UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
KERN, YOB, and ALDYKIEWICZ
Appellate Military Judges

UNITED STATES, Appellee
v.
Private First Class BRANDON T. WEAVER
United States Army, Appellant

ARMY 20090397

Headquarters, Fort Stewart
Tara A. Osborn, Military Judge
Lieutenant Colonel Stacey E. Flippin, Acting Staff Judge Advocate (pretrial)
Lieutenant Colonel Shane E. Bartee, Staff Judge Advocate (post-trial)

For Appellant: Major Daniel E. Goldman, JA (argued); Colonel Mark Tellitocci, JA; Lieutenant Colonel Imogene Jamison, JA; Lieutenant Colonel Peter Kageleiry, JA; Major Daniel E. Goldman, JA (on brief); Lieutenant Colonel Jonathan F. Potter, JA.

For Appellee: Captain Kenneth W. Borgnino, JA (argued); Major Amber J. Williams, JA; Major Katherine S. Gowel, JA; Captain Kenneth W. Borgnino, JA (on brief).

28 March 2012

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

ALDYKIEWICZ, Judge:

A military judge, sitting as a general court-martial, convicted appellant, pursuant to his pleas, of absence without leave, indecent acts, wrongful appropriation, adultery, and furnishing alcohol to a minor in violation of Articles 86, 120, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 920, 921, 934 (2006) [hereinafter UCMJ]. Contrary to his pleas, appellant was also convicted of aggravated sexual assault of a child and sodomy with a child in violation of Articles 120 and 125. Appellant was sentenced to a dishonorable discharge, confinement for five years, and reduction to the grade of E-1. The convening

authority approved only so much of the sentence as provided for a dishonorable discharge, confinement for forty-seven months, and reduction to the grade of E-1.[1]

FACTS

In May of 2008, appellant, along with his wife and infant daughter, resided on Fort Stewart, Georgia in row style, attached two-story quarters. The fourteen year-old victim in this case, SDW, lived several quarters over from appellant in the same set of attached residences. She resided there with her brother, step-father, and her mother, Ms. SW. In addition to SDW's immediate family, fourteen year-old NT and her sister lived with SDW. The two girls were Ms. SW's nieces and were living with the family while their mother was deployed.

During the early evening hours of 23 May 2008, appellant provided SDW some alcohol. He also inquired about SDW's and NT's plans for the evening. Later that night, around the midnight hour, appellant and another soldier, Private First Class (PFC) Bassett, assisted the girls in sneaking out of their second story bedroom window so that the four of them (i.e., appellant, SDW, NT, and PFC Bassett) could hang out. The four went to a park with a playground behind the quarters. After a short time in the park, the four went to an on-post shoppette where PFC Bassett purchased alcohol and cigars, after which the four returned to the park where SDW drank some more alcohol. Sometime after midnight, as appellant and SDW sat at the bottom of a plastic tubular slide, appellant engaged in oral sodomy with SDW, after which he engaged in sexual intercourse with SDW.

Following the sexual activity, the four returned to the quarters where they were seen by SDW's mother, Ms. SW. Although it was dark, Ms. SW observed appellant return to his quarters and the two fourteen year-old girls, SDW and NT, proceed to the back of her quarters. When Ms. SW arrived at the back of her quarters, the back door was locked and the girls were no longer outside. Ms. SW then went back to the front of the quarters and, after going upstairs, found her niece, NT, in bed and her daughter, SDW, in the bathroom sitting on the toilet wearing only a pair of panties. Ms. SW described her daughter as appearing to be intoxicated. Considering her daughter's apparent intoxication, Ms. SW initially decided to wait until the morning to find out what the girls had been doing. After splashing water in her daughter's face, she assisted her daughter to bed, at which time her daughter asked "why is my vagina hurting." After hearing this, Ms. SW noticed the clothing her daughter was previously wearing on the floor. The clothing was wet, muddy, and the panties were bloody. Following SDW's statement about

[1] Appellant's pretrial agreement limited confinement to forty-eight months. Without conceding error, the convening authority reduced appellant's sentence by one month, from forty-eight to forty-seven months, to account for the post-trial processing delay in the case. Appellant was also credited with 285 days of confinement credit.

her vagina and seeing the soiled clothing, Ms. SW awoke her niece, NT, and took both girls to the MP station on post. There they were directed to Winn Army Community Hospital, a rape kit was performed on SDW, and law enforcement personnel began their sexual assault investigation.

