UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman ALEXANDRE G. ZURITA
United States Air Force

ACM 37717

25 March 2013

Sentence adjudged 04 June 2010 by GCM convened at Beale Air Force Base, California. Military Judge: Carl L. Reed II.

Approved sentence: Dishonorable discharge, confinement for 8 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; and Captain Luke D. Wilson.

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

Before

ROAN, ORR, and HECKER
Appellate Military Judges

OPINION OF THE COURT

ORR, Senior Judge:

On 3-4 June 2009, the appellant was tried by a court-martial composed of officer members at Beale Air Force Base (AFB), California. Consistent with his plea, he was found guilty of one specification of disrespect to a noncommissioned officer, one specification of violating a lawful order, three specifications of wrongful distribution of marijuana, one specification of wrongful distribution of some amount of 3,4-Methylenedioxymethamphetamine, three specifications of wrongful use of marijuana, one specification of wrongful use of Methamphetamine, and three

specifications of communicating a threat in violation of Articles 91, 92, 112a, and 134, UCMJ, 10 U.S.C. § 891, 892, 912a, 934. The panel of officers sentenced him to a dishonorable discharge, confinement for 8 months, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved the sentence as adjudged.[1]

The appellant raises four issues on appeal: (1) Whether an error occurred when a Central Registry Board report was treated as an admitted exhibit despite the fact it was rejected for admission by the military judge (2) Whether the specifications of communicating a threat fail to state an offense because they allege violations of Article 134, UCMJ, but fail to allege any of the Article's terminal element; (3) Whether the military judge erred by accepting the appellant's plea of guilty to communicating a threat, specifically Specification 3 of Charge V, because (a) the evidence of the case suggested that the appellant had the defense of innocent or legitimate purpose, and (b) there was an insufficient factual basis for the offense on the record and; (4) Whether, given the circumstances of the appellant's offenses as well as the offenses themselves, the appellant's sentence that included a dishonorable discharge is inappropriately severe. Finding no error prejudicial to the substantial rights of the appellant, we affirm. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

Background

In July 2008, Airman First Class (A1C) MS began working as a confidential informant for the Air Force Office of Special Investigations (OSI). As part of his duties, he befriended the appellant. In August 2008, the appellant offered to get A1C MS some marijuana. The following day the appellant called A1C MS and A1C MS gave the appellant $40 to purchase the marijuana. Later, A1C MS went to the appellant's apartment to pick up the marijuana. After the appellant gave A1C MS a Ziploc bag containing 1.69 grams of marijuana, he insisted that A1C MS smoke some so he could determine whether he was working with law enforcement. He told A1C MS that if he turned him in, "I'll kill you, and if I don't, I'll tell my dad to." A1C MS took a hit and passed the joint back to the appellant who also took a hit. A1C MS left the apartment and reported the transaction to the OSI agents and gave them the bag of marijuana.

In September 2008, A1C MS asked the appellant whether he could get some marijuana. The appellant said yes and sold A1C MS approximately 3.64 grams of marijuana for $20. After purchasing the marijuana, A1C MS gave the bag to the OSI agents.

In December 2008, the appellant and Staff Sergeant (SSgt) JS were talking about marijuana at work. SSgt JS told the appellant that his wife smoked marijuana and she

[1] The appellant entered into a pretrial agreement with the convening authority which provided that the convening authority would not approve any confinement in excess of 18 months.

paid her dealer $200 an ounce. The appellant offered to sell her marijuana at the same price and did so on two occasions. Also, after the appellant and his wife moved into SSgt JS's apartment due to a pending reassignment, the appellant found SSgt JS's wife smoking marijuana, asked her for a hit, and smoked the marijuana from a pipe.

In the fall of 2008, the appellant and his wife were visiting a friend, A1C RB, in Yuba City, CA. While there, A1C RB mentioned that he had used ecstasy [3,4-Methylenedioxymethamphetamine] the night before with his girlfriend. The appellant expressed an interest in ecstasy so A1C RB sold the appellant two pills. The appellant swallowed one immediately and saved the other for later.

Over a two-month period, the appellant also discussed buying and selling ecstasy with A1C MS. He offered to buy ten ecstasy pills from a supplier, give them to A1C MS who would, in turn, sell them for a profit. They agreed that A1C MS would buy the ten pills of ecstasy from the appellant for $70 and sell them for $150. However, when the supplier was available, A1C MS did not have the money so the appellant used his own money to buy the pills. After A1C MS received $150 from the OSI, he repaid the appellant his $70 and they split the remaining $80 evenly. A1C MS then turned the pills and $40 over to the OSI.

In July 2009, the appellant also used methamphetamine at his home in Marysville, CA, by swallowing it. He used it again in August 2009, by heating the drug on tinfoil and inhaling the smoke.

In January 2010, the appellant and his wife were having marital difficulties. When two noncommissioned officers (NCO) went to his house to check on him, they noticed that he was very agitated. He accused his wife of stealing his belongings and said, "I'm tired of that fucking bitch taking my shit" and, "when I see her I'm going to kill her." As a result, his commander issued a written no contact order and placed him in the dormitory. The appellant was also detailed to work at the chapel and drove his wife's car on the weekends. After his wife got a ride to the chapel to retrieve her car, she drove the car to a nearby dormitory where she worked. Shortly after she arrived, she began inspecting the car. Just as she lowered the hood of her car, the appellant approached in a gold colored car. He got out of the car and starting yelling obscenities at her. He then reached into her car and attempted to retrieve her keys. When he was unsuccessful, he opened the hood of her car and pulled out the spark plug wires. After a passerby notified the dorm manager, SSgt JM, of the situation in the parking lot, he came outside to resolve the dispute. When the appellant's wife pointed in the appellant's direction, SSgt JM told the appellant, "you do not want to go there." In response, the appellant said, "I don't give a fuck, if you want to bring it on, keep stepping." SSgt JM told the appellant to sit on the bench by the chapel to which the appellant responded, "I'm not going to sit any fucking where, if you want to bring it, bring it." Soon two Security Forces members arrived and apprehended the appellant. As he was being escorted to the patrol car, the appellant said

he would "take care of her later." When informed of his suspected offenses, the appellant said "if she wants to get assaulted, then I can help her out with that."

Sentencing Evidence

In his first assignment of error, the appellant claims that an error occurred when Prosecution Exhibit 15 was treated as an admitted exhibit despite the fact that the military judge rejected its admission into evidence.

During an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session, the prosecution offered to admit Prosecution Exhibit 15 (hereafter the Exhibit) as rebuttal evidence. The Exhibit is a three-page document prepared by the Beale AFB Central Registry Board[2] describing two claims made by the appellant's wife of "physical maltreatment" upon her by the appellant. The report of the first incident from November 2009, reads as follows: "Couple was arguing: [the appellant] held [the appellant's wife] down by getting on top of her on the couch and put his hand over her mouth the [sic] keep her from yelling. [The appellant's wife] pushed [the appellant] off, by pushing him in the face. [The appellant's wife] called police for help. [The appellant] had busted lip; [the apppellant's wife] arrested for domestic violence." The Central Registry Board determined this incident did not meet the criteria for adult maltreatment.

The third page of the Exhibit is a letter dated 11 February 2010, and states that an allegation of "physical maltreatment" of the appellant's wife by the appellant met the criteria for adult maltreatment and entry into the Department of Defense Central Registry database. The date or details of the allegation are not included in the letter.

The military judge determined that it was not admissible as appropriate rebuttal. As a result, the panel members could not be provided the Exhibit. *See* Rule for Courts-Martial 1006(b).

The first issue before us is whether the panel members actually received the Exhibit and, if so, whether it had any impact upon the appellant's sentence. We are not convinced that the members actually received the Exhibit.

Although the Exhibit is clearly marked as "rejected" by the military judge, it is found in the record with the other prosecution exhibits admitted by the military judge. Additionally, the Exhibit is listed in the master index as an "admitted" prosecution exhibit, as opposed to the column indicating that it was "rejected" by the military judge. As a result, the appellant asserts that it "appears from the record of trial" that the document was taken by the members into their deliberations.

[2] The "Central Registry Board" is a multidisciplinary team that makes administrative determinations in cases of suspected family maltreatment. Air Force Instruction (AFI) 40-301, *Family Advocacy*, ¶ 4.1.1 (30 November 2009).

