UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant JOHN A. DAVIS
United States Air Force

ACM 37212

24 February 2009

Sentence adjudged 23 January 2008 by GCM convened at Misawa Air Base, Japan. Military Judge: Gregory O. Friedland (sitting alone).

Approved sentence: Confinement for 48 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Captain Timothy M. Cox, and Captain Tiffany M. Wagner.

Appellate Counsel for the United States: Colonel Gerald R. Bruce and Major Jeremy S. Weber.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final publication.

HEIMANN, Senior Judge:

In accordance with his pleas, the appellant, a technical sergeant with over 19 years of service, was found guilty of possession and distribution of child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. Contrary to his plea, he was also found guilty of attempting to communicate indecent language to a child under 16 years of age, in violation of Article 80, UCMJ, 10 U.S.C. § 880.[1]

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[1] The appellant's language was directed at a police officer, who was pretending to be a 14-year-old girl, in an internet chat room.

A military judge sentenced the appellant to a dishonorable discharge, confinement for 54 months, total forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority's Action is the subject of the first issue and is discussed below.

The appellant alleges three errors. The first two are related to the convening authority's Action, and the third contends the length of confinement is inappropriately severe.[2]

Convening Authority Action

The appellant entered into a pretrial agreement (PTA) with the convening authority. In the PTA, the appellant agreed to plead guilty to the charge and specifications alleging possession and distribution of child pornography, forego a number of motions, be tried by a military judge alone, and make other concessions regarding evidentiary matters. In exchange, the convening authority agreed to not approve any confinement in excess of 48 months. The PTA contained no other sentence limitations.

As part of his extensive clemency submission, the appellant asked the *successor* convening authority to disapprove the punitive discharge and reduce the period of confinement to 28 months.[3] The appellant and his trial defense counsel argued that the discharge and additional confinement only served to punish his wife of 19 years and his two teenage sons. The clemency package particularly highlighted the impact of the loss of retirement. Consistent with the PTA, the staff judge advocate recommended the convening authority reduce the confinement, but otherwise approve the sentence as adjudged. On 24 April 2008, the convening authority took action. The Action reads:

> In the general court-martial case of TECHNICAL SERGEANT JOHN A DAVIS, . . . only so much of the sentence as provides for reduction to airman basic, forfeiture of all pay and allowances, and 48 months confinement is approved and with be executed. The Air Force Corrections System is designated for the purpose of confinement, and the confinement will be served therein or elsewhere as the Director, Air Force Corrections Division may direct. The record of trial is forwarded to The Judge Advocate General for examination under Article 69(a) UCMJ, unless appellate review is waived or withdrawn under Article 61, UCMJ.

The case was then docketed with this Court on 12 May 2008.[4] At some point subsequent to docketing, a "new" Action arrived and was placed in the record. This new

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[2] The third error was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[3] The convening authority who entered into the pretrial agreement with the appellant was replaced by a new convening authority as part of a routine assignment action.

[4] While the docketing with this Court was contrary to the instruction in the Action directing review under Article 69(a), UCMJ, 10 U.S.C. § 869, review by this Court is required under Article 66(b)(2), UCMJ, 10 U.S.C. § 866.

Action purports to rescind the April 24, 2008 Action and approve the dishonorable discharge.[5] Subsequent to this entry in the record, the appellant petitioned the Court to "strike" the new Action from the record. While this request was denied at that time, we agree with the appellant that this "new" Action is a legal nullity. Rule for Courts-Martial (R.C.M) 1107(f)(2); *United States v. Alexander*, 63 M.J. 269, 274 (C.A.A.F. 2006). Having concluded that the "new" Action is a legal nullity, it has not been considered by the Court.[6]

Looking to the original Action, the appellant argues the language in the convening authority's original Action is clear and unambiguous, and the approved sentence does not include the dishonorable discharge. The appellant argues that we have no authority to act on the discharge portion of the sentence because it has already been disapproved by the convening authority. Article 66(c), UCMJ, 10 U.S.C. § 866(c). The appellee, citing language from R.C.M. 1107(g), contends that the Action is ambiguous because it does not *expressly* disapprove the dishonorable discharge. Therefore, the appellee argues, the Action should be returned to the convening authority for clarification.

Over the past several years our superior court has addressed the question of "ambiguous" Actions on several occasions. *United States v. Burch*, 67 M.J. 32 (C.A.A.F. 2008); *United States v. Wilson*, 65 M.J. 140 (C.A.A.F. 2007); *United States v. Politte*, 63 M.J. 24 (C.A.A.F. 2006). In *Burch*, the Court reiterated, "'[w]hen the plain language of the convening authority's action is facially complete and unambiguous, its meaning must be given effect,' without reference to circumstances not reflected in the action itself." *Burch*, 67 M.J. at 33-34 (quoting *Wilson*, 65 M.J. at 141).

We find that the Action is facially complete and unambiguous on its face. The convening authority expressly stated the portions of the sentence he approved. If we were to conclude that the failure to mention an element of the punishment itself constitutes an ambiguity, it would lead to the illogical conclusion that every time the convening authority does not approve a fine, a reduction, or a forfeiture of pay, it would create an ambiguity. Such a conclusion is not consistent with the guidance contained in *Wilson* and *Burch*. In addition, we note that such an approach would also be completely inconsistent with the *Manual for Courts-Martial* and its recommended format for Actions when a convening authority decides to approve only a portion of the sentence. *Manual for Courts-Martial, United States (MCM)*, A16-1 to A16-2 (2008 ed.). Therefore, we find that we are limited to review of only that portion of the sentence that includes reduction to Airman Basic (E-1), total forfeiture of all pay and allowances, and 48 months of confinement.

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[5] The new Action was signed by the same convening authority who signed the original Action.
[6] Having reached this conclusion, we note that the court-martial order dated 5 June 2008 is also a nullity.

Sentence Appropriateness

The appellant also contends that his sentence of 48 months confinement is inappropriately severe. He argues the sentence fails to reflect his over-19 years of service and his numerous awards and decorations. He also expressly asks us to consider the matters he submitted to the convening authority in clemency.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005); *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006) (citations omitted). 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) (citations omitted). 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); *United States v. Dodge*, 59 M.J. 821, 829 (A.F. Ct. Crim. App. 2004) (citing *Healy*, 26 M.J. 394), *rev'd on other grounds*, 60 M.J. 368 (C.A.A.F. 2004).

The appellant possessed and distributed child pornography on various occasions over a two-year period. When he began his criminal conduct, he had just over 16 years of service. When he engaged in indecent language with a person he thought was a 14-year-old girl, he had just over 18 years of service. Thus, we find his argument that his lengthy service suggests his sentence is inappropriately severe lacks merit. Having considered all the misconduct and the entire record, we ourselves are satisfied that the sentence is appropriate.

Conclusion

Having concluded that the convening authority approved a sentence consisting of only a reduction to E-1, forfeiture of all pay and allowances, and 48 months of confinement, 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; *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