UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant STEVEN J. HELLER
United States Air Force

ACM 35901

14 June 2006

Sentence adjudged 19 December 2003 by GCM convened at Randolph Air Force Base, Texas. Military Judge: Patrick M. Rosenow (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 30 years, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Colonel Carlos L. McDade, Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Terry L. McElyea, Major Sandra K. Whittington, Major David P. Bennett, and Timothy L. Hughes, Esq.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Jin-Hwa L. Frazier.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT

JACOBSON, Judge:

In accordance with his pleas, the appellant was found guilty of attempted rape on divers occasions of a child under the age of 16; committing sodomy on divers occasions with a child under the age of 12; two specifications of committing indecent acts on divers occasions upon two different children under the age of 16; one specification of wrongfully and knowingly possessing, receiving and/or displaying visual depictions of children under the age of 18 engaging in sexually explicit conduct; and two specifications

of taking indecent liberties with a child under the age of 16, in violation of Articles 80, 125, and 134, UCMJ, 10 U.S.C. §§ 880, 925, 934. The military judge, sitting alone as a general court-martial, sentenced the appellant to a dishonorable discharge, confinement for 30 years, and reduction to E-1. The convening authority approved the findings and sentence as adjudged.

On appeal, the appellant asks that we find his sentence to be inappropriately severe and claims that he was subjected to cruel and unusual punishment while in post-trial confinement.[1] We find both assignments of error to be without merit and affirm.

This Court has the authority to review sentences pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866(c), and to reduce or modify sentences we find inappropriately severe. Generally, we make this determination in light of the character of the offender and the seriousness of his offense. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). We may also take into account disparities between sentences adjudged for similar offenses. *United States v. Wacha*, 55 M.J. 266, 267 (C.A.A.F. 2001). Our duty to assess the appropriateness of a sentence is "highly discretionary," but does not authorize us to engage in an exercise of clemency. *United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988).

The appellant's sexual abuse of his two daughters was the basis for the charges against him at the court-martial. During the charged timeframe, his oldest daughter, MH, was between 9 and 12 years old. His youngest daughter, AH, was between 5 and 8 years old. At trial the appellant admitted that during the charged time period he committed numerous crimes of a sexual nature against his daughters, but primarily against AH. He twice attempted to rape AH. He committed sodomy upon AH several times by either licking her vagina or placing his penis in her mouth until he ejaculated. On numerous occasions he fondled AH's chest, stomach, genitals, and bottom or forced her to place her hands on his genitals, often bringing himself to orgasm during the abuse. He also showed AH pictures of adults engaging in sexual acts and took pictures of her in sexually explicit poses. On at least two occasions, while his wife was at a church function, the appellant fondled his older daughter by touching her chest and genital area. Finally, the accused downloaded and possessed a large number of photographs depicting children in sexually explicit poses or engaged in sexual activities.

In the sentencing phase of his court-martial the appellant emphasized his recent bipolar disorder diagnosis and presented an expert witness who opined that the appellant had good rehabilitation potential and was unlikely to re-offend.

To the degree that the appellant's mental problems extenuate and mitigate his crimes, we are confident that the military judge considered this factor in arriving at an

[1] Both assignments of error were filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

appropriate sentence. Likewise, we are confident that the military judge carefully considered the opinion of the appellant's expert witness when crafting an appropriate sentence in this case. After carefully examining the submissions of counsel and taking into account all the facts and circumstances surrounding the crimes to which the appellant pled guilty and was convicted of, we do not find the appellant's sentence inappropriately severe. *See Snelling*, 14 M.J. at 268.

Turning to the appellant's second assignment of error, we review claims of cruel and unusual punishment under the Eighth Amendment de novo. *United States v. Smith*, 56 M.J. 290, 292 (C.A.A.F. 2002) (citing *United States v. White*, 54 M.J. 469, 471 (C.A.A.F. 2001)). The Supreme Court has concluded that an official violates the Eighth Amendment only when two requirements are met: (1) The deprivation alleged must be, objectively, a "sufficiently serious" act or omission that results in the denial of "the minimal civilized measure of life's necessities," and (2) The prison official must have a "sufficiently culpable state of mind" amounting to "deliberate indifference" to the inmates health or safety. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citations omitted). In *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), the Supreme Court held that confinement conditions that constituted a "deliberate indifference" to the "serious medical needs" of prisoners violated the Eighth Amendment.

The appellant claims that he has suffered cruel and unusual punishment in two respects. First, immediately following his trial he was placed in maximum custody status and housed in a solitary confinement cell for 37 days prior to his transfer to the United States Disciplinary Barracks (USDB) at Fort Leavenworth, Kansas. Although he was fed, provided with a bed and bible, allowed to attend to his personal hygiene needs, and given a physical every 72 hours, he asserts his treatment was humiliating and unnecessary.

Second, he claims that he has received inadequate and/or inappropriate medical care while at the USDB. The documentation submitted by the appellant belies his attempts to show deliberate indifference to his medical condition on the part of the USDB medical staff. To the contrary, the documents illustrate the appellant's frequent complaints about a wide variety of medical issues have been responded to, albeit not always to the appellant's liking. He has frequently been seen by the medical staff, has been prescribed medication, and was issued a cane to assist his mobility. His complaints about treatment appear to be mostly disagreements with the medical staff regarding the proper course of his treatment, and his more serious allegations have been determined to be unfounded after investigations conducted pursuant to his complaints under Article 138, UCMJ, 10 U.S.C. § 938, and complaints to the Inspector General.

We find that the conditions of post-trial confinement imposed on the appellant fall far short of the cruel and unusual punishment standard set forth by the Supreme Court in the *Farmer* Eighth Amendment analysis. *See, e.g., United States v. Brennan*, 58 M.J.

351, 353-54 (C.A.A.F. 2003); *White*, 54 M.J. at 473-74; *United States v. Erby*, 54 M.J. 476, 478 (C.A.A.F. 2001); *United States v. Sanchez*, 53 M.J. 393 (C.A.A.F. 2000); *United States v. Avila*, 53 M.J. 99 (C.A.A.F. 2000). Likewise, we find that the appellant's complaints about his medical care and disagreements with the USDB's medical staff regarding his medical treatment do not rise to the level of "deliberate indifference" to his medical needs, as explained by the court in *Estelle*. Thus, appellant's second assignment of error is without merit.

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

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator