United States Navy–Marine Corps Court of Criminal Appeals

Before
DEERWESTER, HACKEL, and BAKER
Appellate Military Judges

UNITED STATES
Appellee

v.

Kevin S. MILLICAN
Sergeant (E-5), U.S. Marine Corps
Appellant

No. 202100343

Decided: 11 January 2023

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judge:
Nicholas S. Henry

Sentence adjudged 26 August 2021 by a general court-martial convened at Marine Corps Base Camp Lejeune, North Carolina, consisting of a military judge sitting alone. Sentence in the Entry of Judgment: reduction to E-1, confinement for 3 months, and a bad-conduct discharge.

For Appellant:
LCDR W. Scott Stoebner, JAGC, USN

For Appellee:
LtCol James A. Burkart, USMC
LT R. Blake Royall, JAGC, USN

This opinion does not serve as binding precedent under NMCCA Rule of Appellate Procedure 30.2(a).

PER CURIAM:

Appellant was convicted, consistent with his pleas, of aggravated assault, domestic violence, and extramarital sexual conduct in violation of Articles 128, 128b, and 134, Uniform Code of Military Justice [UCMJ], for: unlawfully grabbing the neck of a person with his hand; unlawfully grabbing the neck of his spouse with his hand; and engaging in extramarital sexual intercourse.[1]

After Appellant raised no Assignments of Error, we specified the following issues:

> ***I. Did the military judge abuse his discretion by accepting Appellant's guilty plea to Specification 1 of Charge III where the offense occurred in August 2018 and Article 128b, UCMJ, came into effect for offenses occurring on or after 1 January 2019; and***
>
> ***II. If so, what is the remedy?***

We agree with the unopposed conclusion of the Government and Appellant that the military judge abused his discretion by accepting Appellant's guilty plea to Specification 1 of Charge III. Both parties argue, and we agree, that the appropriate remedy is to affirm the lesser included offense of Article 128, UCMJ, assault consummated by a battery. We conducted a sentence reassessment and conclude that the sentence as adjudged is appropriate.

I. BACKGROUND

Pursuant to a plea agreement, Appellant pleaded guilty to specifications alleging violations of Articles 128, 128b, and 134, UCMJ. Relevant to our present analysis is Specification 1 of Charge III:

---

[1] 10 U.S.C. §§ 928, 928b, 934.

> In that [Appellant], U.S. Marine Corps, on active duty, did, at or near Blountsville, Alabama on or about 1 August 2018, commit an assault upon [Mrs. Mike,[2]] the spouse of [Appellant], by unlawfully grabbing her neck with the said [Appellant]'s hand.

During his plea colloquy, Appellant provided a factual basis for the military judge to accept his plea to Specification 1 of Charge III. Appellant admitted that on or about 1 August 2018, he intentionally and without consent grabbed the neck of his spouse, Mrs. Mike, and that he did bodily harm to Mrs. Mike by engaging in forceful grabbing of her neck – without her consent or legal justification or excuse. During the military judge's inquiry, Appellant provided that he grabbed Mrs. Mike's neck with his hand, intentionally applied pressure, and heard a choking noise, which he took to indicate that he had temporarily restricted her airflow. The military judge accepted Appellant's plea to Specification 1 of Charge III.

II. DISCUSSION

A. The military judge abused his discretion

1. Standard of review and the law

We review a military judge's decision to accept a guilty plea for an abuse of discretion.[3] It is an abuse of discretion for a military judge to accept a guilty plea if the acceptance is based on an erroneous view of the law.[4] A reviewing appellate court may only reject a guilty plea if there is a substantial basis in

[2] All names in this opinion, other than those of Appellant, the judge, and appellate counsel, are pseudonyms.

[3] *United States v. Hiser,* 82 M.J. 60, 64 (C.A.A.F. 2022).

[4] *United States v. Weeks*, 71 M.J. 44, 46 (C.A.A.F. 2012). *See also United States v. Simpson*, 77 M.J. 279, 282 (C.A.A.F. 2018) (citation omitted).

law or fact to question the plea.[5] We review questions of law arising from guilty pleas de novo.[6]

On 13 August 2018, Congress passed the National Defense Authorization Act for Fiscal Year 2019 [NDAA 2019].[7] Section 532 of NDAA 2019 included a new punitive article, Article 128b, which covered certain domestic violence offenses.[8] NDAA 2019 provided that this new provision would take effect on 1 January 2019. However, the offense underlying Specification 1 of Charge 3, Appellant's assault upon Mrs. Mike, occurred on or about 1 August 2018.

The *Ex Post Facto Clause* found in Article I, Section 9, of the Constitution, has long been interpreted to prohibit laws that: (1) criminalizes acts that were not criminal at the time they were committed; (2) *aggravates a crime or makes it greater than it was at the time it was committed*; (3) imposes additional punishment for a crime that would have not been so punished at the time committed; or, (4) changes the rules of evidence that require less or different evidence to convict than would have been required at the time the act was committed.[9]

2. The military judge abused his discretion by accepting Appellant's guilty plea to the Article 128b offense

The military judge abused his discretion when he accepted Appellant's plea to Specification 1 of Charge III because Article 128b was not in effect at the

---

[5] *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

[6] *Id.*

[7] Pub. L. No. 115-232, 132 Stat. 1636 (2018).

