UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant HENRY L. MCMASTER
United States Air Force

ACM 35153

24 October 2003

Sentence adjudged 15 February 2002 by GCM convened at Kadena Air Base, Japan. Military Judge: Steven B. Thompson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 20 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Shannon J. Kennedy.

Before

BRESLIN, MOODY, and GRANT
Appellate Military Judges

OPINION OF THE COURT

MOODY, Judge:

The appellant was convicted, in accordance with his pleas, of one specification of rape of a child on divers occasions, one specification of forcible sodomy of a child on divers occasions, one specification of assault on a child on divers occasions, and two specifications of indecent acts with a child on divers occasions, in violation of Articles 120, 125, 128, and 134, UCMJ, 10 U.S.C. §§ 920, 925, 928, 934. The appellant was also convicted, contrary to his pleas, of one specification of taking indecent liberties with a child on divers occasions by exposing his genitals to her, in violation of Article 134, UCMJ. A general court-martial, consisting of a military judge sitting alone, sentenced the appellant to reduction to E-1, forfeiture of all pay and allowances, confinement for 20

years, and a dishonorable discharge. The convening authority approved the findings except for the words "on divers occasions" in the contested indecent liberties specification and approved the sentence as adjudged.

The appellant has submitted four assignments of error: (1) That the addendum for the staff judge advocate's recommendation (SJAR) should have been served on the appellant because it contained new matter; (2) That the action is ambiguous in that the convening authority approved the sentence to total forfeitures while at the same time waiving mandatory forfeitures, contrary to *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002); (3) That the contested specification of indecent liberties with a child is neither legally nor factually sufficient; and (4) That the sentence should be reduced in light of the convening authority's disapproval of the "divers occasions" language in the same specification. These last two assignments of error were raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). We find error and order corrective action.

I. Background

The appellant married L.M. in 1998, becoming a stepfather to her two children, the victims in this case, H.C.T. and S.M.B. After their marriage, the appellant and L.M. had a son, C.M. On several occasions between 1 March 2000 and 13 September 2001, the appellant had sexual intercourse with and performed sodomy upon H.C.T. She was 6 years old when this abuse began. According to an interview between H.C.T. and a pediatrician, the report of which was admitted as a prosecution exhibit, the appellant approached the victim while she was in the shower, watching television, or was otherwise alone and penetrated her both vaginally and anally. He also inserted his penis into her mouth and "french kissed" her as well. H.C.T. stated that she told the appellant not to engage in such actions or that she would report him to her mother. However, according to H.C.T., the appellant threatened to beat her if she told on him. H.C.T. advised the pediatrician that she was worried about retaliation. H.C.T. stated in the interview that she locked her door but that the appellant picked the lock in order to gain access to her.

She also stated that the appellant ejaculated on her. During the time covered by these offenses, the appellant was infected with the hepatitis C virus and the human papilloma virus, a sexually transmitted disease that can cause genital warts. In a stipulation of fact, admitted as a prosecution exhibit, the appellant acknowledged that his sexual activity with H.C.T. was sufficient to expose her to infection both to hepatitis C and to the human papilloma virus. There was no evidence at the time of trial that H.C.T. had developed symptoms of either condition.

In addition to these acts, the appellant engaged in other sexual conduct with H.C.T. He "wrestled" with her, became sexually aroused, and rubbed his penis against

her vaginal area, through their clothing. He also exposed his penis to her and on more than one occasion fondled H.C.T.'s genitalia. He also had her touch his penis.

In addition to his sexual misconduct with H.C.T., the appellant exposed his genitals to H.C.T.'s older sister, S.M.B., age 15 at the time of trial, while they were watching television. S.M.B. told her mother about this, after which her relationship with the appellant deteriorated. According to S.M.B., the appellant beat her more than once, striking her on the body, arms, and head with his hands and fists. She stated that on one occasion he drew blood from her nose and mouth and that on another he pushed her down the stairs. In addition, S.M.B. testified that on more than one occasion the appellant threw her to the floor while assaulting her.

