UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JOSHUA P. LOVETT
United States Air Force

ACM 33947 (f rev)

25 August 2004

Sentence adjudged 17 July 1999 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: Linda S. Murnane.

Approved sentence: Dishonorable discharge, confinement for 15 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Karen L. Hecker, Major James M. Winner, and Mr. Norman R. Zamboni.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, Major John C. Johnson, and Captain Kevin P. Stiens.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

PRATT, Chief Judge:

Contrary to his pleas, the appellant was convicted of the wrongful possession of Percocet, rape, and soliciting the commission of an offense to the prejudice of good order and discipline in the armed forces, in violation of Articles 112a, 120, and 134, UCMJ, 10 U.S.C. §§ 912a, 920, 934. The convening authority approved the adjudged sentence of a dishonorable discharge, confinement for 15 years, forfeiture of all pay and allowances, and reduction to E-1, but waived forfeitures for six months for the benefit of the appellant's family. On appeal, this Court affirmed the findings and the sentence in an

unpublished opinion. *United States v. Lovett*, ACM 33947 (A.F. Ct. Crim. App. 9 Sep 2002). Thereafter, our superior court considered the case and affirmed the appellant's convictions for possession of Percocet and for rape, but set aside the conviction for soliciting the commission of an offense[1] and, as a result, the sentence. *United States v. Lovett*, 59 M.J. 230 (C.A.A.F. 2004).

The case comes before us now on remand from our superior court so that we may either reassess the sentence or order a sentence rehearing. In *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), our superior court summarized the analysis required in evaluating sentence reassessment:

> In *United States v. Sales*, 22 MJ 305 (CMA 1986), this Court set out the rules for sentence reassessment by a Court of Criminal Appeals. If the court can determine that, absent the error, the sentence would have been at least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing. *Id*. at 307. A sentence of that magnitude or less "will be free of the prejudicial effects of error." *Id.* at 308. If the error at trial was of constitutional magnitude, then the court must be satisfied beyond a reasonable doubt that its reassessment cured the error. *Id*. at 307. If the court "cannot reliably determine what sentence would have been imposed at the trial level if the error had not occurred," then a sentence rehearing is required. *Id*.

The appellant argues that this Court should order a sentence rehearing because we will have difficulty reliably determining what sentence would have been imposed by the court members below in the absence of the solicitation conviction. The problem, the appellant suggests, is that although he was ultimately convicted of the lesser included offense of soliciting the commission of an offense, the offense charged and litigated by the prosecution was the considerably more serious offense of solicitation to commit murder. The appellant believes that exposure to the damaging testimony presented on the charged offense (1) makes it difficult to determine what impact the lesser included offense may have had on the adjudged sentence, and (2) taints this Court in its ability to fairly reassess the sentence. Thus, he reasons, we should order a rehearing so that his sentence can be assessed by members unaware of, and "untainted" by, knowledge of the offense set aside. We disagree.

Although we appreciate the appellant's concern and his desire for a "cleansed" sentencing evaluation, we believe we are fully capable of reassessing his sentence under the criteria provided in *Sales*.

[1] Consistent with the decision of our superior court, Charge II and its Specification are dismissed.

In reaching their findings on the solicitation offense, the court members evaluated serious allegations but concluded that there was insufficient proof to convict the appellant of solicitation to commit murder, or of the lesser included offense of solicitation to commit kidnapping. Instead, they found the appellant guilty of solicitation to commit an offense prejudicial to good order and discipline; namely, keeping the appellant's wife from appearing at his trial. Having applied the proper burden of proof in evaluating their findings, there is no reason to believe that the court members shirked their responsibility to sentence the appellant only for the offenses they believed he had committed. Likewise, this Court is well practiced at evaluating evidence and reassessing sentences, distinguishing in the process between matters that may and may not be properly considered for the purpose at hand.

Our review of the record readily reflects that as the trial entered its sentencing phase, the gravamen of the appellant's criminal behavior was the repeated rape of his stepdaughter while she was between the ages of 5 and 7 years. This is further reflected in the trial counsel's sentencing argument, the almost singular focus of which was the heinous nature of the appellant's crimes against his stepdaughter and their predictable lifelong impact upon her:

> TC: Members of the court, [the victim] sat up there in that chair with her leg in the air to show you how that man (pointing to the accused), her stepfather, raped her. Imagine how she looked laying on the bed, her parents' bed, in that house, with her leg in the air that same way so that the accused could rape her; rape her again, and again, and again, and when [she] told him it hurt, he went to the bathroom and got that lotion and came back, and kept on raping her . . . that members, is what [she] had to look forward to when she got home from kindergarten. That's what [she] had to look forward to when she got home from first grade.
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> TC: The accused robbed her of her childhood, then he robbed her of her innocence. . . . The scars that he's going to leave with [her], starting at age five, are going to be with her for the rest of her life. That's why we're asking for an appropriately severe sentence in this case. He earned it. He deserves it, and [she] deserves it too.

In an argument that spanned nearly five pages of the record of trial, trial counsel made only passing mention of the drug offense and the solicitation offense. Our review of this record convinces us that the court members would have placed similar relative significance on the offenses for which they were sentencing this appellant.

Under the circumstances of this case, then, we think it entirely likely that the members may have adjudged the same sentence even absent consideration of the solicitation offense which has been set aside.[2] However, we are convinced beyond a reasonable doubt that, by reducing the confinement period to 14 years, we will have assessed a punishment certainly no greater than the sentence the original court-martial would have imposed in the absence of the solicitation offense. *Doss*, 57 M.J. at 185. Accordingly, reassessing the sentence under the criteria set out in *Sales*, we find that the appropriate sentence is a dishonorable discharge, confinement for 14 years, forfeiture of all pay and allowances, and reduction to E-1. The sentence, as thus reassessed, is

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court

[2] At trial, in view of his conviction for repeatedly raping his young stepdaughter, the appellant faced a maximum punishment of a dishonorable discharge, confinement for life without the possibility of parole, forfeiture of all pay and allowances, reduction to E-1, and a fine. The removal of the conviction for the solicitation offense would not have reduced that maximum punishment.