UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
BROOKHART, PENLAND, and ARGUELLES[1]
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant CHAYLE HENG
United States Army, Appellant

ARMY 20210404

Headquarters, 25th Infantry Division
Mark A. Bridges, Military Judge
Colonel Marvin J. McBurrows, Staff Judge Advocate

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

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Captain R. Tristan C. De Vega, JA (on brief).

24 June 2022

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

ARGUELLES, Judge:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of two specifications of domestic violence and one specification of animal abuse in violation of Articles 128b and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 928b, 934 (2018) [UCMJ]. In accordance with the plea agreement, the military judge sentenced appellant to a bad-conduct discharge, confinement for seventeen months, and reduction in rank to E-1.

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[1] Judge Arguelles decided this case while on active duty.

This case is before the court for review pursuant to Article 66, UCMJ. Appellant's sole assignment of error is that in enacting Article 128b, Congress intended to preempt the two-year maximum confinement authorized by the President for violations of Article 128 assault consummated by a battery that involve a spouse, partner, or child.[2] For the reasons that follow, we disagree and order no relief.

BACKGROUND

At the time of the plea, the President had not yet promulgated the maximum punishment for the two Article 128b domestic violence specifications at issue. Rule for Courts-Martial [R.C.M.] 1003(c)(1)(B)(i) provides that for an offense not listed in Part IV of the Manual for Courts-Martial which "is included in or closely related to an offense listed therein the maximum punishment shall be that of the offense listed . . . ." During the plea colloquy, after the military judge referenced R.C.M. 1003(c)(1)(B), both counsel agreed that the Article 128b domestic violence offenses to which appellant pleaded guilty were most similar to the Article 128 offense of assault consummated by a battery on a spouse, which had a listed maximum confinement of two years. In addition, the plea agreement listed a range of two to fourteen months for the two Article 128b offenses. At the conclusion of the trial, the military judge sentenced appellant to eight months for the first Article 128b specification, five months for the second, and four months for the Article 134 animal abuse specification, all to run consecutively for a total of seventeen months.

Notwithstanding that his counsel expressly agreed that the statutory maximum for the Article 128b domestic violence offenses was two years, and that he agreed that he could be sentenced to up to fourteen months for these offenses, appellant now claims that the statutory maximum for the domestic violence offenses was really only six months. Specifically, appellant argues that by passing the statute authorizing the new Article 128b domestic violence offense, Congress expressly intended to preempt the President's two-year maximum penalty for an Article 128 assault consummated by a battery on a spouse, partner, or child. As such, appellant argues that the most closely related offense to Article 128b was simple assault under Article 128, which carries a maximum confinement of six months. Viewed in light of the actual language of the two provisions at issue, however, along with the principles of statutory interpretation, appellant's claim is without merit.

LAW AND DISCUSSION

1. Additional Facts

[2] Unless otherwise noted, all punitive article references are to the UCMJ.

On March 1, 2018, the President signed Executive Order 13,825, 83 Fed. Reg. 9889 [Exec. Order 13,825], which added the following language to Article 128, effective 1 January 2019:

> (3) *Assaults permitting increased punishment based on status of victim.*
>
> . . .
>
> (c) *Assault consummated by a battery upon a child under 16 years, a spouse, intimate partner, or immediate family member.*
>
> (i) That the accused did bodily harm to a certain person;
>
> (ii) That the bodily harm was done unlawfully;
>
> (iii) That the bodily harm was done with force or violence; and
>
> (iv) That the person was then a child under the age of 16 years, or a spouse, intimate partner, or immediate family member of the accused.
>
> . . .
>
> (f) *Assault consummated by a battery upon a child under 16 years, spouse, intimate partner, or an immediate family member.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

Exec. Order 13,825 at 9890, 10292, and 10297. The Executive Order did not, however, alter the Article 128 definition of bodily harm as "an offensive touching of another, however slight." *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*], pt. IV, ¶77.c.(1)(a).