II. New Matter in the Addendum

The appellant alleges that he was not given a fair opportunity to seek clemency from the convening authority. Specifically, the appellant contends that the staff judge advocate (SJA) included "new matter" in the addendum to the SJAR without first serving it on the defense and providing an opportunity to respond.

The appellant was convicted and sentenced on 15 February 2002. On 17 April 2002, the appellant was served with a copy of the SJAR. On 3 May 2002, the appellant submitted his clemency matters. On 7 May 2002, the SJA prepared an addendum to the original SJAR, which stated, in pertinent part:

> The accused committed some very serious offenses that warrant serious punishment. The acts he committed against and upon his stepdaughter beginning when she was only 6 years old are some of the most despicable that an adult can commit upon a child. While it's easy to say young [H.C.T.] hasn't suffered any lasting physical injury as a result of being raped and sodomized repeatedly by the accused, there's no telling what psychological effects his selfish acts will have on her as she grows older. The accused's contention she lied about what he did to her also raises serious question about his professed acceptance of responsibility and his rehabilitation prospects. [H.C.T.'s] account of what occurred is much more believable than the minimizing admissions the accused made to OSI after his misconduct was discovered. After-the-fact assertions of finding God are similarly easy to make and hard to evaluate. Although I have doubts about his claims, one can only hope the accused has truly seen the error of his ways and won't commit such heinous acts on anyone again after he's released from jail. However, regardless of whether or not he's seen the light, it doesn't undo or lessen the severity of the crimes he committed nor warrant reducing the sentence he received. It's unfortunate, but the accused's family and loved ones are often impacted by the crimes they

> commit. Short of needlessly delaying taking action in the case, there's no way to save the accused's family from a decrease in the money they'll receive for the remaining few months of the waiver you approved without disapproving his reduction to E-1. While this is a matter wholly within your discretion, it's not warranted here. No military member convicted of raping and sodomizing a child should be allowed to retain any semblance of recognition from the Service he served in before his crimes. I therefore recommend you approved [sic] the full sentence adjudged.

This addendum was not served on the appellant.

Whether comments in an addendum to an SJAR constitute "new matter" requiring service on the accused is a question of law, to be reviewed de novo. *United States v. Key*, 57 M.J. 246 (C.A.A.F. 2002). The discussion to Rule for Court-Martial (R.C.M.) 1106(f)(7) defines new matter as including:

> [D]iscussion of the effect of new decisions on issues in the case, matter from outside the record of trial, and issues not previously discussed. "New matter" does not ordinarily include any discussion by the staff judge advocate or legal officer of the correctness of the initial defense comments on the recommendation.

Examples of new matter include written comments by the convening authority's chief of staff that the accused (convicted of aggravated assault) was "[l]ucky he didn't kill" the victim and that he was a "thug", *United States v. Anderson*, 53 M.J. 374, 376 (C.A.A.F. 2000); reference to a positive urinalysis which was not presented at trial, *United States v. Chatman*, 46 M.J. 321 (C.A.A.F. 1997); and a statement that the accused's matters in extenuation and mitigation had been considered by "the seniormost military judge in the Pacific", *United States v. Catalani*, 46 M.J. 325, 327 (C.A.A.F. 1997). However, discussion in the addendum of comments raised by the appellant in post trial submissions is not new matter. *See United States v. Komorous*, 33 M.J. 907 (A.F.C.M.R. 1991); *United States v. Wixon*, 23 M.J. 570 (A.C.M.R. 1986), *aff'd*, 25 M.J. 165 (C.M.A. 1987). *See also United States v. Ortiz*, ACM S29343 (A.F. Ct. Crim. App. 19 Dec 1997) (unpub.op.); *United States v. Daulton*, ACM 30750 (A.F. Ct. Crim. App. 28 Feb 1995), (unpub. op.), *rev'd on other grounds*, 45 M.J. 212 (C.A.A.F. 1996); *United States v. Shepard*, ACM 28139 (A.F. Ct. Crim. App. 25 Sep 1991) (unpub. op.).

