UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain GRANT D. MCKENZIE
United States Air Force

ACM 35890

28 March 2006

Sentence adjudged 10 December 2003 by GCM at Peterson Air Force Base, Colorado. Military Judge: Barbara G. Brand (sitting alone).

Approved sentence: Dismissal and confinement for 9 months.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Sandra K. Whittington, Major James M. Winner, and Frank J. Spinner, Esq.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Major John C. Johnson, and Jesse Coleman (legal intern).

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 violating a lawful general regulation, and wrongfully and knowingly possessing, receiving and/or displaying visual depictions of children under the age of 18 engaging in sexually explicit conduct, in violation of Articles 92 and 134, UCMJ, 10 U.S.C. §§ 892, 934. The military judge, sitting alone as a general court-martial, sentenced the appellant to confinement for 9 months and to be dismissed from the service. The convening authority approved the findings and sentence as adjudged. On appeal, the appellant asks that we find his sentence 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 (C.M.A. 1988).

Background

The appellant was issued a laptop computer by the Air Force in late September 2002 for the purpose of accomplishing his official duties. By the time the Air Force Office of Special Investigations seized his computer on 6 November 2002, the laptop contained over 1,000 obscene images. These images, according to the stipulation of fact, included "obscene depictions of adults, adults engaging in sexual activity, and beastiality [sic]." The images had been downloaded from the Internet, both during duty hours and non-duty periods. The appellant admitted, both in the providence inquiry and in the stipulation of fact, that he was aware that Air Force Instruction 33-129, *Transmission of Information Via the Internet* (4 Apr 2001), prohibited the display, storage, and/or receipt of obscene material on a government computer.

Between the appellant's government-issued laptop, his home computer, and various electronic storage devices, 1,832 pictures, 705 web pages, 32 Usenet articles with picture attachments, and 1 video file were found that were suspected to be either obscene material or visual depictions of minors engaging in sexually explicit activity. The accused admitted that he actively searched for child pornography websites and downloaded images from them on his government computer. He also admitted accessing newsgroups with names including "ILLEGAL GIRLS . . . MAMA MIA" and "Small lolitas" on his home computer.

During the sentencing phase of his court-martial, the appellant intently focused his extenuation and mitigation case on his mental health problems. He presented his treating psychiatrist and an expert witness in forensic psychiatry to testify that he suffered from bipolar disorder and an addiction to pornography. The bipolar disorder had been diagnosed several years before trial, when the appellant was assigned to Maxwell Air Force Base (AFB), Alabama. The appellant had been receiving treatment prior to committing his crimes, but the experts opined that the treatment was inadequate and the appellant should have been medically discharged. The appellant did not claim that his mental condition absolved him of guilt, but argued strenuously that it should be considered as a mitigating or extenuating circumstance.

Before our Court, the appellant resurrects this line of reasoning. In doing so, his counsel even goes so far as to state "in all likelihood, had the mental health providers at Maxwell AFB, AL, given [the appellant] the proper medical attention after his bipolar disorder diagnosis, his criminal offenses and his court-martial would not have occurred." In making this assertion, the appellant continues to walk the thin line between taking responsibility for his crimes and shifting that responsibility to the Air Force.

We note, however, that after the military judge properly accepted the appellant's guilty plea, she was presented with testimony from the appellant's psychiatrist and the expert in forensic psychiatry, both of whom described and explained the appellant's mental health problems. Additionally, the defense submitted exhibits that contained comments on the appellant's condition. The appellant himself, in his unsworn statement, emphasized his mental problems. There is no question as to whether the military judge was aware of the appellant's problems prior to her deliberations on sentencing. Also before the military judge, however, was testimony from the appellant's psychiatrist that indicated that the appellant had consistently under-reported his actual symptoms over the years. Similarly, the appellant's expert witness testified that the appellant had not fully disclosed his struggle with pornography to his medical providers and that his military records and performance reports showed nothing that would lead a mental health provider to reevaluate the treatment he had been receiving from the Air Force. A review of the appellant's officer performance reports (OPRs) supports the expert's opinion. With the exception of the OPR created after the appellant's crimes had been discovered, the reports document many years of outstanding performance. The appellant is showered with accolades such as "one of my sharpest officers," "top performer," "model Flight CC, leader and mentor," and "superstar officer, leader and educator." The appellant himself emphasized his top-notch performance as an officer by submitting over 30 letters, certificates, and character statements – many issued during the time he now claims the Air Force should have taken notice of his problems and discharged him.

We find that the appellant's over-reliance on his medical diagnosis before this Court to be disingenuous and self-serving. To the degree that his mental problems extenuate and mitigate his crimes, we are confident that the military judge considered this factor in arriving at her sentence. 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.

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). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court