

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
BROOKHART, PENLAND, and ARGUELLES¹
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant First Class TIANTHONY L. WAGNER
United States Army, Appellant

ARMY 20210336

Headquarters, 7th Infantry Division
Matthew S. Fitzgerald, Military Judge
Lieutenant Colonel Robert A. Rodrigues, Staff Judge Advocate

For Appellant: Major Rachel P. Gordienko, JA; Captain Ian P. Smith, JA (on brief).

For Appellee: Major Pamela A. Jones, JA (on brief).

21 October 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This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.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 one specification of drunken operation of a vehicle and two specifications of simple assault with an unloaded firearm, in violation of Articles 113 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 913 and 928 [UCMJ].

The military judge sentenced appellant to confinement for eight months, reduction in rank to E-3, a bad conduct discharge, and total forfeiture of all pay and allowances. Specifically, the military judge sentenced appellant to four months on each of the Article 128 specifications, to run consecutively, and no time on the Article 113 specification. The convening authority took no action on the findings.

¹ Judge Arguelles decided this case while on active duty.

This case is before the court for review pursuant to Article 66, UCMJ. Although not raised by appellant, based on our independent review of the record and for the reasons that follow, we find that there was not an adequate basis in law and fact to support his guilty plea to one of the assault specifications. In addition, we provide additional relief as set forth in our decretal paragraph based on the government's dilatory post-trial processing.²

BACKGROUND

On the evening of 5 January 2020, appellant and his ex-girlfriend crossed paths at a bar where appellant played music, and argued about why their relationship ended. After leaving the bar, appellant drove to his ex-girlfriend's house, which was occupied at the time by her adult children ("Son" and "Daughter"). When appellant arrived at the house, Son let him in and relayed to him that his mother said she was forty-five minutes away. Upon hearing this appellant became irate and took out a handgun, which he eventually put away before returning to his car to wait for his ex-girlfriend.

After drinking vodka in his car for approximately forty-five minutes, appellant pushed his way into the house and waved his gun around, "flagging" and pointing it at Son. Appellant then went upstairs to Daughter's room, where he woke her up, hugged her, and told her that "whatever happens between your mom and I tonight, I still love you." Appellant still had his firearm in his hand while he was talking to Daughter, and likewise "flagged" her several times. When appellant's ex-girlfriend arrived at the residence, she gave Son and Daughter her car keys and told them to leave the home.

LAW AND DISCUSSION

A. Factual Insufficiency - Specification 5 of Charge IV

We review a military judge's acceptance of a guilty plea for an abuse of discretion, and questions of law arising from the guilty plea de novo. *United States v. Murphy*, 74 M.J. 302, 305 (C.A.A.F. 2015) (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)).

When an appellant has pleaded guilty, the validity of the conviction "must be analyzed in terms of providence of his plea, not sufficiency of the evidence." *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996). The military judge is

² We have also given full and fair consideration to the other matter personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find it to be without merit.

responsible for determining whether there is an adequate basis in law and fact to support a guilty plea. *Inabinette*, 66 M.J. at 322 (citation omitted). To that end, a providence inquiry must establish not just that the accused believes himself guilty, “but also that the factual circumstances as revealed by the accused himself objectively support that plea.” *United States v. Higgins*, 40 M.J. 67, 68 (C.M.A. 1994) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). It is not sufficient to merely obtain the accused’s consent to the elements as defined. Rather, the military judge must question the accused “about what he did or did not do, and what he intended” in order to establish the providence of his plea. *United States v. Care*, 40 C.M.R. 247, 253 (1969). A military judge abuses this discretion where he fails to obtain an adequate factual basis to support the plea. *Inabinette*, 66 M.J. at 322.

In reviewing a military judge’s acceptance of a plea, we apply a substantial basis test: “Does the record as a whole show ‘a substantial basis’ in law and fact for questioning the guilty plea.” *Id.* (citations omitted). Put another way, once the military judge accepts the plea and enters a finding, “an appellate court will not reverse that finding and reject the plea unless it finds a substantial conflict between the plea and the accused’s statements or other evidence of record,” to include the stipulation of fact. *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996); *United States v. Sweet*, 42 M.J. 183, 185 (C.A.A.F. 1995) (in determining whether a guilty plea is provident, the military judge may consider “the facts contained in the stipulation [of fact] along with the inquiry of appellant on the record”). Finally, the “mere possibility” of such a conflict between the plea and appellant’s statements is not a sufficient basis to overturn the trial results. *Garcia*, 44 M.J. at 498 (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

At issue here is Specification 5 of Charge IV, to which appellant pleaded guilty for simple assault of Daughter with an unloaded firearm, in violation of Article 128, UCMJ:

In that [appellant] did, at or near Tacoma, WA, on or about 5 January 2020, assault [Daughter] by pointing at her with an unloaded firearm.