On 26 July 2008, several months after the incident with SDW, appellant was attending a party in a Hinesville, Georgia hotel, along with several other soldiers and civilians. The party later moved to Specialist (SPC) D's home in Walthourville, Georgia. As the evening progressed and people tired, SPC D, Ms. JM, Ms. TW, and appellant all went to bed in SPC D's bed. In the early morning hours of 27 July 2008, while sharing the same bed with SPC D, Ms. JM, and Ms. TW, and while SPC D and Ms. JM slept, appellant and Ms. TW engaged in sexual intercourse. Later that morning, appellant was advised that Ms. TW reported that appellant sexually assaulted her.

The following day, on 28 July 2008, appellant borrowed a truck belonging to a fellow soldier (PFC JP) under the guise that he needed to use the truck to dispose of the barracks trash. PFC JP allowed appellant temporary use of his vehicle on the condition that the keys and his vehicle be returned within thirty minutes. Rather than return the vehicle, appellant, without authority, took PFC JP's truck and drove from Fort Stewart, Georgia to Ohio where the appellant was apprehended by civilian authorities and the vehicle was recovered.

LAW AND DISCUSSION

Appellant raises three assignments of error, all of which merit discussion; however, only the third warrants relief. The first assignment of error addresses the military judge's handling of SDW's trial disclosure that she saw a school psychiatrist, a fact allegedly disclosed to the trial counsel several days before trial yet undisclosed to the defense, as well as the apparent non-disclosure of alleged counseling/treatment records. The second assignment of error alleges an unreasonable multiplication of charges with regards to Charge I and its Specification (aggravated sexual assault of a child) and Charge III, Specification 1 (adultery).[2] The third assignment of error alleges unreasonable post-trial processing delay. Although not raised as error, the sufficiency of the adultery pleading (Charge III, Specification 1) and appellant's plea of guilty thereto, in light of our superior court's rulings in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) and *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012), also merits discussion but no relief.

[2] Appellant contested the Article 120, UCMJ (aggravated sexual assault of a child) offense and pleaded guilty to the Article 134, UCMJ (adultery) offense.

The Victim's Statement to the Trial Counsel and Access to Counseling/Treatment Records

A military judge's decision on a discovery issue is reviewed for an abuse of discretion. *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004) (citing *United States v. Morris*, 52 M.J. 193, 198 (C.A.A.F. 1999)). "A military judge abuses [her] discretion when [her] findings of fact are clearly erroneous, when [she] is incorrect about the applicable law, or when [she] improperly applies the law." *Id.*

As detailed below, the military judge did not abuse her discretion in determining that the there was no *Brady* or Rule for Courts-Martial [hereinafter R.C.M.] 701(a)(6) violation regarding non-disclosure of SDW's statement regarding psychiatric counseling and a potential diagnosis of "borderline personality disorder," information allegedly disclosed by SDW to the trial counsel several days before trial. Contrary to appellant's assertion on appeal, the military judge's ruling did not focus solely on R.C.M. 701(a)(6) to the exclusion of R.C.M. 701(d), sections titled "[e]vidence favorable to the defense" and "[c]ontinuing duty to disclose" respectively; rather, her ruling is consistent with the provisions of both R.C.M. 701(a)(6) and 701(d). Finally, the military judge did not err in characterizing the evidence as victim impact evidence admissible as aggravation evidence under R.C.M. 1001(b)(4).

