

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant ROBERT F. CHRISTOFARO
United States Air Force

ACM 35238

18 May 2004

Sentence adjudged 17 May 2002 by GCM convened at Pope Air Force Base, North Carolina. Military Judge: Ann D. Shane (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 8 months, and reduction to E-4.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Kyle R. Jacobson, Karen L. Hecker, and David P. Sheldon.

Appellate Counsel for the United States: Colonel LeEllen Coacher and Lieutenant Colonel Lance B. Sigmon.

Before

BRESLIN, ORR, and GENT
Appellate Military Judges

OPINION OF THE COURT

GENT, Judge:

The appellant was convicted, in accordance with his pleas, of indecent assault, wrongfully communicating a threat, communicating indecent language, and drunk and disorderly conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934. A military judge, sitting alone as a general court-martial, sentenced the appellant to a bad-conduct discharge, confinement for 8 months, and a reduction to E-4.

The appellant asserts that the findings should be set aside because the convening authority violated his pretrial agreement. The convening authority signed a pretrial agreement promising not to approve a period of confinement greater than 7 months. The

staff judge advocate's recommendation advised the convening authority of the sentence adjudged and the provision of the pretrial agreement limiting confinement to 7 months. The staff judge advocate recommended that the convening authority approve a sentence including a bad-conduct discharge, 7 months of confinement, and a reduction to E-4. However, the convening authority signed an action that approved a bad-conduct discharge, 8 months of confinement, and a reduction to E-4. The action was published in the promulgating order.

A post-trial affidavit provided by the government indicates that confinement authorities, apparently relying on other documents, implemented the provision of the pretrial agreement that limited the appellant's confinement to 7 months. The appellant's prison release date was determined by subtracting the appellant's administrative credit for "good time" from 7 months, rather than 8 months. For these reasons, we find that the government fulfilled the promise the convening authority made in the pretrial agreement. Although the action was erroneous, the appellant received the benefit of the pretrial agreement at the proper time.

According to Rule for Courts-Martial 1107(g), we may instruct a convening authority to withdraw an erroneous action and substitute a corrected action when the action contains a clerical error. Since the appellant suffered no prejudice, we will do so in our decretal paragraph.

The appellant also alleges that his sentence was 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 or she 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). In the case before us, we considered the number and nature of appellant's offenses, their significant impact on the victim, as well as the character of the appellant's service. We find the appellant's sentence is not inappropriately severe.

We return the record of trial to the Judge Advocate General for remand to the convening authority to withdraw the erroneous action and substitute a corrected action and promulgating order not inconsistent with the terms of the pretrial agreement. Thereafter, Article 66, UCMJ, shall apply.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator