UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman BRIAN K. COURPALAIS
United States Air Force

ACM 35571

10 February 2005

Sentence adjudged 14 December 2002 by GCM convened at Offutt Air Force Base, Nebraska. Military Judge: Thomas W. Pittman.

Approved sentence: Dishonorable discharge, confinement for 42 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Major Terry L. McElyea.

Appellate Counsel for the United States: Lieutenant Colonel Robert V. Combs.

Before

PRATT, GENT, and MOODY
Appellate Military Judges

OPINION OF THE COURT

GENT, Judge:

A general court-martial consisting of officer members found the appellant guilty, pursuant to his pleas, of permitting classified photos to be removed from their proper place of storage, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The adjudged sentence included a dishonorable discharge, confinement for 7 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority reduced the confinement to 42 months, but otherwise approved the adjudged sentence.

The appellant assigns three errors for our consideration: (1) Whether his guilty plea is improvident because the military judge failed to elicit facts from the appellant that

his conduct amounted to gross negligence; (2) Whether the appellant is entitled to a sentence rehearing because the court members heard key aggravation testimony during presentencing that was discovered post-trial to be "materially inaccurate and misleading"; and (3) Whether that portion of his sentence that includes a dishonorable discharge and confinement for 42 months is inappropriately severe. Finding no error, we affirm.

The specification alleged that the appellant violated 18 U.S.C. § 793(f), which makes it a criminal offense for those entrusted with any photograph relating to national defense, through gross negligence, to permit the same to be removed from its proper place of custody. During the providency inquiry, the military judge correctly instructed the appellant about the elements of this offense and properly defined the term "gross negligence." Then the military judge asked the appellant to explain why he believed he was guilty of this offense. In his narrative answer to this question, the appellant stated that he removed four classified photographs from their proper place of storage. He said he took three of them home because he wanted to show them to family members. He said he took the fourth photograph home because he found it amusing. The appellant's statements evidence more than gross negligence. Indeed, the appellant's statements plainly indicate his conduct was intentional. When read in its entirety, we can find no "substantial basis in law and fact" for questioning the appellant's guilty plea. *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

The appellant next asserts that he is entitled to a sentence rehearing because the court members heard key aggravation testimony during presentencing that was discovered post-trial to be "materially inaccurate and misleading." It is important to note what this assignment of error is not about. The appellant did not allege prosecutorial misconduct. He did not claim that he is entitled to a new trial under Article 73, UCMJ, 10 U.S.C. § 873, because he has newly discovered evidence, or that there has been a fraud upon the court. Instead, he invites our attention to two matters. The first is a statement, made by the confidential consultant who assisted him at trial, that was submitted to the convening authority. We find nothing in the statement that materially contradicts the aggravation testimony at issue in this case. Next, the appellant asserts that a television program that aired four months after the trial contradicted a government presentencing witness. But the defense provided no evidence of the content of the program. The record before us presents no reason to conclude that the appellant should be granted a sentence rehearing.

Finally, the appellant claims the portion of his sentence including a dishonorable discharge and confinement for 42 months is inappropriately severe. This Court may only affirm those findings and sentences we find are 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). 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 grant 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 "on the basis of the nature and seriousness of the offense and the character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). Applying this standard, we find that no portion of the appellant's sentence is inappropriately severe.

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 Court