During the sentencing portion of the trial, the following colloquy occurred between the trial counsel and SDW:

> Q. [SDW], have the events between you and PFC Brandon Weaver on or about 24 May of 2008, has that affected you in any way psychologically?
>
> A. I know that I'm not the same person that I was before that incident. I don't like to blame a lot of -- I don't like to blame stuff on things because I'm a strong person, and I usually -- I don't know how to say it. But, yeah -- I don't like to say it's because of that, but I know from that point, I haven't been me at all. I get like -- I mean, *I talked to a psychiatrist* and from what I was telling of how I was feeling and everything, *he told me that I could be -- I could have anxiety issues, one, and he said I could have borderline personality disorder.* I -- I don't -- it's like I'm not sad anymore. I'm just angry. It's just -- I don't -- I don't know how to explain it. It is ---- (emphasis added)

On cross-examination, SDW noted that: her reference to a psychiatrist on direct examination referred to her first time seeing a psychiatrist; her talk with the

psychiatrist occurred while she lived in White Plains, New York;[3] and, she was never evaluated because she moved before she could be evaluated. The cross-examination then focused on what the government was told regarding "this borderline personality disorder" and when were they told. The following colloquy occurred:

A. I told Captain [G].[4] I told him the day I came back to Georgia and he was talking about -- going over this topic. *I told him that I'm definitely not the same person I was at all.* (emphasis added)
Q. So three days ago?
A. Yes.
Q. How -- you met with this doctor just one time?
A. I met with this doctor a couple of times, actually, because I was really going through some stuff. And he helped me through a lot of stuff that I was going through. So it had to be about a good five times out of different weeks that I went to see him.[5]

Based on the foregoing direct and cross-examination testimony, the defense counsel argued that the government had an obligation to turn over the above information, citing *Brady v. Maryland*, 373 U.S. 83 (1963). Beyond arguing that the potential borderline personality disorder diagnosis was "something the defense could have used to attack if there is any merit" and something they could have "further investigated," defense failed to articulate how SDW's statements were either "favorable to the defense," material, or exculpatory.

The military judge then inquired of the government what they knew, when they knew it, and what, if anything was provided to the defense after which she announced the following:

> The testimony from [SDW] that she saw a school psychiatrist and her potential diagnosis is victim impact evidence. It's evidence in aggravation of the psychological impact on her as a result of the offenses committed by the accused. This is proper aggravation evidence under R.C.M. 1001(b)(4). There is no evidence that [SDW] had any psychological problems prior to the offenses, and, in fact, the government's diligent efforts in subpoenaing the records from three different schools of the victim turned up nothing in this regard. And all of the school records that were provided by the three schools were

[3] SDW and her family resided in White Plains following appellant's May 2008 sexual assault of SDW.

[4] CPT [G] is the trial counsel of record.

[5] Defense had no further cross-examination for SDW following this answer.

> turned over to the defense. Because this is aggravation evidence, it doesn't negate or reduce the guilt of the accused nor is it evidence that tends to reduce the punishment. To the contrary, it's evidence of the aggravating circumstances favorable to the government, not favorable to the defense. There is no Brady violation or a violation of R.C.M. 701(a)(6).
>
> Now, as far as discovery is concerned, the government notified the defense pursuant to R.C.M. 701(5) of the names of the witnesses the trial counsel intended to call in sentencing, one of which was [SDW], and the defense has had ample opportunity to talk with [SDW] beforehand.

Notwithstanding her ruling on the purported non-disclosure by the government, the military judge afforded both government and defense an opportunity to recall SDW and cross-examine SDW. Neither the government nor defense sought to recall SDW, the defense stating "And I don't need to cross-examine her either, ma'am."[6]

The findings by the military judge are not clearly erroneous. Rather, they are fully supported by the evidence of record. There is no evidence that SDW suffered from any personality disorder whatsoever, either at the time of trial or any time before. There is likewise no evidence that she was ever formally diagnosed with any disorder. Quite the contrary, her testimony and that of her mother, Ms. SW, was that SDW was never formally evaluated. This is consistent with the information both SDW and her mother provided to the trial counsel when he asked them approximately one month before trial about any psychiatric visits. Trial counsel, in response to the military judge's questions noted, that SDW told him, several days before trial, "I have all kinds of emotional and mental problems. I cry all the time." The trial counsel specifically noted SDW did not tell him she could have a borderline personality disorder. Likewise, trial counsel noted, in response to the military judge's inquiry, that SDW never mentioned a "psychiatrist." This is consistent with SDW's testimony on cross-examination that she told the trial counsel, "I told him that I'm definitely not the same person I was at all."

