UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JESSIE GAINES III
United States Air Force

ACM 37429

24 November 2009

Sentence adjudged 18 February 2009 by GCM convened at Sheppard Air Force Base, Texas. Military Judge: Nancy J. Paul (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 36 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Michael S. Kerr.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Major Kimani R. Eason, and Gerald R. Bruce, Esquire.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

PER CURIAM:

A general court-martial composed of military judge alone convicted the appellant in accordance with his pleas of one specification of attempted robbery, two specifications of robbery, one specification of assault, one specification of disorderly conduct, and one specification of unlawfully carrying a concealed weapon, in violation of Articles 80, 122, 128, and 134, UCMJ, 10 U.S.C. §§ 880, 922, 928, 934. The convening authority approved the adjudged sentence of reduction to E-1, confinement for 36 months, and a dishonorable discharge. On appeal the appellant challenges the appropriateness of his sentence. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

During a one-day crime spree the appellant first attempted to rob an individual at a car wash, but the robbery failed because the victim had no money. The appellant then went to another bay of the car wash where he robbed a husband and wife at gunpoint, taking $50 from them. He then went to a church where services had just concluded and proceeded to swear at and spit on an elderly member of the congregation and threaten him with a gun. The appellant further admitted during the plea inquiry that he carried a handgun concealed in his pants during the episode.

The appellant does not recall any of the charged facts but agreed that the events occurred based on reviewing police reports, witness interviews, and discussions with his counsel. His inability to recall the events charged, however, does not alone render his guilty plea improvident. *United States v. Whelehan*, 10 M.J. 566, 568 (A.F.C.M.R. 1980). The appellant's responses during the plea inquiry establish a provident plea to the charged offenses. *United States v. Shaw*, 64 M.J. 460 (C.A.A.F. 2007).

Underlying the appellant's lack of recall and the events themselves were questions regarding the appellant's mental state. After explaining the defense of lack of mental responsibility to the appellant, the military judge inquired of both the appellant and his defense counsel whether lack of mental responsibility was a defense in the case. Both replied that it was not. A sanity board found that the appellant was mentally responsible and competent to stand trial, and the military judge conducted an exhaustive inquiry into the appellant's mental responsibility and competency after the issue was arguably raised by the defense expert's testimony during sentencing. In detailed findings of fact, the military judge concluded that the appellant was mentally responsible, competent to stand trial, and reaffirmed her acceptance of the guilty pleas.

The appellant does not dispute the providence of his plea based on mental disease or defect but instead argues that such mental disease shows the sentence is inappropriately severe. We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] 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). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006) (citing *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007).

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, 287-88 (C.A.A.F. 1999); *Healy*, 26 M.J. at 395-96. Here, extensive evidence concerning the appellant's mental state was offered by both sides at trial, and

the military judge's careful consideration of the issue shows that she factored this into a sentence tailored for this particular offender. The victims of the appellant's crimes testified concerning their extreme fear at being confronted by an armed man demanding money and the lasting effects this crime has had on them. A victim at the church testified concerning the fear the appellant created in the congregation and the security measures the church has taken since the incident.

For his crimes the appellant faced a maximum sentence that included confinement for over 40 years, but he entered into a pretrial agreement that capped his confinement at 36 months. As the government points out in its brief, the appellant's argument is essentially a renewal of his request for clemency. Having given individualized consideration to this particular appellant, the nature of the offense, the appellant's record of service, and all other matters in the record of trial, we hold that the approved sentence is not inappropriately severe.

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; *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