UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman CHRISTOPHER D. HICKS
United States Air Force

ACM 37116

24 September 2008

Sentence adjudged 01 June 2007 by GCM convened at Spangdahlem Air Base, Germany. Military Judge: Gordon R. Hammock.

Approved sentence: Bad-conduct discharge, confinement for 5 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Lance J. Wood.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Ryan N. Hoback.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

A panel of officer and enlisted members sitting as a general court-martial convicted the appellant of one specification of indecent acts, in violation of Article 134, UCMJ, 10 U.S.C. § 934.[1] The members sentenced the appellant to a bad-conduct discharge, six months confinement, forfeitures of $650 pay per month for six months, and reduction to E-1. The convening authority approved the findings, the bad-conduct

[1] The appellant was charged with one specification of rape and the members found him guilty of the lesser-included offense of indecent acts (engaging in sexual intercourse with another in the presence of a third party).

discharge, five months of the adjudged confinement, and the reduction to E-1. On appeal the appellant asks the court to disapprove his bad-conduct discharge because his sentence, when compared to that received by his co-actor, is inappropriately severe.[2] Finding no error, we affirm.

Background

During the early hours of 24 September 2006, the appellant met then-Airman AR at a local Irish pub. Over the course of the night, Airman AR consumed several alcoholic beverages and became drunk. While at the pub, the appellant and Airman AR encountered Staff Sergeant CS, who was drunk and crying. The appellant and Airman AR convinced Staff Sergeant CS to accompany them to the appellant's residence, and upon arriving, Staff Sergeant CS vomited and fell asleep on the appellant's bed. At a later point in the evening, while Staff Sergeant CS was still lying on the appellant's bed, Airman AR performed oral sex on her, and the appellant had sexual intercourse with both Staff Sergeant CS and Airman AR. Shortly thereafter, the appellant drove Staff Sergeant CS to a friend's house, whereupon she reported the incident to her friend and Staff Sergeant CS's husband. Staff Sergeant CS' husband, in turn, reported the incident to her first sergeant, which led to Staff Sergeant CS making an unrestricted report.

Discussion

Inappropriately Severe Sentence

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); *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). Moreover, while we are required to examine sentence disparities in closely related cases, we are 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)), *pet. granted on other grounds*, 65 M.J. 320 (C.A.A.F. 2007).

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[2] The appellant's co-actor pled and was found guilty of two specifications of indecent acts (watching the appellant engage in sexual intercourse with another and placing her tongue on the vagina of another while the appellant watched). The military judge sentenced her to four months confinement and a reduction to E-1.

Closely related cases include those which pertain to "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." *Lacy*, 50 M.J. at 288. "At [this Court], an 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 Government must show that there is a rational basis for the disparity." *Id.*

Without question, Airman AR was the appellant's co-actor in the crimes involving Staff Sergeant CS. As such, Airman AR's case is "closely related" to the appellant's case. Moreover, in light of the fact that the appellant received a punitive discharge and Airman AR did not, the sentences of the two cases are highly disparate. Accordingly, the government bears the burden of showing that there is a rational basis for the disparity.

The government has met its burden in this case. Several factors provide a rational basis for the disparity between the appellant's sentence and Airman AR's sentence, not the least of which was their choice of forum. Airman AR elected to be tried and sentenced by a military judge sitting alone. Conversely, the appellant elected to be tried and sentenced by a panel of court members. Second, Airman AR pled guilty, accepted responsibility for her crimes, and this likely influenced the military judge's sentence. The appellant, on the other hand, pled not guilty, as was his right, was found guilty, and was likely not given credit for accepting responsibility for his crimes. Third, Airman AR, because of her positive attitude and performance, engendered support from her chain of command and others—they either testified or provided character statements on her behalf—and this support influenced the military judge's sentence. The appellant had no such support and this lack of support, while likely not detrimental, certainly was not favorable. Lastly, Airman AR and the appellant did not arrive at their courts-martial "carrying the same baggage." Airman AR had no "bad paper" and had the support of her squadron members attesting to her rehabilitative potential. On the other hand, the appellant had a long and varied record of misconduct[3] and no squadron support. Put simply, Airman AR and the appellant were not similarly situated and this factor, along with the previously mentioned factors, provides a rational basis for the disparity between their sentences.

We next consider whether the appellant's sentence was appropriate as judged by individualized consideration of appellant on the basis of the nature and seriousness of the offense and the character of the accused. After carefully reviewing the entire record of trial, we find the appellant's approved sentence, including the bad conduct discharge, appropriate.

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[3] The appellant had received: (1) a civilian conviction for driving under the influence; (2) non-judicial punishment for failure to go; (3) non-judicial punishment for being drunk and disorderly; (4) a letter of reprimand for violating a general order; and (5) a letter of reprimand for failure to go.

Conclusion

The approved findings and the 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 the sentence are

AFFIRMED.

OFFICIAL

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