UNITED STATES NAVY–MARINE CORPS
COURT OF CRIMINAL APPEALS

No. 201600020

UNITED STATES OF AMERICA
Appellee

v.

THOMAS M. CARNAHAN
Corporal (E-4), U.S. Marine Corps
Appellant

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judge: Colonel James K. Carberry, USMC.
For Appellant: Commander Richard E.N. Frederico, JAGC, USN.
For Appellee: Major Cory A. Carver, USMC; Lieutenant Robert J. Miller, JAGC, USN.

Decided 22 December 2016

Before PALMER, MARKS, and FULTON, *Appellate Military Judges*

This opinion does not serve as binding precedent, but may be cited as persuasive authority under NMCCA Rule of Practice and Procedure 18.2.

PALMER, Chief Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of six specifications of rape of a child and six specifications of sexual child abuse, in violation of Article 120b, Uniform Code of Military Justice, 10 U.S.C. § 920b (2012). The military judge sentenced the appellant to confinement for life, reduction to pay grade E-1, total forfeitures, and a dishonorable discharge. Pursuant to a pretrial agreement (PTA), the convening authority disapproved the adjudged forfeitures, conditionally waived automatic forfeitures for six months, and approved the remaining sentence but suspended all confinement in excess of 35 years.

The appellant alleges two assignments of error: first, that the military judge's failure to conduct an adequate inquiry into the terms of the appellant's PTA rendered his plea improvident; and second, that the adjudged sentence of confinement for life with the possibility of parole was inappropriately severe. The appellant asks us to set aside the findings and sentence.

After considering the alleged errors and the record of trial, we are satisfied that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

I. BACKGROUND

The appellant began sexually abusing his biological daughter when she was 14 months old. During his providence inquiry the appellant admitted the sexual abuse continued for well over two years and involved dozens of sexual and lewd acts occurring at three different residences. The conduct included six instances of forcibly penetrating his daughter's mouth with his penis, 16 instances of penetrating his daughter's mouth with his penis without force, twice digitally penetrating her vagina, 25-30 instances of rubbing his penis on her vagina, 10-15 instances of rubbing her vagina with his hand, 15-20 instances of rubbing his penis against her buttocks, 15-20 instances of touching her anus with his penis, 24-33 instances of causing her to masturbate his penis with her hands, one instance of licking her vagina, and 65 instances of rubbing his penis between her thighs. The appellant admitted knowing all these acts were wrong and that he committed these acts for his own sexual gratification. Prior to announcing findings, the military judge, without objection, consolidated the original 19 specifications comprising the above-described misconduct into 12 specifications.[1]

II. DISCUSSION

A. PTA discussion during providence inquiry

The appellant argues the military judge's cursory inquiry into his understanding of the PTA—that primarily relied on the appellant's

[1] Although not discussed in detail on the record, it is apparent that the military judge consolidated the sexual act specifications into single specifications when the various acts occurred during the course of the same episode. The military judge likewise consolidated the specifications of various lewd acts occurring during the same time period at the same location into single specifications (e.g., various lewd acts that occurred during the same time period and at the same location as alleged in the original specifications 4, 5, 6, and 7, were consolidated into a single specification; likewise specifications 16, 18, and 21 were also consolidated into a single specification). Record at 79-80; Appellate Exhibit (AE) VII.

assurances that he read and understood the PTA terms—was deficient. In particular, the appellant claims the military judge failed to adequately explain and discuss a PTA provision requiring the appellant to waive pretrial motions. The impact of this failure, the appellant asserts, was demonstrated when his trial defense counsel did not challenge the referred charges as an unreasonable multiplication of charges, prompting the military judge's *sua sponte* merger of several specifications. Additionally, the appellant argues his trial defense counsel's initial, imprecise articulation of the maximum imposable sentence should have prompted the military judge to more closely scrutinize the PTA.[2]

During the appellant's court-martial, the military judge inquired into the PTA, signed by the appellant on 30 September 2015 and accepted by the convening authority on 9 October 2015, and received assurances from the appellant that: (1) the appellant's trial defense counsel explained the agreement to him four times; (2) the appellant read the PTA completely approximately four times before signing it; (3) the appellant completely and fully understood the agreement and his trial defense counsel had fully explained each provision to him; and (4) the appellant had no specific questions regarding any provision of the PTA and did not desire further review of the agreement or any of its specific provisions with the military judge. As a result, the military judge did not inquire into any specific PTA provisions. In one of them, the appellant agreed "to waive all motions except those that are otherwise non-waivable pursuant to [RULE FOR COURTS-MARTIAL (R.C.M.) 705(c)(1)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.)]."[3] The appellant raised no motions.

