portion of the traffic stop.

The findings and conclusions are amply supported by the record and show that the military judge determined that the testimony of the arresting officer was an adequate substitute for the missing video. If an adequate substitute for missing critical evidence exists, then no relief is warranted under R.C.M. 703. Therefore, the military judge did not abuse his discretion in denying relief on both the stated due process grounds as well as the stricter requirements of R.C.M. 703.

Appellate Delay

We note that the overall delay of over 18 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. *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 contains 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 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, 10 U.S.C. §866; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

Accordingly, the findings and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court