If a comment constitutes new matter, and if the appellant "makes some colorable showing of possible prejudice," *Chatman*, 46 M.J. at 324, then he or she will be entitled to relief. *See also United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998).

In the case sub judice the SJAR contains, in the cited paragraph, numerous statements which the appellant alleges constitutes new matter. We will examine these statements to determine if that assertion is correct.

A. "*While it's easy to say young [H.C.T.] hasn't suffered any lasting physical injury as a result of being raped and sodomized repeatedly by the accused, there's no telling what psychological effects his selfish acts will have on her as she grows older*."

Trial defense counsel, by affidavit attached to the appellant's brief, states that this was an improper invitation to the convening authority to speculate about future harm to the victim, such speculation being by definition outside the record.

However, in his memorandum requesting clemency for the appellant, the trial defense counsel stated that:

> [T]here is no evidence that [H.C.T.] ever received any lasting physical injury. [Her] physical exam from September 2002 was normal for a child of her age. There was no indication of any scarring, tears, or other physical injury. Similarly, although the prosecution went on at some length about the fact that [the appellant] does carry the human papilloma virus (HPV) and the hepatitis C antibodies, there has been no indication whatsoever that [H.C.T.] was infected with either HPV or hepatitis C.

Therefore, the appellant's counsel introduced the effect of the abuse on the victim. Although limited to physical harm, counsel's discussion taken as a whole would leave the impression that H.C.T. was unaffected by the offenses. This is especially true when the comments are read in conjunction with the appellant's own statement to the Air Force Office of Investigations (AFOSI), contained in the record, which present the victim as a willing participant in the sexual activity. The contested language in the addendum appears to be nothing more than a comment on the correctness of counsel's submission. It also appears that the SJA's comment was based upon matters in the record of trial.

It should be noted that an expert witness testified at some length about the emotional impact on a child victim of sexual abuse. "[T]here can be signs of depression, fear, confusion, hostility, aggressions [sic], along with feelings of guilt and shame." The expert went on to state that there can be long range harm as well, such as increased sexual promiscuity, higher rates of teenage pregnancy, and low self-worth. When asked, "Would it be fair to say that [H.C.T.] will never be the same," the expert replied "That's very likely." The expert also stated that the abuse complicates efforts to resolve the child's attention deficit disorder. Another expert, a psychologist testifying about pedophilia, stated that, when interviewing H.C.T., he asked her about her relationship with the appellant, at which point she "curled up into a fetal position, pulled her doll close to her mouth, sucked her thumb and then delayed her answer significantly." In

summary, the challenged comment in the addendum responds to matters raised on behalf of the appellant in his post-trial submissions and does not interject issues not previously discussed by the appellant or which were derived from outside the record of trial.

B. "The accused's contention she lied about what he did to her also raises serious questions about his professed acceptance of responsibility and his rehabilitation prospects. [H.C.T.'s] account of what occurred is much more believable than the minimizing admissions the accused made to OSI after his misconduct was discovered."

The appellant asserts that this comment was an improper injection into the SJAR of the SJA's personal views as to the appellant's rehabilitation potential. In his clemency letter, however, the appellant stated that his plea of guilty was "by no means . . . an admission to my step daughter [H.C.T.'s] reported version of events. There are many untruths in her statements . . . the Staff Judge Advocate's Recommendation is full of untruths that [H.C.T.] reported." Therefore, the appellant first raised the subject of the relative credibility of his version of events over that of the victim. In addition, he has also called into question the credibility and fairness of the SJAR.

In fact, the SJAR discusses in detail the circumstances underlying the charges pertaining to H.C.T. In doing so, it refers explicitly to the version of events presented by the appellant during the providence inquiry and also contained in his statement to the AFOSI. It also refers to the above-referenced pediatrician's interview notes with the victim. Both the appellant's AFOSI statement and the physician's interview notes were admitted into evidence as prosecution exhibits.