Prior to discussing the two specifications at issue, the military judge thoroughly explained the ramifications of appellant’s guilty plea and the rights he was forfeiting by virtue of his plea. The military judge also explained the meaning and purpose of the stipulation of fact, ensuring that appellant fully understood and agreed to it.

As part of the providence inquiry, the military judge correctly explained the elements of the offense of simple assault with an unloaded firearm: (1) that appellant offered to do bodily harm to the victim by pointing at her with an unloaded firearm; (2) that the offer was done unlawfully; (3) that the offer was done with force and

violence; and (4) that the offer was done with an unloaded firearm. Tracking the language of the Military Judge’s Benchbook and Article 128, UCMJ, the military judge also correctly informed appellant that:

An “assault” is an unlawful offer made with force or violence to do bodily harm to another whether or not the offer is consummated. You must have made a demonstration of violence either by an intentional or by a culpably negligent act or omission *which created in the mind of the victim a reasonable apprehension of receiving immediate bodily harm*. Specific intent to inflict bodily harm is not required. It is not necessary that the bodily harm be actually inflicted.

(emphasis added). See Dep’t of Army, Pam. 27-9, Legal Services: Military Judges’ Benchbook, para. 3a-52-1 (29 Feb. 2020) [Benchbook]; *Manual for Courts-Martial of the United States* (2019 ed.)[MCM], pt. IV, ¶ 77.c.2(b)(ii).

Although appellant admitted in his stipulation of fact and providence inquiry that he inadvertently “flagged” or pointed his unloaded firearm at Daughter, there is no indication that she was ever in “reasonable apprehension of receiving immediate bodily harm.” To the contrary, the only evidence admitted at trial on this issue is paragraph 7 of the Stipulation of Fact, which concludes by stating that “[Daughter] would testify that she was scared that [appellant] was going to kill her brother and her mother.”

Fear of harm to another, however, is not sufficient to establish a factual basis for an assault charge. See *United States v. Kaufman*, 46 C.M.R. 822, 824 (A.C.M.R. 1972) (holding that there “must be an apprehension on the part of the victim of danger to his person, and that *apprehension must be in the anticipated sense, not the cognizance of past danger*”) (emphasis in original), citing *United States v. Hernandez*, 44 C.M.R. 500 (A.C.M.R. 1971); Cf. *State v. Nicholson*, 119 Wn.App. 855, 863 (2003) (holding that apprehension of harm to a third party is insufficient to meet the fear and apprehension element of common law assault); *State v. Warbritton*, 215 Kan. 534, 537-38 (1974) (“The apprehension of bodily harm to which the statute alludes must be the fear of the victim – the person who is assailed – for his or her own safety”).³

³ Although not admitted at trial, in a Piece County Sheriff Department Supplemental Report (Appellate Exhibit VII) referenced during an earlier argument pertaining to Military Rule of Evidence 404(b), Daughter told the sheriff’s deputy that she “did not feel threatened by the firearm that her father had.”

In sum, although we normally accord military judges significant deference in finding an adequate factual basis for a plea, we find that the military judge abused his discretion in this case by accepting appellant's plea to assaulting Daughter without establishing that she was in fear for her safety. Accordingly, we shall set aside the legally and factually insufficient specification and provide relief in our decretal paragraph.

B. Dilatory Post-Trial Processing

The military judge sentenced appellant on 3 June 2021 and entered judgment on 9 August 2021. Although trial counsel completed his Precertification Review of the 406-page record of trial (ROT) on 19 October 2021, the Military Judge did not complete his Authentication until 20 December 2021, and the court reporters certified the ROT and transcript on 4 January 2022. The record is devoid of any explanation for the approximate two-month delay between trial counsel's review and the Military Judge's Authentication. We received appellant's case on 8 February 2022, 251 days after the announcement of sentence.

Claims of unreasonable post-trial delay are reviewed de novo. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). "Due process entitles convicted service members to a timely review and appeal of court-martial convictions." *Id.* at 132 (citing *Toohey v. United States*, 60 M.J. 100, 101 (C.A.A.F. 2004)). For cases referred on or after 1 January 2019, "this court will presume unreasonable delay in cases when more than 150 days elapse between final adjournment and docketing with this court." *United States v. Brown*, 81 M.J. 507, 510 (Army Ct. Crim. App. 2021).

