UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant BRIAN N. BERG
United States Air Force

ACM 35967

15 February 2006

Sentence adjudged 15 April 2004 by GCM convened at Ellsworth Air Force Base, South Dakota. Military Judge: Glenn L. Spitzer (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 26 years, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Sandra K. Whittington, and Major John N. Page III.

Appellate Counsel for the United States: Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Carrie E. Wolf.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

MATHEWS, Judge:

The appellant stands convicted, in accordance with his pleas, of one specification of rape of a child under 16 years of age; two specifications of forcible sodomy of a child under 12 years of age; and two specifications of indecent acts with a child under 16 years of age, in violation of Articles 120, 125, and 134, UCMJ, 10 U.S.C. §§ 920, 925, 934. Each offense was committed on divers occasions, over a period of at least three years. The appellant was sentenced by a military judge sitting alone as a general court-martial to a dishonorable discharge, confinement for 26 years, and reduction to the grade of E-1. The convening authority approved the findings and sentence as adjudged.

On appeal, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant asserts that his sentence was inappropriately severe. He alleges that the testimony of a defense witness, Dr. Rex Frank, established his excellent rehabilitation potential; that his service record prior to trial was good; and that there was neither "physical violence" nor conclusive evidence of any victim impact relating to his crimes. He argues that he is therefore entitled to "meaningful" sentence relief. We disagree.

While eventually concluding that the appellant's overall rehabilitation potential was "excellent," Dr. Frank's testimony took a number of detours that were not especially helpful to the defense team. For example: Dr. Frank admitted that the appellant's conduct met the clinical definition of a pedophile; opined that the appellant had difficulty with self-control and respecting the feelings of others; and noted that the appellant sought to justify his behaviors. Although some of the clinical tests Dr. Frank administered to the appellant were suggestive of a low potential for recidivism, others suggested the appellant was being dishonest in his responses. Finally, Dr. Frank admitted that the appellant's actuarial appraisal would have been comparable with that of Jeffrey Dahmer, a well-known sex offender and serial killer.[*]

The appellant's military record was likewise muddled. The appellant's performance reports for the most part reflect very good duty performance, but they are, when considered in their entirety, by no means exceptional. Further, it is impossible to evaluate the appellant's military career without noting that the appellant began sexually abusing a five-year-old child about six months after donning the uniform. This conduct, the appellant admitted, was "the antithesis" of good order and discipline – a judgment with which we concur.

Finally, the appellant's claims discounting the violence and victim impact of his misconduct are belied by his admission that he used physical force to rape his victim; medical evidence that the victim suffered severe internal tearing; and testimony that a child subjected to the sort of prolonged, repetitive abuse committed by the appellant can reasonably be expected to endure a lifetime of psychological challenges as a consequence.

Considering the record as a whole, taking into account both the appellant and his crimes, we find that the sentence is just and appropriate. *See United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

[*] In light of the damaging nature of some of his testimony, we have evaluated carefully the trial defense counsel's decision to call Dr. Frank, using the standards enunciated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and by our superior appellate court in *United States v. Polk*, 32 M.J. 150 (C.M.A. 1991). We see no deficiency in their performance. Although on balance, we cannot say that Dr. Frank's testimony was helpful to the appellant, it did draw out a number of qualities that trial defense counsel emphasized in their efforts to place the appellant and his conduct in the best possible light.

The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court