UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Sergeant ROBERT J. BOEHNLEIN
United States Air Force

ACM 35253

21 December 2004

Sentence adjudged 24 May 2002 by GCM convened at Randolph Air Force Base, Texas. Military Judge: Israel B. Willner (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 15 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Antony B. Kolenc.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, Lieutenant Colonel Robert V. Combs, and Captain Steven R. Kaufman.

Before

MALLOY, JOHNSON, and GRANT
Appellate Military Judges

OPINION OF THE COURT

JOHNSON, Judge:

In accordance with his pleas, the appellant was convicted by a general court-martial of desertion, sodomy on divers occasions with a child under the age of 16 years, and indecent acts on divers occasions with a child under the age of 16 years,[1] in violation of Articles 85, 125, and 134, UCMJ, 10 U.S.C. §§ 885, 925, 934. The appellant was also

[1] The appellant pled guilty to the specification of the charge excepting the words, "by dipping his penis in syrup and making [MB] lick the syrup off." The excepted words were dismissed with prejudice pursuant to a pretrial agreement.

charged with attempted sodomy with a child under the age of 16 years,[2] but that charge was dismissed with prejudice pursuant to a pretrial agreement. A military judge, sitting alone, sentenced the appellant to a dishonorable discharge, confinement for 22 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority reduced the confinement to 15 years pursuant to the pretrial agreement. The appellant raises three assignments of error for our consideration: (1) Whether the military judge erred by considering, over defense objection, sentencing evidence that the appellant attempted to commit sodomy with his minor son and had engaged in sodomy with his minor daughter four years prior to the charged offenses; (2) Whether the convening authority's 29 July 2002 promulgating order and action approving the appellant's sentence to a dishonorable discharge is a "nullity" where he took action on the case 18 days earlier; and (3) Whether the appellant's sentence is inappropriately severe.[3] Finding no error, we affirm.

Background

This is a child molestation case. The appellant was a married computer operator. The appellant started making sexual advances toward his natural daughter, MB, when she was 7 years old. Between the ages of 7 and 12 years, the appellant forced MB to rub his penis, place her mouth on his penis, move her mouth over his penis until he ejaculated in her mouth, and then swallow his semen. In addition to the sodomy, the appellant also fondled MB's breasts and stuck his fingers in her vagina. The sexual abuse continued over a number of years, occurring sometimes 2-3 times a week. After the sexual abuse was reported to the authorities, the appellant deserted the Air Force and fled to Mexico.

Admission of Sentencing Evidence

At issue is whether the trial judge improperly admitted testimony from the victim that the appellant poured chocolate syrup on his penis and forced his daughter to lick it off when she was 3 or 4 years old and that the appellant asked his then 12-year-old son, BDB, to perform oral sex on the appellant.

A military judge's ruling on the admissibility of evidence is reviewed for an abuse of discretion. *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997). When the military judge conducts a proper balancing test, his decision to admit evidence will not be overturned absent a "clear abuse of discretion." *United States v. Saferite*, 59 M.J. 270, 274 (C.A.A.F. 2004) (citing *United States v. Ruppel*, 49 M.J. 247, 250 (C.A.A.F. 1998)).

The government may introduce evidence of "any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found

[2] This charge alleged misconduct against the appellant's son, BDB.
[3] This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

guilty." Rule for Courts-Martial (R.C.M.) 1001(b)(4); *United States v. Gogas*, 58 M.J. 96, 98 (C.A.A.F. 2003). Aggravating evidence includes "evidence which is directly related to the offense for which an accused is to be sentenced so that the circumstances surrounding that offense or its repercussions may be understood by the sentencing authority." *Gogas*, 58 M.J. at 98 (citing *United States v. Vickers*, 13 M.J. 403, 406 (C.M.A. 1982)).

During sentencing, trial counsel offered evidence that when MB was 3 or 4 years old, the appellant told her to go to the kitchen and get some syrup. He poured chocolate syrup on his penis and told her to suck his penis. The trial defense counsel objected to this testimony. The military judge found this evidence was relevant because it showed a type of grooming of the victim for the charged offense, as well as it demonstrated a continuous course of conduct. The trial judge balanced the testimony under Mil. R. Evid. 403, and found the probative value was not substantially outweighed by any danger of any unfair prejudice and overruled the objection. Also during sentencing, the government introduced a videotaped deposition that was taken on 11 January 1989, when MB was 12 years old. The deposition included graphic testimony from MB who testified about the incident that occurred when she was 3 or 4 years old. Trial defense counsel did not object to the admission of the deposition when the evidence was offered, nor did she object during or after the testimony was played.