The number of days from adjournment to final docketing with this court was 251 days. Given the presumption of unreasonable delay in this case, we look to the four factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), to conduct our due process review: "(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." *Moreno*, 63 M.J. at 135. The four factors are balanced, and no one factor is dispositive. *Id.* at 136. Although the first two factors weigh in his favor, because appellant has not identified any particularized anxiety or concerns, or specifically identified how the delay would prejudice him at any rehearing, he has failed to demonstrate prejudice. Additionally, in the absence of *Barker* prejudice, we find the delay was not "so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). We therefore conclude there is no due process violation in this case.

However, our inquiry does not end there. "Absent a due process violation, this court considers whether relief for excessive post-trial delay is warranted based on this court's sentence appropriateness authority under *Article 66(d), UCMJ.*"

Brown, 81 M.J. at 510 (emphasis in original); see *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Arias*, 72 M.J. 501, 507 (Army Ct. Crim. App. 2013). Having considered the entire record, to include the lack of any compelling reason or explanation for the delay of over two months between trial counsel's Precertification Review and the Military Judge's Authentication, we find that an additional 15-day reduction in sentence to confinement is appropriate in this case.

C. Military Judge's Failure to Rule on Motion to Dismiss

Pursuant to the Plea Agreement, at the outset of the proceedings appellant entered not guilty pleas to the following charges and specifications: one specification of failure to obey a regulation, one specification of drunken operation of a vehicle, four specifications of rape by fear or force, four specifications of simple assault, one specification of breaking and entering, and one specification of drunk and disorderly conduct, in violation of Articles 92, 113, 120, 128, 129, and 134, UCMJ. 10 U.S.C. §§ 892, 913, 920, 928, 929, and 934.

The parties also agreed that following the military judge's acceptance of appellant's guilty pleas, the government would move to withdraw all of the above charges and specifications to which appellant plead not guilty. Although the government fulfilled its obligation to make such a motion, the military judge failed to make a ruling:

MJ: Government, do you move to withdraw the charges and specifications to which Sergeant First Class Wagner has pled not guilty, with the understanding that after the court announces the sentence, said withdrawn charges and their specifications will be dismissed without prejudice?

TC: Yes, Your Honor.

MJ: Accused and Defense Counsel, please rise.

[The accused and his defense counsel did as directed.]

MJ: Sergeant First Class Wagner, in accordance with your plea of guilty, this court finds you: Of the Charges and their Specifications: Guilty.

Given that no evidence was admitted in support of the charges and specifications to which appellant pleaded not guilty, combined with the military judge's failure to rule on the government's motion to withdraw, we will now enter findings of not guilty for all the following charges and specifications for which appellant entered not guilty pleas: Charge I and its Specification; Specification 2 of Charge II; Charge III and its four Specifications; Specifications 1, 2, 3, and 4 of

Charge IV; Charge V and its Specification; and Charge VI and its Specification. Likewise, we will exercise our authority to correct the Statement of Trial Results such that the findings for all of the above Charges and Specifications are listed as "Not Guilty." See Rule for Courts-Martial 1111(c)(2); *United States v. Pennington*, ARMY 20190605, 2021 CCA LEXIS 101, at *5 (Army Ct. Crim. App. 3 Mar. 2021) (summ. disp.) ("Exercising our authority under R.C.M. 1111(c)(2), we note and correct the following issues in appellant's post-trial documents . . .").

CONCLUSION

The finding of guilty to Specification 5 of Charge IV is SET ASIDE. Having considered the entire record, including the fact that the military judge imposed a segmented sentence of four months, we are able to reassess the sentence in accordance with the principles articulated by our superior court in *United States v. Sales*, 22 M.J. 305, 307–08 (C.M.A. 1986) and *United States v. Winkelmann*, 73 M.J. 11, 15–16 (C.A.A.F. 2013), and will grant four months of sentence relief.

The remaining findings of guilty are AFFIRMED.

Given our grant of four months of sentence relief in setting aside Specification 5 of Charge IV, plus an additional fifteen days of sentence relief for the unreasonable post-trial delay, only so much of the sentence as provides for three months and fifteen days of confinement, reduction to E-3, a bad conduct discharge, and total forfeiture of all pay and allowances is affirmed. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of his sentence set aside by this decision, are ordered restored. See UCMJ arts. 58b(c) and 75(a).

Senior Judge BROOKHART and Judge PENLAND concur.

FOR THE COURT:

A large black rectangular redaction box covers the signature of James W. Herring, Jr. A small red square is visible within the redacted area.

JAMES W. HERRING, JR.
Clerk of Court