On appeal, both in the written brief and during oral argument before this court, appellant argued the government failed to meet its discovery obligations by failing to produce the records associated with SDW's alleged psychiatric discussions while in White Plains. The argument assumes, however, the actual existence of records, an assumption unsupported by any evidence of record. As the military

[6] Of note, the first time SDW mentioned a psychiatrist was during her direct examination on the merits, where she stated: "I started talking to my school psychiatrist and he told me I had anxiety issues," testimony that was neither objected to nor the subject of any cross-examination by defense counsel.

judge found and the record supports, the government diligently sought, through the use of subpoenas, records from three different schools attended by the victim, to include her White Plains school, all of which "turned up nothing" regarding psychiatric counseling. Similarly, the military judge's finding that the government turned over to the defense "all of the school records that were provided by the three schools" is also fully supported by the record and confirmed by appellant's trial defense counsel.

Prior to trial SDW told the government that she had "all kinds of emotional and mental problems" and "[she cried] all the time." SDW's response to defense's cross-examination questioning established that SDW told trial counsel "I'm definitely not the same person I was at all." Nothing in the record establishes that SDW advised the trial counsel of any psychiatric consults. Additionally, nothing in the record establishes the existence of any undisclosed medical, psychiatric, or counseling records. As noted by the military judge in her ruling, defense had access to the SDW, and could have asked her before trial about anyone she may have spoken to about the incident. The defense fails to cite any authority that SDW's statement to trial counsel that she has "all kinds of emotional and mental problems" and "[cries] all the time" imposes an affirmative duty on the part of the government to somehow memorialize this information and then provide it to the defense. While defense appellate counsel is correct in noting that R.C.M. 701(d) imposes a continuing duty to disclose on the government, that continuing obligation applies to "additional evidence or material previously requested or required to be produced, which is subject to discovery or inspection under [R.C.M. 701]." Since the statement by SDW is neither favorable, material, or exculpatory, nothing in R.C.M. 701 or *Brady* required trial counsel to summarize and then provide SDW's statement to defense counsel.

Defense appellate counsel also argued that SDW's statement and any related treatment records were covered by their 2 November 2008 Motion to Compel Discovery, a specific discovery request wherein defense counsel requested, in part:

> 3) A copy of TW and DW's high school records (to include grade reports, disciplinary records, counseling/social work records, and attendance records)
>
> 4) A copy of all medical records of TW and DW's generated by any treatment received as a result of the charges;

The request for school records was renewed in the defense's 16 November 2008 Motion to Compel Discovery which requested, in part: "Any and all school records including disciplinary records concerning all of the minor children involved in the case against PFC Brandon Weaver."

"Where an appellant demonstrates that the Government failed to disclose discoverable evidence in response to a specific request or as a result of prosecutorial misconduct, the appellant will be entitled to relief unless the Government can show that nondisclosure was harmless beyond a reasonable doubt." *United States v. Roberts*, 59 M.J. 323, 327 (C.A.A.F. 2004) (citing *United States v. Hart*, 29 M.J. 407, 410 (C.M.A. 1990)). As previously noted, there is no evidence of the existence of any responsive records that the trial counsel failed to disclose.

SDW's statement that she suffered from emotional and mental problems as a result of appellant's sexual assault is neither favorable under R.C.M. 701(a)(6), exculpatory under *Brady*, or subject to a continuing duty to disclose under R.C.M. 701(d). Consistent with the military judge's finding, the fact that a fourteen year-old girl sexually assaulted by an adult soldier suffers mentally and emotionally following the sexual assault is evidence favorable to the Government and properly admitted as aggravation evidence under R.C.M. 1004(b), victim-impact evidence directly relating to the offenses for which appellant was convicted. "Evidence in aggravation includes 'evidence of ... psychological ... impact on ... any person ... who was the victim of an offense committed by the accused....'." *United States v. Ashby*, 68 M.J. 108, 120 (C.A.A.F. 2009) (witness allowed to testify "I'm suffering. It's painful, and I am suffering"); *see also United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009) (father's testimony that daughter "is nowhere near the same daughter that she was before. It has just totally changed her one hundred percent" held admissible aggravation evidence).

