UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman KYLE J. DALTON
United States Air Force

ACM 37057

25 November 2008

Sentence adjudged 24 April 2007 by GCM convened at Langley Air Force Base, Virginia. Military Judge: W. Thomas Cumbie (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 10 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, Lieutenant Colonel Christopher C. Van Natta, Major Donna S. Rueppell, and Captain G. Matt Osborn.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

HEIMANN, Judge:

Consistent with his pleas, the appellant was found guilty of involuntary manslaughter and disobeying a general regulation, in violation of Articles 119 and 92, UCMJ, 10 U.S.C. §§ 919, 892, respectively. The adjudged and approved sentence consists of a dishonorable discharge, forfeiture of all pay and allowances, reduction to E-1, and confinement for 10 years.

On appeal, the appellant raises one assertion of error. He claims that the sentence is inappropriately severe. We also address the providence of the plea of guilty to disobeying the general regulation, an issue identified by our review of the case. Having concluded that the conviction for disobeying the general regulation cannot stand, we reduce that specification to a finding of willful dereliction of duty and reassess the sentence.

Providence of Plea

The appellant pled guilty to and was found guilty of violating Air Force Instruction (AFI) 31-207, *Arming and Use of Force by Air Force Personnel*, ¶ 2.12 (1 Sept 1999). It was undisputed that AFI 31-207 prohibits drawing or aiming a firearm when deadly force is not reasonably necessary and the firearm is not used for signaling. It was also undisputed that this provision of the AFI is a punitive provision. However, what was lost to all of the parties was another provision of AFI 31-207 that expressly provides that AFI 31-207:

> does not apply to USAF personnel . . . assigned to duty in the following areas or situations, as defined by an executive order or a DoD directive:
>
> In a combat zone in time of war.
>
> In a designated hostile fire area when rules of engagement apply, or when the combatant commander issues operations orders setting forth different criteria.

AFI 31-207, ¶ 1.1.1.

While we recognize that the appellant pled guilty to this offense, we cannot affirm a guilty plea on appeal if there is "a 'substantial basis' in law and fact for questioning the guilty plea." *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). Upon our review of the applicable AFI, we conclude that a "substantial basis" exists for questioning the appellant's plea. The AFI simply had no application to the appellant at the time of his relevant conduct. *See generally United States v. Martinelli*, 62 M.J. 52 (C.A.A.F. 2005) (finding guilty plea improvident where plea was to violation of a law that only applied domestically and the appellant's conduct occurred overseas).

Concluding that the charge of disobeying a lawful regulation cannot stand does not end our inquiry. A lesser included offense of the specification is the offense of willful dereliction of duty. The appellant is guilty of this offense if he was aware of a duty, and he was willfully derelict in the performance of those duties. During the plea inquiry, the appellant admitted that "although we weren't exactly told the regulation number, many times we've been briefed on what it contains during the guard mount, sir, with weapon

safety or through CATM, sir, when we go to qualify on our firing," and they were told to "treat every weapon as if it's loaded." He also agreed, in a stipulation of fact, that he understood rules at his installation required him to maintain his weapon in a "green" (unloaded) status while in his quarters.

Based upon all of the above, we are satisfied that the appellant clearly understood he had a duty, over and above the AFI, not to point any weapon at the victim. He admitted, during the plea inquiry, to intentionally violating this duty on two separate occasions. We are therefore satisfied that we can sustain a conviction for willful dereliction of duty on divers occasions during the time period charged. Having dismissed the greater charge, and affirming only the lesser included offense, we will address the impact of this action in the decretal paragraph below.

Sentence Appropriateness

The appellant asserts that ten years confinement and a dishonorable discharge is inappropriately severe. In support of his assertion, his counsel argues the facts and circumstances of the offense and the offender do not support the sentence. In this regard, the appellant asks the Court to consider the money saved by the appellant's plea, the remorse shown by the appellant, the character letters offered in support of the appellant, his good duty performance, and his undisputed rehabilitation potential.

In addition to the above, the appellant also asks the Court to consider the sentences of three Marines convicted for involuntary manslaughter. In those cases, the Marines received confinement periods of 27, 8, and 6 months. Only the first received a punitive discharge. The appellant offers the stipulation of fact from the case of the offender who received the most severe sentence. He provides no information regarding the evidence in mitigation or aggravation offered in any of these cases.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). 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).