[8] 10 U.S.C. § 928b.

[9] *United States v. Roberts*, 75 M.J. 696, 701 (N-M Ct. Crim. App. 2016) (emphasis added) (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)). *See also Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925) ("It is settled… that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited *as ex post facto*."); *Collins v. Youngblood,* 497 U.S. 37, 43 (1990) ("The *Beazell* formulation is faithful to our best knowledge of the original understanding of the Ex Post Facto clause: Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts.").

time the assault occurred.[10] Accordingly, the findings of guilty to the Article 128b offense must be set aside and dismissed.

However, we conclude that Appellant was provident to the lesser included offense of assault consummated by a battery, Article 128, UCMJ.[11] Whether an offense is a lesser included offense is a question of law we review de novo.[12] Article 59(b), UCMJ, provides this court with the authority to "approve or affirm . . . so much of the finding as includes a lesser included offense."[13]

We look to the elements test from *Schmuck v. United States*, 489 U.S. 705, 716 (1989). Elements of a lesser included offense must be a subset of the elements of the charged offense.[14] A violation of Article 128, assault consummated by a battery, is necessarily included in the Article 128b offense charged in Specification 1 of Charge III as the elements of that offense are a subset of the elements of the charged offense.

Accordingly, from the record, we are convinced that Appellant was provident to the lesser included offense of assault consummated by a battery under Article 128.[15] "Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense."[16] As it relates to Specification 1 of Charge III, we find Appellant's plea provident to the lesser included offense of assault consummated by a battery.[17]

B. Sentence Reassessment

Having set aside and dismissed Appellant's conviction for the greater offense charged in Specification 1 of Charge III and affirming the lesser included offense of assault consummated by a battery, we must determine whether we

---

[10] *See Montana v. Hall*, 481 U.S. 400, 402 (1987).

[11] Article 128, UCMJ (2016); 10 U.S.C. § 928.

[12] *United States v. Miller*, 67 M.J. 385, 387 (C.A.A.F. 2009).

[13] Article 59(b), UCMJ; *See also United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008).

[14] *Medina*, 66 M.J. at 24-25 (C.A.A.F. 2008).

[15] Article 128, UCMJ (2016).

[16] Article 59(b), UCMJ (2016).

[17] Article 128, UCMJ (2016).

can reassess the sentence or remand to the trial court for a rehearing on sentence. We do so by analyzing (1) whether there have been dramatic changes in the penalty landscape or exposure; (2) whether sentencing was by members or military judge alone; (3) whether the nature of the remaining offenses captures the gravamen of the criminal conduct within the original offenses, and whether or not significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses; and (4) whether the remaining offenses are of the type with which appellate judges should have experience and familiarity to determine what sentence would have been imposed at trial.[18]

Appellant remains convicted of one specification of aggravated assault by strangulation, one specification of assault consummated by a battery, and one specification of extramarital sexual conduct.[19] His overall punitive exposure remains in excess of that provided for in the plea agreement, which provided a minimum sentence of one month, and a maximum of three months confinement, for each specification to which Appellant pleaded guilty, including Specification 1 of Charge III.[20] The military judge conducted the sentencing, and the remaining offenses and the record capture the gravamen of Appellant's criminal misconduct. Finally, the remaining offenses are offenses that we have sufficient experience and familiarity with to reliably determine what sentence would have been imposed at trial. Accordingly, we conclude that we can reassess the sentence.

The record is clear that Appellant committed an aggravated assault and an assault consummated by a battery against two different victims, and he engaged in extramarital sexual conduct. Reviewing this sentence with the "individualized consideration" of the particular accused based on the "nature and seriousness of the offense and the character of the offender," we find unitary punishment consisting of reduction to E-1, and a bad-conduct discharge to be appropriate.[21]

The segmented sentencing construct of MJA 2016 requires our reassessment of the sentence of confinement. Based on the entirety of the record, we

---

[18] *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013).

[19] Articles 128 and 134, UCMJ.

[20] App. Ex. IV at 9-10.

[21] *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (internal quotation omitted).

hold that a sentence of three months confinement for the sole specification under Charge II, three months confinement for Specification 1 of Charge III, and one month for Specification 2 of Charge IV is a just and appropriate segmented sentence. We also hold that it is appropriate for all sentences of confinement to run concurrently.[22]

III. CONCLUSION

After careful consideration of the record, only so much of the findings of guilty to Specification 1 of Charge III as finds Appellant guilty of the lesser included offense of assault consummated by a battery is **AFFIRMED**. The greater offense of domestic violence, charged in Specification 1 of Charge III is **DISMISSED**. The remaining findings of guilt and the sentence as reassessed are **AFFIRMED**.

FOR THE COURT:

MARK K. JAMISON
Clerk of Court

[22] In finding Appellant guilty to the lesser included Article 128 offense, vice Article 128b, we reduced the possible confinement exposure to six months from six years; however, the sentence exposure for either offense would be in excess of the three-month maximum authorized by the plea agreement (Appellate Ex. IV) for Specification 1 of Charge III.