Finally, in their supplemental filing before this court, defense appellate counsel, as an alternative to setting aside appellant's conviction for Charges I and II and their Specifications, requests that this court order a *DuBay* hearing to investigate the possible ramifications of a diagnosis of personality disorder for the government's chief complaining witness."[7] Having found that the military judge did not abuse her discretion nor did she err in the handling of SDW's testimony and her related disclosures, the request for a court-ordered *DuBay* hearing is denied.

[7] In its initial submission, defense appellate counsel argued, citing *United States v. Trigueros*, 69 M.J. 604 (Army Ct. Crim. App. 2010), the military judge erred "because she failed to investigate the possible ramifications of a diagnosis of a borderline personality disorder for the government's chief complaining witness." The supplemental defense appellate filing, while requesting a *DuBay* hearing, fails to articulate the parameters of any such hearing. It stands to reason, however, that the hearing, if ordered, would address the purported failure by the military judge to further investigate SDW's alleged discussions with a school psychiatrist and her purported diagnosis of "borderline personality disorder."

Unreasonable Multiplication of Charges

Appellant was found guilty, among other offenses, of one specification of aggravated sexual assault of a child in violation of Article 120, UCMJ (Charge I and its Specification) and one specification of adultery in violation of Article 134, UCMJ (Charge III, Specification 1). The "woman not his wife" in the adultery charge and individual with whom he engaged in sexual intercourse was SDW, the named victim in the aggravated sexual assault of a child specification. The sexual act which formed the basis of both offenses was the same act of sexual intercourse. At trial, defense counsel argued the offenses were multiplicious for sentencing,[8] a fact which the government conceded. As a result, the military judge treated Charge I and its Specification (aggravated sexual assault of a child) and Charge III, Specification 1 (adultery) as multiplicious for sentencing.

On appeal, appellant argues the military judge erred by allowing appellant to be convicted of both Charge I and its Specification (aggravated sexual assault of a child) and Charge III, Specification 1 (adultery), arguing for the first time that they constitute an unreasonable multiplication of charges.

Before reaching whether appellant's conviction for aggravated sexual assault of a child and adultery constitutes an unreasonable multiplication of charges, this court must first determine the impact of appellant's failure to raise the issue at trial. In other words, did appellant waive or forfeit the issue, waiver extinguishing appellant's right to raise the issue on appeal and forfeiture subjecting the issue to a plain error analysis, or was the multiplicity for sentencing motion sufficient to preserve the issue of unreasonable multiplication of charges. *See* R.C.M. 905(e); *see also, United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009). The record contains no evidence that appellant intentionally relinquished or abandoned his claim. *Gladue*, 67 M.J. at 314. Absent evidence of an affirmative, knowing, and voluntary relinquishment of a right, waiver does not bar this court from considering appellant's claim. *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001).

Next this court considers whether appellant forfeited his claim by his failure to timely raise the issue, thus triggering a plain error analysis. *Id.* Multiplicity for double jeopardy purposes, unreasonable multiplication of charges as applied to findings, and unreasonable multiplication of charges as applied to sentencing, while related, are three discrete trial concepts. *United States v. Campbell*, 71 M.J. 19, 24

[8] Defense argued that both contested offenses as well as the adultery offense should be merged for sentencing purposes; that is, Charge I and its Specification (aggravated sexual assault of a child), Charge II and its Specification (sodomy with a child), and Charge III, Specification 1 (adultery) should be merged. The Government conceded that Charge I and its Specification (aggravated sexual assault of a child) should be merged for sentencing purposes with Charge III, Specification 1 (adultery).

(C.A.A.F. 2012). A motion for relief based on multiplicity fails to raise either unreasonable multiplication of charges for findings or for sentencing. Finding forfeiture, this court would then engage in a plain error analysis. However, as noted in the discussion below, we find no error on the part of the military judge, plain or otherwise, warranting relief.

