

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
J.A. MAKSYM, J.R. PERLAK, R.Q. WARD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JOSHUA D. WYLY
CRYPTOLOGICAL TECHNICIAN COLLECTION SECOND CLASS
(E-5), U.S. NAVY**

**NMCCA 201100005
GENERAL COURT-MARTIAL**

Sentence Adjudged: 13 August 2010.

Military Judge: CDR Kevin O'Neil, JAGC, USN.

Convening Authority: Commander, Navy Region Southwest, San Diego, CA.

Staff Judge Advocate's Recommendation: CDR L.B. Sullivan, JAGC, USN.

For Appellant: LT Ryan Santicola, JAGC, USN; Capt Michael Berry, USMC.

For Appellee: Maj William Kirby, USMC.

31 October 2011

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of aggravated sexual contact with child, rape of a child, sodomy with a child under the age of 12, indecent language to a child under the age of 16, persuading a minor to engage in sexually explicit

conduct, as well as receipt and possession of child pornography in violation of Articles 120, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, and 934. The military judge sentenced the appellant to confinement for 42 years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority approved the sentence as adjudged but, in accordance with the pretrial agreement (PTA), suspended confinement in excess of 30 years.

The appellant raises four assignments of error. First, he asserts that two of the Article 134, UCMJ specifications did not expressly allege either terminal element and consequently failed to state an offense. He next asserts that he was subjected to pretrial punishment in violation of Article 13, UCMJ, and RULE FOR COURTS-MARTIAL 304(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Finally, he claims that he was denied his right to a speedy trial under Article 10, UCMJ, and that his sentence is inappropriately severe.¹

We have carefully considered the record of trial, the appellant's brief and assignments of error, and the Government's response. We affirm the findings and sentence as approved.

Background

At the time of the offenses for which he was convicted, the appellant was an active-duty service member stationed on board the USS NIMITZ (CVN 68). In August 2007, Aviation Electronics Technician Second Class (AT2) AD, a friend and former shipmate of the appellant's, came to live with the appellant, his wife, and his son in Spring Valley, CA. Subsequently AD's 6-year-old daughter, SD, came to live with them as well. Between June and August 2008, the appellant began a series of sexual acts with SD when no one else was home.

In the first instance, the appellant and SD were in his bedroom watching a movie. The appellant began rubbing her back and leg and then touched her vagina. Record at 55-57. In the second instance, when the minor was again in his bedroom, the appellant licked her labia and clitoris, exposed himself, and masturbated in front of her. *Id.* at 57-63. He then penetrated her once with his penis. *Id.* at 63-67. The appellant had set up a webcam in his bedroom and took images of the conduct. *Id.* at 74-77. In the third instance, he again touched her vagina

¹ The final three assignments of error were submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

with his fingers. *Id.* at 65-68. The appellant claimed he did all these things at the minor's request and without use of any force, even asserting that she undressed herself. *Id.* at 58, 66.

The appellant was also charged with and convicted of possession of child pornography. Using Limewire, a computer search engine, he searched specifically for child pornography and downloaded all the images that came up. *Id.* at 89-94. He downloaded the images and saved them on DVDs before transferring them to an external hard drive and taking it on a sea deployment in summer 2009. *Id.* at 99-103. The appellant also downloaded and saved writings and sexually explicit stories involving rape and incest, usually involving minors. *Id.* at 108-11.

Finally, between December 2007 and December 2008, the appellant engaged in sexually explicit discussions with two other minors, his wife's cousin and that cousin's friend. On web chats, he discussed masturbation and other sexually explicit topics, describing what he would do to the minors sexually, and defining other sexual terms. *Id.* at 122-36.

Failure to State an Offense

We are again confronted with the issue of whether an Article 134, UCMJ, specification must necessarily include a terminal element. Here, while most specifications included reference to the terminal elements, Specifications 1 and 2 of Additional Charge II failed to do so. The appellant initially preserved this issue in light of the decision by the Court of Appeals for the Armed Forces (CAAF) to grant review of our decision in *United States v. Fosler*, 69 M.J. 669 (N.M.Ct.Crim.App. 2010).

While the CAAF held that the terminal element in an Article 134, UCMJ, offense must be expressly alleged or necessarily implied by the language of the specification in a contested trial, its decision did not specifically address the absence of the terminal element in the context of a guilty plea. *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011).² We distinguish this case on that basis. Indeed, the *Fosler* holding relied in part on *United States v. Watkins*, 21 M.J. 208 (C.M.A. 1986), a case that significantly distinguished a guilty plea from a contested case. In *Watkins* the court stated:

² The CAAF rejected the notion that the use of the word "wrongfully," by itself, necessarily implies the terminal element.

Where . . . the specification is not so defective that it "cannot within reason be construed to charge a crime," the accused does not challenge the specification at trial, pleads guilty, has a pretrial agreement, satisfactorily completes the providence inquiry, and has suffered no prejudice, the conviction will not be reversed on the basis of defects in the specification.

Id. at 210.

