UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant FREDERIC G. DANIELS
United States Air Force

ACM 37293

21 May 2009

Sentence adjudged 01 July 2008 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: Stephen Woody (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 years, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Major Lance J. Wood, and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Major Jeremy S. Weber, Captain Michael T. Rakowski, and Gerald R. Bruce, Esquire.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

PER CURIAM:

Contrary to the appellant's pleas, a military judge sitting as a general court-martial convicted him of one specification of sodomy with a child under 12 years of age, one specification of indecent acts with a child,[1] and one specification of indecent exposure, in violation of Articles 125 and 134, UCMJ, 10 U.S.C. §§ 925, 934. The adjudged and approved sentence consists of a bad-conduct discharge, six years confinement, and a reduction to E-1.

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[1] The appellant pled guilty by exceptions and substitutions but the military judge found the appellant guilty as charged.

On appeal the appellant asks this Court to approve only so much of the sentence that calls for a bad-conduct discharge, two years confinement, and a reduction to E-1 and to order a *Dubay*[2] hearing. The basis for his request is that he opines: (1) his approved sentence which includes confinement for six years is inappropriately severe and (2) additional fact finding is required to assess whether sentences for child molestation offenses in the military are imposed in a racially disparate manner.[3] Finding no prejudicial error, we affirm the findings and the sentence.

Background

In the summer of 2005, the appellant, while vacationing at his sister's house in Texas, exposed his penis to AT, then his 10-year-old niece, fondled her breasts, and licked her breasts and vagina. In August 2007, AT told her mother about the incident and AT's mother confronted the appellant. The appellant wrote AT's mother two e-mails wherein he confessed to having inappropriate oral contact with AT.

Inappropriately Severe Sentence

We review 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); *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). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we 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); *United States v. Dodge*, 59 M.J. 821, 829 (A.F. Ct. Crim. App.), *aff'd in part and rev'd in part on other grounds*, 60 M.J. 368 (C.A.A.F. 2004).

The appellant is a sexual predator who sexually abused his then 10-year-old niece. His crimes rank among the most heinous crimes recognized by society and severely compromises his standing as a military member and member of society. After carefully examining the submissions of counsel, the appellant's military record, a record that was outstanding prior to his crimes, and taking into account all the facts and circumstances surrounding the offenses of which the appellant was found guilty, we do not find the appellant's sentence, one which includes six years of confinement, inappropriately severe.

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[2] *United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1967).
[3] The issues are filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Racially Disparate Sentence

"When faced with a post-trial dispute over discovery relevant to an appeal, [this Court] needs to conduct an analysis similar to that used . . . for claims of ineffective assistance of counsel." *United States v. Campbell*, 57 M.J. 134, 138 (C.A.A.F. 2002). "First, [we] must determine whether the appellant met his threshold burden of demonstrating that some measure of appellate inquiry is warranted." *Id.*

> In addressing this question, [this Court] should consider, among other things:
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> (1) whether the defense has made a colorable showing that the evidence or information exists;
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> (2) whether or not the evidence or information sought was previously discoverable with due diligence;
>
> (3) whether the putative information is relevant to appellant's asserted claim or defense; and
>
> (4) whether there is a reasonable probability that the result of the proceeding would have been different if the putative information had been disclosed.

Id.

"Second, if [we decide] inquiry is warranted, [we] must determine what method of review should be used." *Id.* This Court has discretion to determine how and in what form additional evidence, when required, will be obtained. *Id.*

An appellant "who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination.'" *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (quoting *Whitus* v. *Georgia*, 385 U.S. 545, 550 (1967)). "A corollary to this principle is that a criminal defendant must prove that the purposeful discrimination 'had a discriminatory effect' on him." *Id.* (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985)). In short, to prevail the appellant must prove that his sentencing authorities acted with discriminatory purpose.

Here the appellant offers no evidence of purposeful discrimination. Rather he asserts, without evidence, that his sentence and the sentences of other minority child molesters confined at the Naval Air Station Miramar Brig were imposed in a racially disparate manner. Since he has offered no evidence of racial animus on the part of the sentencing authorities, we find he has failed to meet his threshold burden of

demonstrating that some measure of appellate inquiry is warranted. Accordingly, we refuse to engage in the fishing expedition he seeks.

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, 10 U.S.C. § 866(c); *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

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