Based on application of the five *Quiroz* factors to the facts of appellant's case, this court finds that the military judge did not err in finding appellant guilty of both offenses thus obviating the need for any "plain error" analysis. *See United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001). *See also United States v. Paxton*, 64 M.J. 484, 491 (C.A.A.F. 2007); *United States v. Anderson*, 68 M.J. 378, 386 (C.A.A.F. 2010). First, as previously noted, appellant did not file a motion at trial nor did he object based on unreasonable multiplication of charges. Secondly, while the Article 120 offense (aggravated sexual assault of a child) and Article 134 offense (adultery) are based on the same sexual act, a singular act of sexual intercourse, they are aimed at distinctly separate criminal acts. The Article 120 offense (aggravated sexual assault of a child) focuses on the protection of children from predatory action by adults such as appellant. The Article 134 offense (adultery) is focused, in part, on the impact of extramarital affairs on good order and discipline, the reputation of the armed forces, and the effect or impact on the non-criminal, victim spouse of the offending spouse's criminal activity. *See United States v. Taylor*, 64 M.J. 416, 420 (C.A.A.F. 2007) (holding "adultery is a crime against the person of the other spouse" for purposes of the marital testimonial privilege (M.R.E. 504(c)(2)(A)). Thirdly, the number of charges and specifications at issue does not misrepresent or exaggerate appellant's criminality. Rather, they accurately portray the degree and extent of appellant's criminality by reflecting a willingness on his part to commit crimes against children as well as his spouse. Fourthly, the charges and specifications at issue do not unreasonably increase appellant's punitive exposure. Without the adultery conviction, appellant faced a maximum period of confinement of forty-eight years and one month (577 months). The adultery conviction increased appellant's confinement exposure by one year to forty-nine years and one month (589 months) or approximately 2%. Although appellant's potential confinement exposure increased, his actual sentence did not as the military judge treated both offenses at issue as multiplicious for sentencing. Finally, there is no evidence of prosecutorial overreaching in the drafting of the charges in this case.

Having considered the *Quiroz* factors as applied to appellant's case, this court's ability to "address prosecutorial overreaching by imposing a standard of reasonableness," *United States v. Paxton*, 64 M.J. 484, 490 (C.A.A.F. 2007), and the military judge's treatment of Charge I and its Specification (aggravated sexual assault of a child) and Charge III, Specification 1 (adultery) as multiplicious for sentencing, we find the military judge did not err in finding appellant guilty of both offenses.

Post-trial Processing

Appellant's third assignment of error alleges unreasonable post-trial processing delay. Appellant's case ended on 6 May 2009. The record totaled 543 pages plus an additional authentication page. On 2 November 2009, 180 days after announcement of sentence, appellant's defense counsel demanded speedy post-trial processing. The defense memo stated, in part:

> Speedy post-trial processing is an important issue with regard to PVT Weaver's case because he is eligible for parole on 24 November 2009 and is scheduled to appear before the parole board in December 2009. However, he cannot appear before the board until his sentence is approved by the Convening Authority. In order to provide him an opportunity to appear before the parole board, it is necessary to have PVT Weaver's record of trial completed as soon as possible. The prejudice by any further delay in his case is obvious.

In addition to highlighting the importance of speedy post-trial processing, the defense requested an anticipated record completion date as well as reasons for any additional delays. A review of the record reveals that the defense's written demand for speedy post-trial processing went unanswered. On 24 November 2009, defense counsel authenticated the record. Despite defense counsel authentication in November, the military judge did not receive the record for authentication until 28 December 2009, thirty-four days after defense authentication. The record is devoid of any explanation as to why it took the government over one month to provide the military judge with a record reviewed by defense. The military judge authenticated the record on 30 January 2010 and the convening authority took action on 24 February 2010, 294 days after announcement of sentence in appellant's case. Oral argument before this court occurred on 6 December 2011, 593 days after announcement of sentence and five days short of twenty-one months after this court received the case.

