UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant GABRIEL MACHADO
United States Air Force

ACM 35908

31 May 2006

Sentence adjudged 12 February 2004 by GCM convened at Moody Air Force Base, Georgia. Military Judge: Linda S. Murnane (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 30 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major James M. Winner, Major Sandra K. Whittington, Major Jennifer K. Martwick, Major John N. Page III, and Major Maria A. Fried.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Kimani R. Eason.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT

JACOBSON, Judge:

In accordance with his pleas, the appellant was found guilty of nine specifications of violating a lawful general regulation, one specification of committing sodomy on

divers occasions,[1] and one specification of committing indecent acts with another on divers occasions, in violation of Articles 92, 125, and 134, UCMJ, 10 U.S.C. §§ 892, 925, 934. The convening authority approved the findings and sentence as adjudged. On appeal, the appellant submits two assignments of error. First, he asserts that Air Education and Training Command Instruction (AETCI) 36-2002, *Recruiting Procedures for the Air Force*, ¶ 1.1.2.2.5 (18 Apr 2000),[2] both on its face and as applied to him, violates the Due Process Clause of the Constitution and is unconstitutionally vague. Second, the appellant asks that we find his sentence to be inappropriately severe. We find both assignments of error to be without merit and affirm.

After the appellant filed his brief in the case sub judice, the Court of Appeals for the Armed Forces (CAAF) held AETCI 36-2002, ¶ 1.1.2.2.5, does not violate the Due Process Clause of the Constitution. *United States v. Pope*, 63 M.J. 68 (C.A.A.F. 2006). Thus, the first question raised by appellant's initial assignment of error has been settled adversely to him. Furthermore, following our superior court's guidance in *Pope*, we also find the Instruction is not unconstitutionally vague. During his guilty plea, the appellant told the military judge that he was aware of AETCI 36-2002, ¶ 1.1.2.2.5, had received training on it, and understood its meaning. He then proceeded to describe how he believed he violated the Instruction by engaging in inappropriate relationships with Air Force recruits while he was serving in his capacity as an Air Force recruiter. At no time during the providence inquiry did he express any confusion regarding his understanding of the wrongfulness of his behavior. Although some of his behavior may not have been specifically described in the Instruction, such specificity is not required. As CAAF pointed out in *Pope*, 63 M.J. at 74, "[i]t was not necessary for the Air Force recruiting instruction to identify every possible nook and cranny in the line of conduct, for the line is straight and narrow." We find that the appellant's statements during the guilty plea, the training he admitted to receiving, and the plain language of AETCI 36-2002 provide ample evidence that he was on notice that the misconduct he engaged in was subject to criminal sanction.

As to the appellant's second assignment of error, we find that the appellant's adjudged sentence was not 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.*

[1] Although not asserted as error, we have considered whether the appellant's guilty plea to sodomy is provident in light of the United States Supreme Court decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). We believe that by broadcasting live images of the couple's sexual activities over the Internet, the appellant removed himself from the category of people protected by the *Lawrence* concern with privacy between consenting adults. This subject was discussed briefly on the record, and the appellant agreed with the military judge that he had not engaged in "private, consensual sodomy" because he "invited the public to view the event." We therefore find that *Lawrence* does not apply to the appellant's situation.

[2] This Instruction has been superceded by Air Force Recruiting Services Instruction 36-2001, *Recruiting Procedures for the Air Force* (1 Apr 2005).

Snelling, 14 M.J. 267, 268 (C.M.A. 1982). 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). *See also United States v. Healy*, 26 M.J. 394 (C.M.A. 1988).

The appellant admitted to behaving inappropriately with six separate Air Force recruits while he was serving as a recruiter. This behavior included inappropriate comments, sexual advances, offering to provide alcohol to minors, consuming alcohol with a recruit, and engaging in sexual acts with a recruit. Most of the recruits, including the two girls he invited to join with him in a sexual threesome, were high school girls 18 years old or younger. The appellant's most egregious conduct occurred with DM, a 17-year-old recruit. The appellant engaged in numerous sex acts with DM, both in private and in front of a video camera. The camera broadcasted their sexual encounters across the Internet. 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 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

THOMAS T. CRADDOCK, SSgt, USAF
Court Administrator