On 13 August 2018, six months after the President signed his Executive Order, Congress passed the National Defense Authorization Act for Fiscal Year 2019 [NDAA 2019], Pub. L. No. 115-232, 132 Stat. 1636 (2018). Included within NDAA 2019 was a new offense, Article 128b Domestic Violence, which provided as follows:

> Any person who—
>
> (1) commits a violent offense against a spouse, an intimate partner, or an immediate family member of that person;
>
> (2) with intent to threaten or intimidate a spouse, an intimate partner, or an immediate family member of that person—
>
> (A) commits an offense under this chapter [10 U.S.C §§ 801 et seq.] against any person; or

> (B) commits an offense under this chapter [10 U.S.C §§ 801 et seq.] against any property, including an animal;
>
> (3) with intent to threaten or intimidate a spouse, an intimate partner, or an immediate family member of that person, violates a protection order;
>
> (4) with intent to commit a violent offense against a spouse, an intimate partner, or an immediate family member of that person, violates a protection order; or
>
> (5) assaults a spouse, an intimate partner, or an immediate family member of that person by strangling or suffocating; shall be punished as a court-martial may direct.

NDAA 2019, § 532(a), 132 Stat. at 1759-60. This new provision took effect on 1 January 2019. NDAA 2019, § 532(b), 132 Stat. at 1760. Article 128b makes no mention of Article 128, or the President's Executive Order implementing the two-year punishment enhancement for assault consummated by battery committed upon a child under 16 years, a spouse, intimate partner, or immediate family member.

2. Law

"The construction of a statute is a question of law that we review de novo." *United States v. Kelly,* 77 M.J. 404, 406 (C.A.A.F. 2018) (citation omitted). In determining whether Congress intended to preempt Article 128's two-year victim-status penalty enhancement by enacting a new Article 128b domestic violence offense, we start with the well-established principles of statutory construction. *United States v. McNutt*, 62 M.J. 16, 20 n.27 (C.A.A.F. 2005). Statutory construction begins with the language of the statute. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-42 (1989). The plain language will control unless its application would lead to an absurd result. *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (citations omitted); *United States v. Beauge,* __ MJ ___, 2022 CAAF LEXIS 181, at *9 (C.A.A.F. 3 Mar. 2022) (citing *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012)). In *Beauge*, the Court of Appeals for the Armed Forces (CAAF) further explained:

> In determining whether language is plain, a court must look 'to the language itself, the specific context in which that language is used, and the broader context of the [rule] as a whole.' *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997). Where 'only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law,' that meaning will prevail. *United Sav. Ass'n v. Timbers of*

> *Inwood Forest Assocs.*, 484 U.S. 365, 371, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988).

2022 CAAF LEXIS 181, at *9.

"Going behind the plain language of a statute in search of a possibly contrary congressional intent is a step to be taken cautiously." *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982) (citation and internal quotation marks omitted).

Another fundamental tenet of statutory construction is that, in the absence of an express intent to preempt, when reviewing two statutes that at first blush appear to conflict, appellate courts should "seek[] to harmonize independent provisions of a statute." *Kelly*, 77 M.J. at 406-07; *United States v. Bartlett*, 66 M.J. 426, 428 (C.A.A.F. 2008) (holding that "statutes covering the same subject matter should be construed to harmonize them if possible . . . ."); *United States v. Kohlbeck*, 78 M.J. 326, 332 (C.A.A.F. 2019) ("Unsurprisingly, under the 'presumption of validity' canon, an interpretation of a statute or rule that renders it valid is preferable to an interpretation that would invalidate the rule.") (citation omitted). In *United States v. LaGrange*, 1 C.M.A. 342, 3 C.M.R. 76, 78 (1952), for example, the Court of Military Appeals [CMA] was faced with an alleged conflict between a rule of procedure prescribed by the President and a Congressionally-enacted statutory provision. Although the court recognized that the statute must stand alone if the two were inconsistent, it also held that any such perceived conflict "imposes on this Court the duty to reconcile any conflicting provisions dealing with the same subject matter and to construe them, in so far as reasonably possible, so as to be in harmony with each other." *Id.*

Along the same lines, it is not enough to show that two penalty provisions might produce different results when applied to the same facts, but "[r]ather, the legislative intent to repeal must be manifest in the 'positive repugnancy between the provisions.'" *United States v. Batchelder*, 442 U.S. 114, 121-22 (1979) (citing *United States v. Borden Co.*, 308 U.S. 188, 199 (1939)). *See also United States v. McPherson*, 73 M.J. 393, 396 (C.A.A.F. 2014) ("This Court has no license to generate a statutory conflict where none exists . . . ."); *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979) ("[I]t must be shown that Congress intended the other punitive article to cover a class of offenses in a complete way.") (citations omitted).

Finally, as part of our analysis we must also "assume that Congress is aware of existing law when it passes legislation." *United States v. McDonald*, 78 M.J. 376, 380 (C.A.A.F. 2019) (citing *Miles v. Apex Marine Corps*, 498 U.S. 19, 32 (1990)); *Kick*, 7 M.J. at 85 ("It is reasonable to assume that Congress was aware of the existence of such military law when performing its constitutional task to make laws for the armed forces.").