A review of the standards enunciated by our superior court in *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006) reveal that the delay in processing appellant's case through action as well as through this court are both presumptively unreasonable, the former exceeding 120 days and the latter exceeding eighteen months. *Id.* As a result, appellant's case triggers a *Barker v. Wingo*, 407 U.S. 514 (1972) four-factor analysis to determine if appellant's due process rights were violated. Those factors are: "(1) length of delay; (2) reasons for delay; (3) an assertion of the right to timely review and appeal; and (4) prejudice." *Moreno*, 63 M.J. at 135; *see also United States v. Ney*, 68 M.J. 613, 616 (Army Ct. Crim. App. 2010). In assessing factor four, prejudice, three sub-factors are considered: "(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3)

limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired." *Moreno*, 63 M.J. at 138-39 (quoting *Rheuark v. Shaw*, 628 F.2d 297, 303 n.8 (5th Cir. 1980)). With regards to sub-factor two above, anxiety and concern of those convicted awaiting appeal, the *Moreno* court noted that "the appropriate test for the military justice system is to require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Moreno*, 63 M.J. at 140.

As noted above, factor one favors appellant. Two of the three post-trial timelines established by our superior court, time from end of trial to action by the convening authority and time from receipt of the record by a service court of appeals until completion of appellate review, exceed our superior court's standards of 120 days and eighteen months respectively, creating a presumption of unreasonable delay. Factor two also favors appellant. A review of the record reveals, with the exception of the DD Form 490 ("Chronology Sheet"), no explanation for the delay in processing appellant's case through action. The DD Form 490 notes, in the remarks section: "28 May, 8 Jul 09; 24 Sept-10 Oct 09--OSJA transitional period/deployment transitional period" and "Post-Trial: 19 Feb-22 Feb=2 days (matters were received on 22 Feb 10) TDS was served on 8 Feb 10." This second entry, however, creates an unresolved conflict with the appellant's actual R.C.M. 1105/6 submissions which begins with a defense memorandum dated 16 November 2009. Assuming defense's submissions were not received until the date noted on the DD Form 490, the government has documented no more than fourteen days of defense delay (i.e., 8-22 February 10), leaving unexplained 280 days of delay. Factor three also favors appellant. On 2 November 2009 appellant's defense counsel demanded speedy post-trial processing. The lack of timely post-trial processing was also highlighted at paragraph 3, sub-paragraph (h) of defense counsel's 16 November 2009 memorandum accompanying appellant's R.C.M. 1105/6 submissions, which reads:

> The delay in processing PVT Weaver's record of trial has materially prejudiced PVT Weaver's ability to seek post-trial relief through the parole process. PVT Weaver is eligible for parole on 24 November 2009 and has a hearing scheduled in December 2009. However, because his sentence is not approved and his record of trial is not finalized, he will not be able to appear before the parole board. Such significant delay in post-trial processing has historically been condemned by the Army Court of Criminal Appeals (ACCA) . . . .

As this court has noted, the above post-trial delay claim within an appellant's R.C.M. 1105/6 submissions is sufficient, for factor three purposes, to constitute "an

assertion of appellant's right to timely review and appeal."[9] *Ney*, 68 M.J. at 617. In appellant's case, he demanded speedy post-trial processing on 2 November 2009 and asserted the same no later than 22 February 2010.

Regarding factor four, prejudice, appellant fails to establish prejudice under any of the *Moreno* prejudice sub-factors. Specifically, "appellant has not suffered ongoing prejudice in the form of oppressive incarceration, undue anxiety [or concern], or the impairment of the ability to prevail in a retrial." *United States v. Allende*, 66 M.J. 142, 145 (C.A.A.F. 2008). Furthermore, "[a]ppellant has not suffered detriment to his legal position in the appeal as a result of the delay." *Id.* Appellant's assertion that he was prejudiced because of an inability to appear before the [Army Clemency and] Parole Board at his first opportunity, an argument made in both his R.C.M. 1105/6 post-trial submissions as well as his appellate brief, also fails to establish prejudice. Appellant has provided no evidence to establish that he would have been paroled upon first look or released from confinement at any time sooner that the date of his actual release. Appellant's assertion of prejudice regarding the possibility of an early release is nothing more than "mere speculation." *See Moreno*, 63 M.J. at 140-141 (court notes "mere speculation" is insufficient to prevail when considering whether delay impaired an appellant's grounds for appeal or a defense in the event of reversal and retrial); *see also Allende*, 66 M.J. at 145 (appellant's affidavit that he was denied employment as a result of inability to obtain timely discharge certificate, Department of Defense Form 214 (DD 214), without more insufficient to establish prejudice). *Compare United States v. Jones*, 61 M.J. 80 (C.A.A.F. 2005) (prejudice established by submission of unrebutted affidavits from potential employer that appellant's ability to apply for employment limited and/or precluded because of a lack of a DD 214).

