UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain TROY O. KENNEDY
United States Air Force

ACM 35929

31 March 2006

Sentence adjudged 22 January 2004 by GCM convened at Brooks City-Base, Texas. Military Judge: Patrick M. Rosenow and Barbara G. Brand (sitting alone).

Approved sentence: Dismissal.

Appellate Counsel for Appellant: Colonel Carols L. McDade, Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Sandra K. Whittington, and Captain Christopher S. Morgan

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Carrie E. Wolf.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

PER CURIAM:

The appellant was found guilty, in accordance with his plea, of one specification of failure to obey a lawful order in violation of Article 92, UCMJ, 10 U.S.C. § 892.[1] A military judge, sitting alone as a general court-martial, sentenced the appellant to be

[1] The trial defense counsel filed a motion to suppress evidence that was granted by the military judge resulting in the government withdrawing a charge and specification alleging obstruction of justice, in violation of Article 134, UCMJ, 10 U.S.C. § 934. Further, the defense presentation led the military judge to find their client not guilty of a charge and specification of assault, in violation of Article 128, UCMJ, 10 U.S.C. § 928, pursuant to Rule for Courts-Martial 917.

dismissed from the service. The convening authority approved the findings and sentence as adjudged. On appeal, the appellant submits three assignments of error. Finding no merit in these assignments, we affirm.

The appellant first claims his sentence is inappropriately severe. 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).

This was appellant's second court-martial. Evidence presented to the military judge indicated that the appellant repeatedly and deliberately ignored two direct written orders from his commander that directed him to avoid all contact with MC, an individual who played a prominent part in the first court-martial. Rather than complying with his commander's orders, the appellant continued his relationship with MC. The evidence showed that the appellant and MC shared a house (or, alternatively, she was a very frequent guest at the appellant's house), that MC attended the appellant's softball games on a regular basis, and that the two were in frequent telephone contact, all in direct violation of the commander's orders. Other evidence presented to the military judge during sentencing was the court-martial order from the appellant's first conviction and a letter of reprimand. 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, we do not find the appellant's sentence inappropriately severe. *See Snelling*, 14 M.J. at 268.

The appellant's second assignment of error alleges he was denied effective assistance of counsel during the presentencing proceedings when his trial defense counsel failed to introduce specific evidence regarding the retirement benefits the appellant would forfeit as the result of a punitive discharge.

In order for an individual to claim ineffective assistance of counsel, an appellant must overcome a strong presumption that defense counsel has "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). The appellant must prove that counsel's performance was deficient and this deficiency prejudiced the appellant. *Id.* at 691-92. The appellant has not offered any evidence in his post-trial declaration or in any other form that overcomes the presumption that his counsel acted reasonably and rendered adequate assistance. A thorough review of the record indicates

that the appellant's defense team presented a vigorous defense during all phases of the trial. The tactical and strategic decisions made by defense counsel during the course of the trial, among other benefits, reduced the appellant's confinement exposure by five and one-half years.

The appellant's post-trial affidavit argues, however, that had his counsel chosen to present evidence regarding his Air Force Reserve retirement benefits to the military judge, "the outcome could have been more positive." In a separate affidavit, trial defense counsel explains that the defense team made the decision that specific arguments regarding the possibility of retirement were better suited for the clemency process, where the convening authority would have more disposition options than the military judge possessed. In support of trial defense counsel's opinion that specific retirement evidence was "too speculative" in the appellant's case, we note that even before this Court, counsel for each side disagree on how the appellant's combination of active duty and Reserve service would affect his retirement benefits. Nonetheless, it was abundantly clear to the military judge that the appellant served in the armed forces, in one capacity or another, for over 20 years by the time of trial. Trial defense counsel placed a variety of evidence before the military judge that indicated the appellant served in the military for more than 20 years, including two character letters that specifically mentioned that fact. In addition, several service-related certificates admitted as defense exhibits were over 20 years old. The appellant, himself, specifically informed the military judge of his lengthy service during his extremely detailed written and oral unsworn statements. Additionally, the trial defense counsel referred to the appellant's service as being more than 20 years in the opening sentence of his argument, and made the same reference later in the argument.

We find that the defense team was not ineffective in making the decision to approach the issue of possible retirement benefits in this way. We are also confident that the military judge, an experienced jurist and career Air Force officer, considered the appellant's lengthy service and potential retirement when deciding on an appropriate sentence. Based on our careful reading of the entire record, we find the appellant's claim of error to be without merit.

Finally, we find the appellant's third assignment of error to be meritless as well. The government had a good-faith belief that the appellant committed the crimes for which he was charged, and was within its rights to pursue them. The fact that the appellant's alleged victim ultimately carried through with her decision to not testify at the court-martial, thereby rendering her prior oral and written allegations of abuse inadmissible, did not render the charge itself "baseless" as alleged by the appellant.

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

ANGELA M. BRICE
Clerk of Court