UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman BRANDON J. KIELISCH
United States Air Force

ACM 38114

26 September 2013

Sentence adjudged 2 March 2012 by GCM convened at Offutt Air Force Base, Nebraska. Military Judge: Natalie D. Richardson.

Approved Sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Don M. Christensen; Captain Brian C. Mason; and Gerald R. Bruce, Esquire.

Before

HELGET, WEBER, and PELOQUIN
Appellate Military Judges

PER CURIAM:

The appellant was tried by a general court-martial composed of officer members for assault consummated by battery and aggravated assault, in violation of Article 128, UCMJ, 10 U.S.C. § 928, and disrespect towards a noncommissioned officer, in violation of Article 91, UCMJ, 10 U.S.C. § 891. In accordance with his pleas, the appellant was found guilty of eight specifications of assault consummated by battery.[1] Contrary to his pleas, members convicted him of one specification of disrespect toward a

[1] The appellant was charged with six specifications of assault consummated by battery and two specifications of aggravated assault. He was found guilty, consistent with his pleas, of the six specifications of assault consummated by battery. As to the aggravated assault specifications, the appellant was found guilty, consistent with his pleas, of the lesser included offenses of assault consummated by battery.

noncommissioned officer. The adjudged sentence consisted of a bad-conduct discharge, confinement for 6 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged, but deferred all of adjudged and mandatory forfeitures until the date of his action.

On appeal, the appellant asserts that the bad-conduct discharge portion of his sentence is overly severe.[2]

Background

Over the period from September 2009 to June 2010, the appellant, on numerous occasions, physically assaulted his then-spouse, Staff Sergeant (SSgt) AK. The assaults took place in public settings and in their home, and typically followed or arose in the course of a disagreement. The assaults consisted of the appellant pushing, grabbing, restraining, or striking SSgt AK. On at least three occasions, SSgt AK sustained significant physical injuries. Those injuries included a swollen eye and lacerations to her cheek as well as injuries to her hand, wrist, and arm. On two of those occasions, she presented herself to a medical emergency room. In one instance, her treatment included a splint of her wrist and hand. In another instance, her treatment included casting of her lower arm and elbow.

In September 2010, as the marriage was in decline, SSgt AK moved out of the marital residence and lived with friends. On 8 September 2010, SSgt AK intended to go to the marital residence to retrieve some of her belongings. Concerned for her safety, she asked her supervisor, Technical Sergeant (TSgt) WL, to accompany her to the residence. In the course of removing her belongings, she asked TSgt WL for assistance in carrying some items from the home. As TSgt WL approached the entrance, the appellant told TSgt WL that he would punch TSgt WL if he entered the home. The appellant was fully aware of TSgt WL's position and rank at the time of the incident.

At sentencing, the Government introduced evidence of the appellant's prior misconduct, which consisted of a letter of reprimand for underage drinking as well as civilian convictions for driving under the influence, driving while his license was suspended, disorderly conduct, failure to stop at the direction of a law enforcement official, and eluding police.

In his unsworn statement, the appellant apologized to SSgt AK and her family for his misconduct and expressed remorse for his actions. He suggested he was immature when he entered the relationship with SSgt AK and acknowledged that his assaults of her were wholly inappropriate. He further indicated he had learned from his mistakes and matured, and was now involved in a loving, long-term relationship with his girlfriend.

[2] The appellant raises this issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Discussion

The appellant suggests his sentence is disparate when compared to closely related cases. The appellant further asserts that the imposition of a bad-conduct discharge is overly harsh given the indications of mutual aggression between him and SSgt AK.

As to sentence disparity, the appropriateness of a sentence generally should be determined without reference or comparison to sentences in other cases. *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985). We are not required to engage in sentence comparison with specific cases "except in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases." *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999) (quoting *Ballard*, 20 M.J. at 283). Further, the 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." *Id.* at 288. Examples of closely related cases include co-actors 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." *Id.*

In the instant case, the appellant does not cite any "closely related" cases he seeks to compare to his own circumstances. As such, the appellant fails in meeting the threshold burden that may otherwise lead this Court to a sentence disparity analysis.

We next turn to the appellant's assertion that the imposition of a bad-conduct discharge in this case is overly harsh or severe.

A court-martial is free to impose any lawful sentence that it considers fair and just. *United States v. Turner*, 34 C.M.R. 215, 217 (C.M.A. 1964). Under Article 66(c), UCMJ, 10 U.S.C. § 66(c), this Court is required to independently determine the sentence appropriateness of each case we affirm. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005). "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves," whereas clemency, a "command prerogative," "involves bestowing mercy – treating an accused with less rigor than he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). In making the assessment of sentence appropriateness, we consider the nature and seriousness of the offenses as well as the character of the offender. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

In the appellant's case, the maximum punishment authorized included a bad-conduct discharge, confinement for 4 years and 3 months, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

The appellant seems to suggest that the bad-conduct discharge is overly severe because of the mutually aggressive nature of his altercations with SSgt AK. While the assaults did occur within the course of domestic disputes and arguments, nothing in the record suggests SSgt AK was an aggressor or physically abusive to the appellant. During his providence inquiry, the appellant clearly informed the court that he was never threatened by SSgt AK or ever in a position where he felt the need to defend himself. Given the frequency and severity of the assaults committed by the appellant within the confines of a would-be trusting, marital relationship, the sentence, to include the bad-conduct discharge, is wholly appropriate for these offenses and for this offender.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court