We review a military judge's acceptance of a plea for an abuse of discretion, reversing only if the record as a whole shows a substantial basis in law or fact for questioning the guilty plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). When an accused pleads guilty pursuant to a PTA, the "military judge shall inquire" into the resulting plea agreement to "ensure: (A) That the accused understands the agreement; and (B) That the parties agree to the terms of the agreement." R.C.M. 910(f)(4). "If the plea

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[2] When asked by the military judge what advice he gave the appellant regarding the maximum possible sentence, the trial defense counsel answered, "195 years and eight life sentences" but then shortly thereafter added, "really, it's one, obviously." Record at 72. The military judge then recessed the court to afford the trial defense counsel the opportunity to discuss the sentence maximum with the appellant. Following the recess, the trial defense counsel correctly stated the maximum punishment, and the military judge then repeated the correct maximum punishment, which the appellant stated he understood.

[3] AE IV at 4 ¶ 8(i).

agreement contains any unclear or ambiguous terms, the military judge should obtain clarification from the parties. If there is doubt about the accused's understanding of any terms in the agreement, the military judge should explain those terms to the accused." R.C.M. 910(f)(4), Discussion. This inquiry is "necessary to ensure that an accused is making a fully informed decision as to whether or not to plead guilty. . . . [A]n inquiry that falls short of these requirements and fails to ensure the accused understands the terms of [his PTA] is error." *United States v. Hunter*, 65 M.J. 399, 403 (C.A.A.F. 2008) (citations omitted).

Court of Appeals for the Armed Forces precedent requires a showing of prejudice before finding a plea improvident, thus we decline to classify the failure to inquire into a provision of the PTA as a "structural error[]," which "require[s] no proof of prejudice for reversal." *United States v. Brooks*, 66 M.J. 221, 224 (C.A.A.F. 2008); *see also United States v. Carie*, No 201600051, 2016 CCA LEXIS 358 (N-M. Ct. Crim. App. 16 Jun 2016). Absent plain irregularities in the written terms themselves, "we will reject the providency of a plea" based on a deficient R.C.M. 910(f)(4) inquiry by a military judge, "only where the appellant demonstrates a material prejudice to a substantial right." *Hunter*, 65 M.J. at 403 (citations and internal quotation marks omitted). To demonstrate prejudice, "the substantial right that must be prejudiced is the right to make an informed decision to plead guilty." *Id.* at 403 (citing *United States v. Gonzalez*, 61 M.J. 633, 636 (C.G. Ct. Crim. App. 2005)) (additional citations omitted). "Where there is no evidence or representation . . . that Appellant misunderstood the terms of his agreement, that the operation of any term was frustrated, [or] that Appellant's participation in the agreement was anything other than wholly voluntary we will not find prejudice." *Id.* (citation and internal quotation markss omitted).

Here we need not decide whether the military judge erred in his PTA inquiry because, even assuming error, the appellant has failed to articulate material prejudice. He does not now assert that he misunderstood his PTA's terms, or that had the military judge provided a more in depth explanation of the PTA he would have pleaded not guilty. Neither does the appellant now allege that had the military judge read and explained the PTA paragraph 8(i) provision requiring him to waive certain motions, he would have opted to plead not guilty and file an unreasonable multiplication of charges motion. Instead, he argues only that "[p]erhaps, if he had been aware of the [unreasonable multiplication of charges] issue [he] would have made an informed choice to litigate pretrial motions and negotiate a [PTA] subsequent to obtaining rulings on the motion."[4]

[4] Appellant's Brief and Assignment of Error of 28 Apr 2016 at 15.

