UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant PATRICK COOPER
United States Air Force

ACM 35894

31 May 2006

Sentence adjudged 12 November 2003 by GCM convened at Ellsworth Air Force Base, South Dakota. Military Judge: Jack L. Anderson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 29 years, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Sandra K. Whittington, and Major L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Gary F. Spencer, Lieutenant Colonel Michael E. Savage, and Major Tracey L. Printer.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MATHEWS, Judge:

The appellant entered guilty pleas to one specification of attempted forcible sodomy of a child, in violation of Article 80, UCMJ, 10 U.S.C. § 880; one specification of rape of a child, in violation of Article 120, UCMJ, 10 U.S.C. § 920; one specification of forcible sodomy of a child, in violation of Article 125, UCMJ, 10 U.S.C. § 925; one specification of indecent liberties with a child, and two specifications of indecent acts with a child, in violation of Article 134, UCMJ, 10 U.S.C. § 934. Each specification alleged that the appellant committed the various acts of misconduct on divers occasions.

The appellant pled guilty, by exceptions, to one of the rapes and one of the indecent acts, but was convicted of those offenses as charged. His adjudged and approved sentence consists of a dishonorable discharge, confinement for 29 years, and reduction to the grade of E-1.

On appeal, the appellant alleges that his plea to attempted forcible sodomy of a child was improvident because the military judge mistakenly omitted the element of "force" from the providency inquiry. The appellant also alleges, pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982), that his sentence is inappropriately severe; that his trial defense counsel's decision to call an expert witness whose testimony proved damaging amounted to ineffective assistance of counsel; and that the evidence is legally and factually insufficient to sustain a conviction on the litigated rape offense.

Providency of the Appellant's Pleas

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). It is settled law that the military judge must explain the elements of each offense to the accused in order to secure a guilty plea. *United States v. Redlinski,* 58 M.J. 117, 119 (C.A.A.F. 2003) (citing *United States v. Care,* 40 C.M.R. 247 (C.M.A. 1969)). *See also* Rule for Courts-Martial (R.C.M.) 910(c)(1), Discussion. When this requirement is not followed, the plea is improvident, unless it appears from the entire record that the accused was aware of the elements of the offense, either explicitly or inferentially. *United States v. Jones,* 34 M.J. 270, 272 (C.M.A. 1992); *United States v. Pretlow,* 13 M.J. 85, 88 (C.M.A. 1982).

The government urges us to find the appellant's plea provident, arguing the record contains sufficient evidence to sustain the appellant's conviction. The appellant pled guilty to, and was convicted of, repeatedly raping and forcibly sodomizing the same victim. Because the military judge explained the element of force in regard to these completed offenses, the government contends the appellant must also have understood it in the context of the attempted offenses. Because the element of force was satisfied in the completed offenses by virtue of the appellant's parental authority over the victim, the government argues it also existed at the time of the attempted sodomies.

The government's position is not wholly unreasonable, and were the facts in this case somewhat different, we might agree; but the portion of the providency inquiry addressing the attempted offenses occurred prior to those portions dealing with the completed offenses. The knowledge that force was a necessary element to the attempts cannot be imputed to the appellant based on discussions with the military judge that had not yet occurred. Worse, the military judge explicitly stated that force was *not* an element of attempted forcible sodomy. He erroneously informed the appellant that "[n]either force nor lack of consent is required for this offense." We are unable to conclude from this record that the appellant was aware of the elements of the offense as

charged when he pled guilty. We will therefore modify the finding by excepting the words "by force and without the consent of the said [AMC]" from Specification 2 of Charge I.

Sentence Reassessment

Because we modified the findings, we next consider whether we can reassess the sentence. If we can determine whether "absent the error, the sentence would have been at least of a certain magnitude," then we "may cure the error by reassessing the sentence instead of ordering a sentence rehearing." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)). *See also United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990).