Despite the court reporter's post-trial affidavit to the contrary, the appellant argues it is a "reasonable inference" to believe she inadvertently passed the Exhibit to the panel members. In her affidavit, the court reporter avers she made an administrative error in her Master Index when she placed the Exhibit in the "accepted" column, rather than indicating that it was rejected by the military judge. She distinctly remembers that the military judge did not send the Exhibit back with the court members because the document remained in her sole possession after it was rejected. Given her specific and detailed memory, we find that the Exhibit was not given to the members.

We have considered the conflict between the court reporter's affidavit and the record of trial's exhibit list as we tested for prejudice. When there is a dispute about a factual matter material to an appellate issue, we need only resort to a post-trial fact-finding hearing if, inter alia, the alleged errors would not warrant relief even if the factual dispute were resolved in the appellant's favor. *United States v. Ginn*, 47 M.J. 236, 243, 248 (C.A.A.F. 1997). Such is the case at hand. Although it is speculative and highly unlikely the panel members actually received the Exhibit, we will assume, arguendo, that they did. The panel's receipt of the documents would therefore be error. However, that does not end our inquiry, as we must evaluate whether such error prejudiced the appellant. *See* Article 59(a), UCMJ. We can determine with confidence that the error did not. In the instant case, the record is full of uncontroverted evidence that the appellant wrongfully used and sold controlled substances on numerous occasions. Additionally, he was verbally abusive to his wife, threatened to kill her, and pled "no contest" in a civilian court to damaging her car. Further, he threatened to kill another Airman, was disrespectful to an NCO, and violated a direct order. Moreover, the panel members received information from his personnel records that included descriptions of several minor disciplinary infractions as well as a record of a nonjudicial punishment action. Given the amount of charged misconduct, coupled with the properly admitted derogatory information received by the panel members, we are confident that if they actually received the Exhibit, the effect would have been de minimis and the sentence would be the same. *See United States v. Sales*, 22 MJ 305, 308 (C.M.A. 1986). Therefore, the appellant's assertions are without merit.

Article 134, UCMJ, Offenses

In his second assignment of error, the appellant asserts that all three of the specifications under Charge V fail to state an offense because they fail to allege any of the three clauses of Article 134, UCMJ.[3] Whether a specification states an offense is a question of law we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F.

[3] Under Article 134, UCMJ, 10 U.S.C. § 134, the Government must prove beyond a reasonable doubt that the accused engaged in certain conduct and that the conduct satisfied one of three criteria, often referred to as the "terminal element." Those criteria are that the accused's conduct was: (1) to the prejudice of good order and discipline, (2) of a nature to bring discredit upon the armed forces, or (3) a crime or offense not capital.

2006). In *United States v. Fosler*, 70 M.J. 225, 233 (C.A.A.F. 2011), a contested case, our superior court held that where an Article 134, UCMJ, specification failed to allege the terminal element, the specification failed to state an offense. The Court dismissed the specification as defective. *Id*. *Fosler*, however, did not involve a guilty plea. Recently, our superior court has addressed the failure to allege the terminal element in an Article 134, UCMJ, specification where the appellant was convicted on the basis of a guilty plea. *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012), *cert. denied* 133 S.Ct. 41 (2012) (mem.). *See also United States v. Nealy*, 71 M.J. 73 (C.A.A.F. 2012); *United States v. Watson*, 71 M.J. 54 (C.A.A.F. 2012). In *Ballan*, the Court held that:

> [W]hile it is error to fail to allege the terminal element of Article 134, UCMJ, expressly or by necessary implication, in the context of a guilty plea, where the error is alleged for the first time on appeal, whether there is a remedy for the error will depend on whether the error has prejudiced the substantial rights of the accused.

71 M.J. at 30 (citing Article 59, UCMJ, 10 U.SC. § 859). The *Ballan* Court further held that, where the military judge describes Clauses 1 and 2 of Article 134, UCMJ, for each specification during the plea inquiry and where "the record 'conspicuously reflect[s] that the accused 'clearly understood the nature of the prohibited conduct' as a violation of clause 1 [or] clause 2" of Article 134, UCMJ, there is no prejudice to a substantial right. *Id*. at 35 (alterations in original) (citing *United States v. Medina*, 66 M.J. 21, 28 (C.A.A.F. 2008)) (internal quotation marks omitted).

