

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman First Class JOSHUA M. KIZIAH
United States Air Force**

ACM 37259

18 December 2009

Sentence adjudged 18 April 2008 by GCM convened at Tinker Air Force Base, Oklahoma. Military Judge: Le T. Zimmerman (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 54 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Imelda L. Paredes, and Captain Marla J. Gillman.

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

Before

**BRAND, JACKSON, and THOMPSON
Appellate Military Judges**

This opinion is subject to editorial correction before final release.

PER CURIAM:

Consistent with the appellant's pleas, a military judge sitting as a general court-martial convicted him of one specification of sodomy with a child who had attained the age of 12, but was under the age of 16; one specification of indecent acts upon a child under the age of 16; and two specifications of conduct prejudicial to good order and discipline or service discrediting conduct for wrongfully communicating by computer to satisfy his sexual or prurient interest and wrongfully sending pictures of his penis and buttocks to a minor via a computer, in violation of Articles 125 and 134, UCMJ, 10 U.S.C. §§ 925, 934. The convening authority approved a sentence consisting of a

dishonorable discharge, confinement for 54 months, and reduction to E-1.¹ The appellant asserts his sentence, which includes 54 months of confinement, is inappropriately severe. Finding no error, we affirm.

Background

The appellant was a security forces member assigned to Tinker Air Force Base, Oklahoma. On 25 June 2007, BW, a then 14-year-old boy living in the local area, sent a message to the appellant's MySpace² webpage requesting access to the appellant's personal webpage. After the appellant granted his request, the appellant and BW began exchanging numerous messages on the appellant's MySpace webpage later that day. The appellant verified BW was 14 years old, discussed sexual orientation with BW, asked if BW liked older men, and traded pictures with BW. The appellant sent seven pictures of himself, which included pictures of the appellant's penis and buttocks, along with sexually suggestive captions for some of the pictures. The appellant called BW and they agreed to meet within four or five days. However, the next day, the appellant contacted BW and asked if they could meet that day. BW agreed to meet the appellant and told him that he would lie to his mother regarding his whereabouts. The appellant drove from base and picked up BW at his off-base home. The appellant took BW to his on-base dormitory room where the two began to kiss. They disrobed and continued to kiss. Both the appellant and BW performed oral sex on each other. Afterwards, they discussed anal sex and agreed BW would perform this sex act on the appellant. BW attempted anal sex, but he did not penetrate the appellant. Finally, the appellant and BW took a shower together where they continued to kiss.

During sentencing, the government called BW's mother to discuss the impact the incident had upon her and BW. She described the changes in BW's behavior as well as the medical treatment and counseling he had received. She also discussed her hospitalization for three days because of a nervous breakdown. She testified the appellant needed to be punished and to receive some jail time. The appellant faced a maximum of 354 months of confinement. The pretrial agreement limited confinement to 60 months. The military judge imposed a sentence of a dishonorable discharge, 54 months of confinement, and reduction to E-1.

During clemency, the appellant asserted confinement for 54 months was severe and requested the convening authority reduce the confinement to 24 months. In support of his clemency request, the appellant included letters from BW and his parents asking that the confinement be reduced. In their letters, BW and his parents stated that although they wanted the appellant to be punished, they believed 54 months of confinement was

¹ Pursuant to a pretrial agreement, the convening authority dismissed two additional specifications and one charge. The pretrial agreement limited confinement to 60 months.

² MySpace is an on-line webpage where individuals can post personal information and photographs, engage in instant messaging, send e-mails, and interact with other individuals who have access to the webpages.

too long. They also pointed out that BW was feeling guilty about the sentence, noting the imposed confinement hampered them from moving on from the incident. The convening authority considered these matters; however, the adjudged sentence was approved without clemency.

Sentence Appropriateness

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005); *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006), *aff'd*, 66 M.J. 291 (C.A.A.F. 2008). 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 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, 287-88 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

In this case, the appellant committed egregious criminal activity involving a 14-year-old boy. On the same day BW made contact with the appellant, the appellant began sending sexually explicit photographs of himself and writing sexually suggestive messages to this child. He wasted no time beginning his despicable behavior. The day after their on-line introduction, the appellant sought out BW and asked him to meet that day. The appellant drove off base to this young boy’s home and took him back to his on-base dormitory room, knowing BW had lied to his mother regarding his whereabouts. Then, this 20-year-old airman took advantage of and violated this child in his on-base dormitory room. We find the facts of this case to be highly aggravating. We also note the appellant received a sentence to include a term of confinement which was well below the maximum of 354 months and, in fact, even lower than the confinement cap of 60 months that the appellant had agreed to in the pretrial agreement. After carefully examining the entire record, including the submissions of counsel and the appellant’s military record, and taking into account all the facts and circumstances surrounding the offenses of which the appellant was found guilty, we do not find the appellant’s sentence, one which includes a dishonorable discharge, 54 months of confinement and reduction to E-1, to be 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). The approved findings and sentence are

AFFIRMED.

OFFICIAL



A handwritten signature in blue ink, appearing to read "S. Lucas", is written over the seal.

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