Our modification of the findings as to Specification 2 of Charge I does not affect the maximum punishment that could be imposed for that offense. *Cf. Manual for Courts Martial*, *United States (MCM)*, Part IV, ¶¶ 4e, 51e(1)-(2) (2005 ed.).[1] Nor does it affect the facts pertaining to that offense: the appellant attempted to commit the same sexual acts with the same victim while exercising the same degree of parental control over her. Moreover, the completed offenses -- which included two specifications for which the appellant could have been sentenced to confinement for life, without the possibility of parole -- were far more significant. We find that the military judge would have imposed the same sentence absent the error.

Sentence Appropriateness

We next turn to the appellant's contention that his sentence -- in particular, that portion which calls for confinement of 29 years -- is inappropriately severe. We consider the appropriateness of the appellant's sentence de novo. *United States v. Baker,* 28 M.J. 121, 123 (C.M.A. 1989). We generally consider this question without reference to sentences in other cases. *United States v. Olinger,* 12 M.J. 458, 460 (C.M.A. 1982) (citing *United States v. Mamaluy,* 27 C.M.R. 176, 180 (C.M.A. 1959)). Here, however, the appellant has invited us to examine a number of cases in which lesser confinement was imposed. He argues that the accuseds in those cases committed more aggravated misconduct than he did, and his sentence is, by comparison, too harsh.

We are required to examine sentence disparities in closely related cases, and permitted -- but not required -- to do so in other cases. *United States v. Wacha,* 55 M.J. 266, 267-68 (C.A.A.F. 2001) (citing *United States v. Ballard,* 20 M.J. 282, 283 (C.M.A. 1985)). *See also United States v. Lacy,* 50 M.J. 286, 288 (C.A.A.F. 1999). The cases proffered by the appellant all involve child molestation-type offenses, but are otherwise

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[1] This provision is unchanged from the 2002 edition that was in effect at the time of the appellant's trial.

completely unrelated. We are not persuaded that the appellant suffered a miscarriage of justice merely because some other offender received a lesser punishment. *See United States v. Durant,* 55 M.J. 258, 261 (C.A.A.F. 2001) ("the military system must be prepared to accept some disparity" even in the sentences of codefendants, "provided each military accused is sentenced as an individual"). We therefore examine the appellant's sentence in light of the facts specific to his case.

The appellant admitted to raping his adopted daughter "between two and ten occasions" while she was between the ages of 12 and 14. He also admitted to forcibly sodomizing her "at least five . . . but not more than 10" times, and committing indecent acts or liberties with her on at least a dozen additional occasions. While acknowledging that his status as an adult and as the parent of his victim made him legally responsible for his crimes, the appellant repeatedly sought to minimize his actual culpability. Prior to trial, he described his criminal acts toward his daughter as "caressing and consensual," and during trial portrayed himself in passive terms -- in some of the acts, he explained, his crime was "allowing" his daughter to do things to him.

The victim's account was considerably different. She described far more numerous instances of sexual assault, including more than 20 rapes. She testified that her efforts to resist physically were overcome by the appellant's use of physical force and she experienced physical pain when the appellant penetrated her. She also described how she would try to hide from the appellant, was afraid to sleep in her own bedroom, and suffered recurring nightmares, up to the time of trial. We do not believe, based on this record, that the appellant's sentence was unduly severe. *See United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982).

Remaining Assignments of Error

We considered the appellant's remaining assignments of error and resolve them adversely to him. The appellant's trial defense counsel presented an expert who concluded the appellant had potential for rehabilitation, and put the appellant in the best light consistent with the facts. We see nothing ineffective in their performance. *See United States v. Polk,* 32 M.J. 150, 153 (C.M.A. 1991). Likewise, we find that the evidence was legally and factually sufficient to sustain the appellant's conviction of the litigated rape, and we are ourselves convinced of his guilt beyond a reasonable doubt. *See United States v. Turner,* 25 M.J. 324, 324-25 (C.M.A. 1987).

Conclusion

The findings, as modified, and sentence, as reassessed, 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 modified findings and reassessed sentence are

AFFIRMED.

OFFICIAL

THOMAS T. CRADDOCK, SSgt, USAF
Court Administrator