A finding of unreasonable post-trial delay but no prejudice, however, does not end this court's analysis. Article 66(c), UCMJ, imposes an obligation on this court to assess the appropriateness of appellant's sentence in light of presumptively unreasonable and unexplained delay in the post-trial processing of his case. *See generally United States v. Toohey*, 63 M.J. 353, 362-63 (C.A.A.F. 2006); *United States v. Moreno*, 63 M.J. 129, 143 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Ney*, 63 M.J. 613, 616-17 (Army Ct. Crim. App. 2010).

Having considered the entire record, the lack of any explanation by the government for the post-trial delay in appellant's case, and the particular facts and circumstances of this case, we find a two-month reduction in the sentence appropriate. Action to effectuate this reduction is taken in the decretal paragraph of this opinion.

[9] Among the enclosures to the defense counsel's memorandum is enclosure 16, the defense's 2 November 2009 memorandum demanding speedy post-trial processing.

Fosler/_Ballan_ Issue

The final issue warranting discussion but no relief is whether Specification 1 of Charge III (adultery with Ms. SDW, a woman not appellant's wife) in violation of Article 134, UCMJ, a pleading which omitted the terminal element for a clause 1 or clause 2 violation[10] fails to state an offense under our superior court's holdings in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) and *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012).

Like our superior court, we will not find prejudice where the record establishes "a providence inquiry [that] clearly delineates each element of the offense and shows that appellant understood 'to what offense and under what legal theory [he was] pleading guilty.'" *United States v. Ballan*, 71 M.J. 28, 34 (C.A.A.F. 2012) (quoting *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008)).

A review of the record reveals the following: 1-appellant offered to plead guilty to Charge III, Specification 1, adultery with [SDW], an offer made nearly four months before trial; 2-appellant stipulated that his adultery with [SDW] "was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces," a written stipulation appellant entered into nearly three months before trial; 3-during appellant's providence inquiry, the military judge covered the elements of adultery, to include prejudice to good order and discipline and service discrediting conduct, defining both; 4-the military judge advised appellant that not every act of adultery is criminal and the government "must prove beyond a reasonable doubt that [appellant's] adultery was either directly prejudicial to good order and discipline or service discrediting; 5-the military judge addressed prejudicial conduct and service discrediting conduct as those terms related specifically to the charged offense of adultery; 6-appellant acknowledged he had no questions about the elements and definitions; 7-appellant advised the military judge that at the time of the offense he was married to someone other than [SDW] and that appellant and [SDW] engaged in sexual intercourse in the public playground (i.e., park) behind an on-post housing area; and 8-appellant acknowledged and explained that that his actions were both prejudicial to good order and discipline and service discrediting.

Appellant's plea of guilty to adultery, the stipulation of fact, and the military judge's detailed, complete, and thorough colloquy establish beyond a doubt that appellant "understood both what he was being charged with and why his conduct was prohibited." *United States v. Ballan*, 71 M.J. 28, 35 (C.A.A.F. 2012). We find no prejudice to the substantial rights of appellant.

[10] The terminal elements for a clause 1 and clause 2, Article 134, UCMJ violation are that the alleged conduct was "to the prejudice of good order and discipline" or "conduct of a nature to bring discredit upon the armed forces" respectively. *See MCM* pt. IV, ¶ 60.c.

CONCLUSION

Therefore, on consideration of the entire record, the assigned errors, and the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), we hold the findings of guilty correct in law and fact. Accordingly, the findings of guilty are affirmed. However, as a result of unreasonable post-trial delay, we find the sentence as approved by the convening authority inappropriate, and the court affirms only so much of the sentence as provides for a dishonorable discharge, confinement for forty-five months, and reduction to E-1. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the sentence set aside by this decision, are ordered restored. *See* UCMJ arts. 58b(c) and 75(a).

Senior Judge KERN and Judge YOB concur.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court