UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman CHRISTOPHER A. BURGESS
United States Air Force

ACM 37263

14 July 2009

Sentence adjudged 17 April 2008 by GCM convened at Travis Air Force Base, California. Military Judge: Charles E. Wiedie.

Approved sentence: Dishonorable discharge, confinement for 100 days, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Maria A. Fried, Major Shannon A. Bennett, Captain Michael A. Burnat, and Captain Tiaundra Sorrell.

Appellate Counsel for the United States: Major Jeremy S. Weber, Captain Jason M. Kellhofer, and Gerald R. Bruce, Esquire.

Before

BRAND, HEIMANN, and HELGET
Appellate Military Judges

PER CURIAM:

In accordance with his plea, the appellant was found guilty of one specification of indecent acts with a child, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The approved sentence consists of a dishonorable discharge, confinement for 100 days, and reduction to E-1.[1]

---

[1] The convening authority also deferred the reduction in rank and the mandatory forfeitures until Action was taken in this case.

The issue on appeal is whether the portion of the appellant's sentence that includes a dishonorable discharge is inappropriately severe.

Background

On 3 July 2008, the victim in this case, KB, was over at the appellant's apartment in Fairfield, California, to help him watch his two sons while the appellant's wife went to the airport. At the time, KB was 13 years old and was living with her cousin, Senior Airman (SrA) AR, a co-worker of the appellant. During KB's visit, the appellant offered to give her a massage, which she accepted. They went into the appellant's son's bedroom and the appellant proceeded to give KB a massage on his son's bed. He started by rubbing her back. After a few minutes, KB rolled over at the appellant's request and he started to massage her stomach. The appellant then lifted her shirt and bra and fondled her breasts with his hands for a few seconds. KB pushed his hands away. While the appellant was touching her, KB was scared that he was going to do more. After the incident occurred, the appellant told KB not to tell anyone about what had just happened.

KB did not report the incident for a couple of months, primarily because she was scared. On 17 September 2008, after KB had reported the incident, the Air Force Office of Special Investigations arranged a telephone call between KB and the appellant. During this conversation, the appellant initially denied that anything inappropriate had happened but eventually admitted he had fondled her breasts. After the telephone conversation, the appellant called SrA AR and told her that KB was accusing him of very serious allegations of inappropriate touching. He said he would never do something like that because she was just a little girl. He told SrA AR that KB was making up the allegations and that she needed to speak with her.

KB testified during sentencing that her grades in school had dropped and she was still experiencing nightmares from the incident.

Inappropriately Severe Sentence

The appellant asserts that his sentence, specifically the dishonorable discharge, is inappropriately severe and requests that we only approve a bad-conduct discharge. We disagree.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268

(C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). "The Courts of Criminal Appeals are required to engage in sentence comparison only 'in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.'" *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). Sentence comparison is generally inappropriate unless this Court finds that any cited cases are "closely related" to the appellant's case and the sentences are "highly disparate." *Lacy*, 50 M.J. at 288. "[A]n appellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.' If the appellant meets that burden . . . then the [g]overnment must show that there is a rational basis for the disparity." *Id.*

The maximum punishment in this case was a dishonorable discharge, seven years confinement, total forfeiture of all pay and allowances, and reduction to E-1. The appellant's approved sentence was a dishonorable discharge, confinement for 100 days, and reduction to E-1.

The appellant asserts that his sentence is more severe when compared to two other cases he alleges are closely related: *United States v. Johnson*, 49 M.J. 467 (C.A.A.F. 1998) and *United States v. Manns*, 54 M.J. 164 (C.A.A.F. 2000).[2] However, the appellant has failed to meet his burden of showing how these cited cases are closely related to his case and that the sentences are highly disparate. Accordingly, under the circumstances of this case, sentence comparison is not warranted.

Having given individualized consideration to this particular appellant, the nature of the offense, the appellant's record of service, and all other matters in the record of trial, we hold that the approved sentence, which includes a dishonorable discharge, is not inappropriately severe.

Conclusion

The approved 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).[3]

---

[2] In *United States v. Manns*, the charges were referred to a Special Court-Martial.

[3] Although not affecting the legal sufficiency of the findings or sentence, the court-martial order erroneously states that the sentence was adjudged on 16 April 2008 vice 17 April 2008. We order the promulgation of a corrected court-martial order.

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court