We find this unlikely. The appellant had the tools to make his "informed" choice before his providence inquiry began. Indeed, during a pretrial conference the parties discussed consolidating several specifications. Those discussions were then memorialized on the record and the proposed consolidations were appended as an appellate exhibit.[5] We find no basis to conclude that had the military judge explained the appellant's waiver of pretrial motions in greater detail, the appellant would have withdrawn his pleas of guilty and filed an unreasonable multiplication of charges motion, reasonably expecting to negotiate a more favorable pretrial agreement. As such, the appellant's argument does not demonstrate material prejudice.

We are similarly unpersuaded by the appellant's argument that the trial defense counsel's initial misstatement of the maximum punishment required the military judge to closely scrutinize the PTA to ensure both the appellant and his counsel understood the its terms. The trial defense counsel almost immediately corrected his own mistake, and then ensured the appellant understood the correct maximum sentence, which was then accurately confirmed by the military judge. Nothing in this circumstance—which the appellant concedes did not rise to the level of ineffective assistance of counsel[6]—warranted greater scrutiny of the PTA. We again find the appellant has not demonstrated material prejudice and that the military judge did not abuse his discretion in accepting the appellant's pleas.[7]

B. Sentence appropriateness

We review the record for sentence appropriateness *de novo*. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). "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). "This 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. McDonald*, No. 201400357, 2016 CCA LEXIS 310, at *4, unpublished op. (N-M. Ct. Crim. App. 19 May 2016) (per curiam) (citations and internal quotation markss omitted). "While [a Court of Criminal Appeals] clearly has the authority to disapprove part or all of the

[5] AE VII; Record at 14.

[6] Appellant's Brief at 13 n.2.

[7] Although the appellant implies the military judge should have inquired into the appellant's mental responsibility, he again demonstrates no material prejudice. Appellant's Reply Brief of 8 Aug 2016 at 7. To the contrary, the appellate defense counsel concedes his belief that an R.C.M. 706 mental responsibility inquiry was conducted and that it "did not produce any results that would necessitate the defense raising lack of mental responsibility as a possible defense." Appellant's Brief at 17 n.3.

sentence and findings," we may not engage in acts of clemency. *United States v. Nerad*, 69 M.J. 138, 145 (C.A.A.F. 2010).

As discussed *supra*, the appellant pleaded guilty to engaging in a near-routine pattern of raping and sexually abusing his biological daughter. The abuse began when she was only 14 months old and continued for another 28 months. The record is replete with evidence that the appellant took advantage of his status as the child's father and his physical strength to commit the charged offenses. During the instances of forcibly penetrating his daughter's mouth with his penis, the appellant stated "[t]here were multiple times when she tried to pull away or squirm [and i]n response I would hold the back of her head with my hand and force her mouth back on my penis."[8] He held her hands on to his penis for minutes at a time as he forced his daughter to masturbate him.[9] When he rubbed his penis between her thighs he would variously have her "bent over the bed" or make her lie on her back while telling her to squeeze her legs together. These assaults were certainly traumatizing. The appellant stated most of the abuse occurred when he was putting his daughter to bed, and the court heard evidence that as his daughter grew older, she fought, cried, and screamed during bedtimes—distress which only ended when the appellant was removed from the house. Moreover, a review of the taped forensic interview of his daughter indicates she was aware and remembers these acts of abuse.[10] The record also reveals the enduring harm the appellant caused. Although the appellant's daughter and family are in therapy, they face an uncertain future, awaiting events that may trigger her memories of his abuse.[11]

After carefully considering the entire record, including the repeated abuse spanning years of his young daughter's life and the appellant's acceptance of responsibility, we are convinced that justice was done and that he received the punishment he deserved.[12] *Healy*, 26 M.J. at 395. Granting relief at this point would be to engage in clemency, a prerogative reserved for the convening authority, and we decline to do so. *See id.* at 395-96.

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[8] Prosecution Exhibit (PE)1 at 5; Record at 54.

[9] Record at 67.

[10] PE 8 at 16:41:00 and 16:43:20.

[11] Record at 86.

[12] The appellant invites us, without providing substantive supporting argument, to also review the case for an unreasonable multiplication of charges for sentencing. Having done so, and after considering R.C.M. 307(c)(4), the factors discussed in *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001), and the facts of this case, we find no error.

III. CONCLUSION

The findings and sentence as approved by the convening authority are affirmed.

Senior Judge MARKS and Judge FULTON concur.

For the Court

R.H. TROIDL
Clerk of Court