

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
WALKER, EWING, and PARKER
Appellate Military Judges

UNITED STATES, Appellee

v.

Sergeant First Class BYUNGGU KIM
United States Army, Appellant

ARMY 20200689

Headquarters, United States Military Academy
Mary Catherine Vergona and Troy A. Smith, Military Judges
Colonel William D. Smoot, Staff Judge Advocate

For Appellant: Colonel Michael C. Friess, JA; Jonathan F. Potter, Esquire; Captain Julia M. Farinas, JA (on brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Rachel P. Gordienko, JA; Captain Julia M. Farinas, JA (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Pamela L. Jones, JA; Captain Dustin L. Morgan, JA (on brief).

26 May 2022

SUMMARY DISPOSITION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

WALKER, Senior Judge:

Appellant asserts that his searching a pornographic website for videos depicting “rape sleep” and “drugged sleep” fail to constitute the offense of indecent conduct. We hold that appellant’s unconditional guilty plea waived this claim and affirm.¹

¹ We have fully and fairly considered appellant’s other assignment of error asserting that his conviction for indecent conduct is unconstitutional as applied to him, in violation of the First Amendment, and determined that it warrants neither discussion nor relief.

BACKGROUND

Appellant's offenses stem from his sexually abusing his step-daughter over the course of a two-year period beginning in 2018 when she was [REDACTED] years old. Appellant's sexual attraction to his step-daughter began when he traveled alone with her for purposes of getting her a medical examination. While staying at a hotel, appellant slept in the same bed as his step-daughter. Upon returning home, appellant realized he missed the physical intimacy of spending time alone with his step-daughter as he had during their trip together. Thus, appellant began to keep his step-daughter awake late in the evenings in order to be alone with her either in the living room or her bedroom. During these encounters, appellant waited until his step-daughter was tired and falling asleep and began providing massages which began on her back and shoulders. Appellant provided these massages in order to gratify his sexual desires. Over time, the massages progressed to her buttocks, inner thigh, and genitalia, both over the clothing and under the clothing. The abuse continued despite appellant's step-daughter reporting the abuse to her mother in late 2018 after an incident in which appellant touched his stepdaughter's genitalia under her clothing as she fell asleep in her bed. Appellant leveraged his step-daughter's medical issues in refuting her allegation by accusing his step-daughter of hallucinating the incident because he knew she was taking a prescription medication in which hallucinations were a side effect.

Appellant's behavior escalated during a family trip in January 2019. While staying at his parent's house, appellant tracked when his step-daughter was going to shower. Prior to his step-daughter entering the bathroom, appellant would stage his cell phone in an inconspicuous location and record his step-daughter in the bathroom in order to capture videos of her without any clothing. He even staged the phone in certain locations in order to ensure he captured her exposed genitalia while shaving her legs. Appellant recorded several videos of his step-daughter, which he edited down to the most sexually explicit parts, and kept them on his cellphone in a folder labeled "trash." Over the course of the next few months, appellant conducted searches on a pornographic website using the terms "rape sleep" and "drugged sleep." In April 2019, appellant's step-daughter reported him to law enforcement when he attempted to sexually abuse her while her mother was recovering in the hospital from giving birth.

Appellant ultimately pleaded guilty to several offenses. During appellant's guilty plea, in addition to explaining how he sexually abused his daughter multiple times over the course of two years, he admitted that he committed the offense of indecent conduct by searching for videos on a pornographic website using the terms "rape sleep" and "drugged sleep." He explained that while he had conducted these searches a number of times, he recalled using those terms during the charged time period because it was after he returned from visiting his parents. Appellant admitted that he used those search terms because he wanted to view pornographic videos

“depicting simulated vulgar sex scenes involving sleep or sex with an individual that was pretending to be asleep.” Appellant explained that he watched videos depicting simulated forceful sexual acts which excited his sexual desires. Specifically, appellant admitted that these videos reminded him of times that he sexually abused his step-daughter. Lastly, appellant admitted that his conduct of viewing these types of videos was service-discrediting.

On 16 November 2020, in accordance with his pleas, a military judge found appellant guilty of four specifications of sexual abuse of a child, one specification of making an indecent recording, one specification of assault consummated by a battery, and one specification of indecent conduct, in violation of Articles 120b, 120c, 128, and 134, Uniform Code of Military Justice, respectively. 10 U.S.C. §§ 920b, 920c, 928, and 934 (2018). Appellant was sentenced to a dishonorable discharge, to be confined for 130 months, and reduction to the grade of E-1. In accordance with the plea agreement, the convening authority approved only so much of the sentence that extended to a dishonorable discharge, confinement for six years, and reduction to the grade of E-1.

LAW AND DISCUSSION

Appellant’s second assignment of error is captioned as “whether the military judge abused his discretion in accepting appellant’s guilty plea to the specification of Charge IV,” that being the specification of indecent conduct. We find that appellant actually asserts in his brief that the specification of indecent conduct fails to state an offense. We hold that appellant waived this issue with his unconditional guilty plea.²

The substance of appellant’s argument is that the underlying facts of the offense of indecent conduct, to which he pleaded guilty, did not constitute unlawful conduct. First, appellant argues that conducting an internet search for legal pornographic material does not constitute an indecent act “by any standard.” Further, appellant goes on to assert that the terms “rape sleep” and “drugged sleep” do not transform an internet search into indecent conduct. Lastly, appellant asserts that the facts and circumstances of his searching for vulgar pornographic material was not service discrediting. In essence, what appellant argues is that his conduct fails to state an offense.

Rule for Courts-Martial (R.C.M.) 907 makes clear that claims of failure to state an offense are non-jurisdictional, and therefore waivable. R.C.M. 907(b)(2)

² We note that the government did not press a waiver claim before this court. We nonetheless address the issue of waiver based upon our obligation to determine whether the findings are correct in law.

(expressly listing failure to state an offense as non-jurisdictional and waivable). Further, this court has previously held an unconditional guilty plea waives any claim of failure to state an offense. *United States v. Sanchez*, 81 M.J. 501, 504 (Army Ct. Crim. App. 2021). When appellant pleaded guilty to the specification of indecent conduct he was “not simply stating that he did the discrete acts described in the [specification]; he [was] *admitting guilt of a substantive crime.*” *United States v. Hardy*, 77 M.J. 438, 442 (C.A.A.F. 2018) (emphasis added) (quotation omitted). Thus, an unconditional guilty plea is, by definition, an affirmative waiver of a “failure to state and offense” claim for the pleaded-to offense. As we noted in *Sanchez*, “[s]ecuring a favorable pretrial agreement via a guilty plea, and then on appeal attacking the facial legality of one the specifications, is inconsistent with the fair and efficient administration of justice.” 81 M.J. at 506. We once again remind practitioners of raising and litigating claims early in the court-martial process. *See id.*

CONCLUSION

For the foregoing reasons we conclude that appellant waived any claim of failure to state and offense by nature of his pleading guilty to the specification of indecent conduct.

Upon consideration of the entire record, the findings of guilty and the sentence are AFFIRMED.

Judge EWING and Judge PARKER concur.

FOR THE COURT:



JAMES W. HERRING, JR. *JWH*
Clerk of Court