Further, trial counsel presented evidence that BDB, the appellant's older son, was propositioned by the appellant to perform oral sex on the appellant. Within a couple of weeks of this proposition, BDB walked into the appellant's bedroom and saw his sister run into the bathroom and saw his father, who was naked, cover his genitals with a pillow. Sometime after that incident, BDB asked MB whether the appellant had sexually propositioned her. She started to cry and divulged the appellant's sexual crimes. Sometime later, BDB decided to run away from home and report the appellant's misconduct to his grandmother in Wyoming. While on the interstate en route to his grandmother's house, a policeman pulled him over and questioned him. BDB told the authorities about his father's criminal conduct.

Trial defense counsel objected to admission of this testimony. The military judge overruled the objection in part. He said he would not consider the testimony for a substantive purpose, but would consider it "for the purpose of demonstrating the facts and circumstances of how the charged misconduct was revealed and why." The military judge further stated that "the accused is to be sentenced only for the offenses of which he has been convicted, and nothing else." Additionally, the military judge balanced the testimony under Mil. R. Evid. 403 and found the probative value was not substantially outweighed by danger of unfair prejudice.

We find the military judge did not abuse his discretion in admitting the challenged testimony. The incident involving the use of chocolate syrup is evidence that is directly

related to the sodomy offense. Such evidence was helpful to the sentencing authority in understanding the circumstances surrounding that offense and an example of what tactics the appellant used to groom his minor daughter. Furthermore, we concur with the military judge that the probative value of the evidence was not substantially outweighed by any danger of unfair prejudice. Even if we found error, any error was harmless in that the same testimony was admitted without objection when the videotaped deposition was admitted into evidence. Likewise the attempted sodomy evidence was properly before the trial court. The trial judge considered the evidence as facts and circumstances surrounding the reporting of the criminal conduct. We are convinced that the testimony was properly admitted, was not unduly prejudicial, and that trial judge sentenced the appellant only for the offenses of which he had been convicted—and nothing more. Accordingly, we find no error.

Convening Authority's Action

On 11 July 2002, the convening authority signed an action that read, "only so much of the sentence as provides for reduction to Airman Basic, total forfeiture of all pay and allowances, confinement for 15 years is approved and, except for the dishonorable discharge, will be executed." This action did not approve the dishonorable discharge. Eighteen days later, the convening authority withdrew his 11 July 2002 action and substituted it with another action dated 29 July 2002. The subsequent action read, "the action taken by me on 11 July 2002 is withdrawn and the following is substituted therefor: only so much of the sentence as provides for a dishonorable discharge, confinement for 15 years, forfeiture of all pay and allowances, and reduction to airman basic is approved and, except for the dishonorable discharge, will be executed." The record reflects the convening authority's second action was published on 29 July 2002 in General Court-Martial Order No. 44. There is no evidence that a previous court-martial order was drafted publishing the first action.

R.C.M. 1107(f)(2) permits the convening authority to "recall and modify any action taken . . . at any time before it has been published or before the accused has been officially notified." *See also United States v. Diaz*, 40 M.J. 335 (C.M.A. 1994). Furthermore, the convening authority "may also recall and modify any action at any time prior to forwarding the record for review, as long as the modification does not result in action less favorable to the accused than the earlier action." R.C.M. 1107(f)(2). The convening authority recalled his 11 July 2002 action before it was published or served on the accused and clarified his intent to approve the dishonorable discharge. Based upon the staff judge advocate's recommendation to approve the dishonorable discharge, the scant submission of clemency matters, the egregious nature of the offenses, and the fact that a punitive discharge cannot be executed later, as contemplated in the withdrawn action, if the convening authority had not approved one, we are convinced the convening authority intended to approve the dishonorable discharge when he signed the 11 July 2002 action. The clarification of his intent in the 29 July 2002 action is not a

modification within the meaning of R.C.M. 1107(f)(2). Furthermore, in response to the appellant's charge that the government did not comply with regulatory guidance, we hold that the slight deviations from the precise requirements of Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, Chapter 10 (2 Nov 1999), are not fatal to this particular set of facts.

Sentence Appropriateness

The appellant's sentence is not inappropriately severe. Article 66(c), UCMJ, 10 U.S.C. § 866(c), requires that we affirm only so much of the sentence as we find "should be approved." In determining sentence appropriateness, we must exercise our judicial powers to assure that justice is done and that the appellant receives the punishment he deserves. Performing this function does not authorize this Court to exercise clemency. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). The primary manner in which we discharge this responsibility is to give individualized consideration to an appellant, including the nature and seriousness of the offenses and the character of the appellant's service. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). We have carefully considered the appellant's nearly 13-year career, the egregious nature of his offenses, the mitigation and extenuation evidence, the guilty plea, and the government's aggravating sentencing evidence. Applying the legal standard stated above to the facts of this case, we find that the appellant's sentence is not inappropriately severe.

Conclusion

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; *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 the Court