Here, the appellant did not challenge the sufficiency of the specifications at trial and pled guilty to the charge and specifications of wrongfully communicating a threat. The military judge conducted a thorough plea inquiry and described and defined the Clause 1 and 2 terminal elements of the Article 134, UCMJ, charge. For each specification, he asked the appellant whether he believed his conduct was either prejudicial to good order and discipline or service discrediting. The appellant acknowledged understanding all the elements, and explained to the military judge why he believed his conduct was both prejudicial to good order and discipline and service discrediting. Thus, "while the failure to allege the terminal elements in the specification[s] was error, under the facts of this case the error was insufficient to show prejudice to a substantial right." *Id*. at 36; *Nealy*, 71 M.J. at 77-78; *Watson*, 71 M.J. at 58-59.

Providence of the Guilty Plea

In his third assignment of error, the appellant contends that the military judge erred when he accepted his guilty plea to communicating a threat as alleged in Specification 3 of Charge V and asks this Court to set aside this specification. He gives two reasons for this assertion. First, he claims that the evidence raises a potential defense

of innocent or legitimate purpose. Next, he asserts that there was an insufficient factual predicate for the offense on the record. We disagree.

We review for an abuse of discretion a military judge's decision to accept or reject an accused's guilty plea. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). A decision to accept a guilty plea will be set aside only where the record of trial shows "a 'substantial basis' in law and fact for questioning the [ ] plea." *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

In the specification at issue, the appellant is charged with threatening to injure his wife by telling Technical Sergeant MC and Technical Sergeant RK that, "I will take care of her one way or another" and, "oh if she wants to get assaulted, then I can help her out with that." The appellant now claims that the threats were not serious and he was just "making statements." Although the appellant correctly points out that a defense to communicating a threat exists under Article 134, UCMJ, where the circumstances reveal that it was made in jest or innocent or legitimate purpose, such is not the case here. *United States v. Brown*, 65 M.J. 227, 231 (C.A.A.F. 2007).

In making this determination we looked at the context in which the statements were made. The appellant made these threats after shouting obscenities at his wife, damaging her car, and disrespecting a noncommissioned officer earlier that day. He also said he would "take care of her later" as he was being escorted to the patrol car. Additionally, he was very agitated and exhibiting violent behavior as he was placed into confinement. During the providence inquiry, the appellant stated that he made the threats while he was upset, "with a very emotional, angry tone," and while people were trying to calm him down. He went on to say that he should not have said what he did but, "At the time, I meant to make the threats." He also said that under the circumstances, his statements indicated an intent to injure his wife either presently or in the future.

We are also not persuaded by the appellant's argument that the record lacked a sufficient factual basis for the military judge to accept his plea. He contends that the language of the threat was so unrealistic that the conditions would never be met. Because the appellant made the statements while upset and in confinement, he argues we should find he did not have a present determination or intent to wrongfully injure his wife, and even assuming that he had the intent to wrongfully injure his wife, the threat to injure her was conditioned upon her desire to be assaulted. In short, he now claims that his statements were an expression of his state of mind and not a real threat.

After reviewing the appellant's actions in their complete context, we find that the military judge did not abuse his discretion by accepting the appellant's plea. The military judge was well aware of the acrimonious relationship between the appellant and his wife. He was also aware of the appellant's stated motive for making the statements and his

actions which began with the appellant confronting his wife and pulling the spark plug wires out of her car earlier in the day. In fact, the military judge asked him twice whether the language he used under the circumstances, amounted to a threat. He said "Yes, Sir" both times. After considering the military judge's questions and the appellant's responses during the providence inquiry in their complete context, we find that his claims that the military judge's questioning was deficient and the facts on the record were insufficient to support this offense are without merit, and the military judge did not abuse his discretion in accepting the appellant's plea of guilty.

Sentence Appropriateness

In his fourth assignment of error, the appellant asserts that his sentence was inappropriately severe. He contends that his misconduct does not warrant the imposition of a dishonorable discharge. We disagree. As previously stated, the appellant pled guilty to wrongfully using and distributing illegal drugs on multiple occasions. Additionally, he was disrespectful toward an NCO and disobeyed a lawful order given to him in writing by his commander. Moreover, he wrongfully communicated a threat on three separate occasions. The maximum punishment for his offenses includes a dishonorable discharge and confinement for 85 years and nine months. After reviewing the record of trial, we find the convening authority's approved sentence to be appropriate, as required by Article 66(c), UCMJ, 10 U.S.C. § 866(c), and reject the appellant's argument that he should not receive a dishonorable discharge.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred.[4] Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[4] 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)).