In making a sentence appropriateness determination, we are required to examine sentences in closely related cases and are permitted – but not required – to do so in other cases. *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006) (citing *United States v. Wacha*, 55 M.J. 266, 267-68 (C.A.A.F. 2001)). "[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." *Lacy*, 50 M.J. at 288.

We begin by assessing the information provided by the appellant on the three Marines also convicted of involuntary manslaughter. In two of the cases, the appellant provides no facts surrounding the convictions and sentences. As such, we give this information no weight in making our assessment. As for the remaining case, in which the Marine was sentenced to 27 months confinement and a bad-conduct discharge, we acknowledge significant similarities in the crimes, but we do not have any additional information regarding the offender, the victim, and the impact of his offense on those involved. In the appellant's case, we have all of that information and it is clear that this additional information played a significant role in the military judge, sitting alone, arriving at his sentence.

Therefore, we find the appellant has not met his burden of showing the Marine case is closely related.

> Merely because a case involves similar charges brought under the same section of the UCMJ does not mean it is 'closely related' within the meaning of this Court's mandate to determine sentence appropriateness. Rather, 'closely related' cases are those which include, for example, 'coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared.'

United States v. Rangel, 64 M.J. 678, 686 (A.F. Ct. Crim. App. 2007) (quoting *Lacy*, 50 M.J. at 288). The logic of the *Rangel* decision is particularly apparent in a case of this nature. We have a completely different set of victims. When a sentence is calculated for someone who has killed another, that sentence must be based not only on the facts surrounding the offense but equally, if not more, importantly, on the impact of the crime on the victim. The appellant's victim was an only son. He left a wife who was his partner for life. He was the father of two small daughters, one of whom he had never seen because he was deployed, and both of whom will have no memory of their father. Clearly, the devastating impact of the appellant's crime on this family was profound and will be profound for many, many years. For that reason alone, we conclude the appellant has failed to establish that his crime is closely related to the Marine case presented.

Finally, looking to the appropriateness of the appellant's sentence on its own, we agree the sentence is significant, but we believe appropriately so. Despite our dismissal of the charge of disobeying a lawful regulation, it is still appropriate to consider the appellant's prior willful dereliction of duty regarding gun safety as a significant aggravating factor. As a security forces airman, he was repeatedly reminded of the importance of gun safety. His willful disregard for this training and the safety of others is

unconscionable. We have no doubt that he has significant rehabilitation potential and that he himself was impacted by this crime, but his crime was significantly aggravated. Senior Airman Carl J. Ware, Jr. was an airman with great promise. He had made a commitment to his country, his wife, and his children. Through no fault of his own, he will not be around to fulfill his promise to any of them. The appellant is responsible for that fact. Therefore, in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial, we find the adjudged and approved sentence appropriate in this case.

Conclusion

Notwithstanding the above, based upon our affirmation of only the lesser included offense of willful dereliction of duty, we must analyze the case to determine whether we can reassess the sentence. *See United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002). Before reassessing a sentence, this Court must be confident "that, absent any error, the sentence adjudged would have been of at least a certain severity." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). A "dramatic change in the 'penalty landscape'" gravitates away from our ability to reassess a sentence. *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003). Ultimately, a sentence can be reassessed only if we "confidently can discern the extent of the error's effect on the sentencing authority's decision." *United States v. Reed*, 33 M.J. 98, 99 (C.M.A. 1991). In *United States v. Harris*, 53 M.J. 86 (C.A.A.F. 2000), our superior court decided that if the appellate court cannot determine that the sentence would have been at least of a certain magnitude, it must order a rehearing. *Harris*, 53 M.J. at 88 (citing *United States v. Poole*, 26 M.J. 272, 274 (C.M.A. 1988)).

In this case, our action reduces the maximum permissible sentence that the appellant faced from 12 years of confinement to 10 years and six months. All other aspects of the maximum permissible sentence remain the same. We also note that the dismissal of the greater charge does not impact the admissibility of any of the evidence or aggravation surrounding the offenses, save AFI 31-207 itself. As such, we are satisfied that all of the facts surrounding the earlier incident of weapon pointing would have been admissible as evidence of the willful dereliction of duty. Therefore, the only change in the sentencing landscape is the small reduction in the maximum permissible sentence. Considering this change, we are confident that the military judge would have imposed a sentence of at least eight years and six months. We reassess the sentence accordingly.

We affirm only so much of the sentence as includes a dishonorable discharge, confinement for eight years and six months, forfeiture of all pay and allowances, and reduction to E-1. The findings, as amended, and the 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 findings, as amended, and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

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