3. Analysis

First, it is easy to harmonize Article 128b and the Article 128 enhanced two-year punishment provision. While Article 128b covers a broader range of conduct than does the Article 128 penalty enhancement, *i.e.*, subsection (1) entails the commission of a "violent" offense, it also applies to conduct not covered by Article 128. Specifically, subsections (2)–(4) of Article 128b, UCMJ, require the violation of a protective order or the intent to threaten or intimidate, neither of which are necessary to violate Article 128. In addition, unlike the Article 128b victim-based penalty enhancement, Article 128b does not apply to assaults committed against non-family member children. As such, and given the absence of any "positive repugnancy between the provisions," Article 128b and the two-year victim enhancement of Article 128 are easily harmonized. *See Kohlbeck*, 78 M.J. at 332 (holding that "an interpretation of a statute or rule that renders it valid is preferable to an interpretation that would invalidate the rule"); *Batchelder*, 442 U.S. at 122 ("In this case, however, the penalty provisions are fully capable of coexisting because they apply to convictions under different statutes.").

Second, as noted above there is nothing in the plain language of Article 128b which addresses, or even mentions, the victim-based penalty enhancements for Article 128. In short, absent the expression of any intent by Congress to the contrary, we are not at liberty to conclude that Congress meant to broadly eliminate the two-year maximum penalty for any assaults consummated by battery committed against a spouse or partner that are not otherwise covered by Article 128b, or for that matter, *any* type of assault consummated by a battery committed against a non-family member child victim. *McPherson*, 73 M.J. at 396 ("This Court has no license to generate a statutory conflict where none exists . . . ."); *Kick*, 7 M.J. at 85 ("We are extremely reluctant to conclude that Congress intended these provisions to preempt this offense from the spectrum of punishable criminal homicides in the absence of a clear showing of a contrary intent either in the language of these codal provisions or their legislative history.").[3]

[3] Appellant does not argue or cite to the NDAA 2019 legislative history in support of his position, and we decline to pore over the voluminous legislative history of that statute in an effort to piece together an argument on his behalf. *See also King v. Burwell*, 576 U.S. 473, 486 (2015) ("If the statutory language is plain, we must enforce it according to its terms.") (citation omitted); *Am. Tobacco Co,* 456 U.S. at 75 (holding that "[g]oing behind the plain language of a statute in search of a possibly contrary congressional intent is a step to be taken cautiously") (citation and internal quotation marks omitted).

Further bolstering our conclusion is that when Congress passed the 2019 NDAA in August of 2018, it is presumed to have known that: (1) back in March of 2018, the President already increased the penalty for Article 128 assault consummated by a battery against spouse/partner/children victims to two years; and (2) that its newly enacted Article 128b domestic violence offense was set to go into effect on the same date as the increased Article 128 penalty provision, 1 January 2019. Notwithstanding this presumption, and the fact that Article 128b makes no reference to Article 128 or its increased penalties, appellant argues that at the same time it was authorizing an new offense broadly targeting domestic violence, Congress also intended *sub silentio* to drastically reduce: (1) the penalty for those assaults consummated by a battery committed against a spouse or partner that do not fall within the provisions of Article 128b; and (2) the penalty for any assault consummated by a battery against non-family member children. As such a reading of the statute flies in the face of logic, common sense, and every tenet of statutory construction, we decline to accept such an absurd interpretation of Article 128b.[4]

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Senior Judge BROOKHART and Judge PENLAND concur.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court

[4] Appellant incorrectly cites to NDAA 2019 for his claim that it contains a Section 548 that further supports his argument. On December 20, 2019, over sixteen months after authorizing the new Article 128b, Congress passed the National Defense Authorization Act for Fiscal Year 2020 [NDAA 2020], Pub. L. No. 116-92, 133 Stat. 1198 (2019). Section 548 of NDAA 2020 authorizes legal counsel for victims of certain domestic violence offenses, to include Article 128b but not Article 128. But, this provision makes no mention of any intent to preempt Article 128 or its increased penalties, and again was implemented almost one year after both Article 128b and the enhanced penalties of Article 128 went into effect. As such, we reject out of hand appellant's contention that by authorizing counsel for victims of Article 128b, but not Article 128, Congress also intended "for Article 128b, UCMJ, to be the preeminent statute regarding domestic violence," and/or to eliminate the two-year enhancement under Article 128.