In post-*Fosler* cases, we have held that the *Fosler* decision does not invalidate a guilty plea to an Article 134, UCMJ specification that lacks the terminal element. See *United States v. Leubecker*, No. 201100091, 2011 CCA LEXIS 161, unpublished op. (N.M.Ct.Crim.App. 13 Sep 2011) ("Even with the changes wrought by *Fosler* . . . we are satisfied that the military judge's informing the appellant of the nature of the terminal elements, and the appellant's assurances that he and his counsel had had sufficient time to discuss the allegations and the elements of proof, militate against any substantial basis in law for setting aside the finding."). Rather, we have adopted a case-specific examination of the charges and the trial proceedings to determine whether or not the appellant was apprised of the terminal element.

Indeed, the facts of the instant case are comparable to those in our recent decision in *United States v. Gibson*, No. 20100669, unpublished op. (N.M.Ct.Crim.App. 30 Aug 2011) (holding that the terminal element was necessarily implied in a guilty plea to various order violations). First, the Appellant entered into a PTA in which he agreed to plead guilty. Appellate Exhibit XV. He also signed a stipulation of fact which demonstrated his understanding of conduct service discrediting or prejudicial to good order and discipline. Prosecution Exhibit 1. The trial judge included the terminal elements when listing the elements for both specifications. Record at 119, 130-31. The trial judge defined those terms for the appellant. Record at 74, 120. Trial defense counsel informed the trial judge that the specifications lacked the terminal element. Record at 120. When the trial judge said it was an element that "need not be pled" and asked defense counsel if they had a different view, defense counsel responded that they had "nothing to discuss. Just bringing to the court's attention what was being discussed." *Id.* The appellant described in his own words how his conduct was prejudicial to good order and discipline or service discrediting. *Id.* at 130,

136. Finally, the other Article 134, UCMJ, specifications included the terminal element. It should have been plain to the appellant that the terminal elements were included in each of the Article 134, UCMJ, offenses and he was adequately on notice of the conduct to be defended against.

Pretrial Punishment

The PTA indicated that the appellant did "specifically agree not to raise the following waivable motions: (1) Relief based on R.C.M. 304(f) and Article 13 for unlawful pretrial punishment" Appellate Exhibit XV at 6. An accused may intentionally waive a right at trial, and such a waiver will extinguish the issue on appeal. *United States v. Gladue*, 67 M.J. 311, 313-14 (C.A.A.F. 2009). We have found that an appellant may waive certain rights in a PTA. See *United States v. Mitchell*, 62 M.J. 673 (N.M.Ct.Crim.App. 2006); see also R.C.M. 705.

During the providence inquiry, the appellant told the trial judge that he was entering into the agreement freely and voluntarily. Record at 139. The court discussed with the appellant his waiver of the Article 13, UCMJ, motion and ensured he understood what it meant to waive the motion. *Id.* at 154-56. Since the appellant waived his motion for pretrial punishment both in the PTA and then in court, and nothing about the specially-negotiated provisions of the PTA violates public policy or appellate case law, we decline to address this assignment of error and hold that it was knowingly waived. *United States v. Inong*, 58 M.J. 460, 465 (C.A.A.F. 2003).

Violation of Right to Speedy Trial

The appellant raises for the first time on appeal that his right to a speedy trial under Article 10, UCMJ, was violated. An unconditional guilty plea waives a speedy trial claim as to that offense when the issue is raised for the first time on appeal. *United States v. Dubouchet*, 63 M.J. 586, 588 (N.M.Ct.Crim.App. 2006). An Article 10, UCMJ, claim must be litigated at trial to avoid waiver.³

At trial, the appellant initially filed but then voluntarily withdrew his Article 10, UCMJ, motion. Record at

³ "We believe that an appellant who has had his day in court, fails to raise a speedy trial issue, and pleads guilty, resulting in a finding of guilty, should not then be allowed to complain about the delay for the first time on appeal." *Dubouchet*, 63 M.J. at 588.

38. The PTA he signed explicitly stated he was not compelled to waive his right to a speedy trial. AE XV at 6. Nor did the appellant attempt to preserve the Article 10, UCMJ motion by entering a conditional plea.

We find that the appellant intentionally waived his Article 10, UCMJ, claim at trial. Indeed, the court below specifically confirmed that the appellant was waiving his Article 10, UCMJ, motion. Record at 38. We apply waiver and decline to provide relief. *Dubouchet*, 63 M.J. at 588.

Inappropriately Severe Sentence

We review sentence appropriateness *de novo*. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). Sentence appropriateness involves the "judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). Such analysis requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

We conclude that the appellant did not suffer an inappropriately severe sentence. He benefitted from a PTA which reduced the portion of the adjudged sentence to confinement which is to be executed from 42 to 30 years. AE XVI. His actions certainly merit the adjudged sentence. On three occasions, the appellant engaged in sexual conduct with a minor who was then six years old, committing both sodomy and sexual assault, and persuaded her to produce a visual depiction of his conduct. Considered in conjunction with his other conduct, including communicating indecent language to two children under the age of sixteen, and knowingly receiving and possessing child pornography, we conclude his sentence was entirely appropriate.

Conclusion

Accordingly, we affirm the findings of guilty and sentence, as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court