In his statement to the AFOSI, the appellant made numerous comments about his interaction with the victim. For example, he stated that he initially discouraged the victim from coming to his bed, but she persisted and eventually the two began "tickling and wrestling." He stated that after wrestling sessions, the victim "would claim she was hot and take off all her clothes but her underwear . . . ." He also stated that on several occasions the victim tried to peek at him in the shower. These and other such statements suggest that H.C.T. was somewhat willing in her interactions with the accused.

These statements are in contrast to the version of the events related by H.C.T. to the pediatrician, which paint a more somber picture of serial abuse. The pediatrician's assessment of H.C.T. was that she "is a 7-year-old female who gives a clear and credible history of penetration, both anally and vaginally with both fingers and penis, as well as oral genital contact." In addition, the psychologist testifying as an expert for the prosecution stated that the appellant's statement to the AFOSI evidenced "minimization in comparison with the victim's statement. There was quite a large discrepancy between what he admitted to and what the victims were saying."

The comment in the addendum that the appellant's version of events is "minimizing" appears to be drawn directly from the testimony admitted at trial. Such a comment should have been reasonably foreseeable in view of the appellant's charge of factual inaccuracy in the SJAR. Indeed, the record reports in extensive detail the versions of events presented both by the appellant and the victim and explicit evaluations of the credibility of these statements. In refuting the appellant's charge of untruthfulness in the SJAR, the addendum constitutes fair comment on issues raised by the appellant.

C. "After-the-fact assertions of finding God are similarly easy to make and hard to evaluate. Although I have doubts about his claims, one can only hope the accused has truly seen the error of his ways and won't commit such heinous acts on anyone again . . . . However, regardless of whether or not he's seen the light, it doesn't undo or lessen the severity of the crimes he committed nor warrant reducing the sentence he received."

The appellant avers that this comment was an unfounded attack on his religious beliefs. In his clemency submission, the appellant requested that his period of confinement be reduced. He stated in conclusion:

> In hindsight I can clearly see that a slow deterioration of my moral compass was mostly in fact due to my lack of a personal relationship with my Lord Jesus Christ. I'm happy to say He is now in control of my life and through His compassion, grace, and direction I shall overcome my human character flaws and become a better person.

These statements conveyed the message that the appellant had taken the first sincere steps toward rehabilitation, in an effort to lessen the amount of time he would otherwise spend in prison. As such, they invite comment as to the sincerity of the appellant's desire to reform.

While the appellant's religious views were not explicitly addressed in trial beyond the appellant's own unsworn presentation during sentencing, as stated above the prosecution did elicit testimony from its psychologist expert witness that sex offenders excel in minimizing their offenses and manipulating others. Stating that the appellant meets the diagnostic criteria for pedophilia, this witness testified as to aspects of the appellant's history, which indicate a capacity to manipulate. Additionally, the expert identified in the appellant's various statements what he termed "cognitive distortions," an ability to rationalize or distort facts, which enabled the appellant to commit the offenses for which he was convicted. The expert stated that it is not possible to predict the success of any effort to treat the appellant for pedophilia.

In his closing argument, the trial counsel devoted considerable time to challenging the appellant's claims of remorse. "This is an accused whose prior history of violence,

dishonesty, and criminal conduct demonstrates that his expressions of remorse and desire to change are unworthy of belief." The appellant's confession, trial counsel argued, "turns the stomach and numbs the heart, but it offers a compelling glimpse into this accused's psyche and the emptiness of his soul."

Therefore, the SJA's profession of doubt as to the appellant's newfound religious faith and sincere desire to change does not go beyond matters admitted into evidence or contained in argument by counsel. To the contrary, it is merely a comment on an issue raised both at trial and in post-trial submissions by the appellant himself. As such, it does not constitute new matter.

D. "Short of needlessly delaying taking action in the case, there's no way to save the accused's family from a decrease in the money they'll receive for the remaining few months of the waiver you approved without disapproving his reduction to E-1. While this is a matter wholly within your discretion, it's not warranted here."

The appellant questions the use of the word "needlessly" in characterizing a delay in post-trial processing undertaken for the benefit of the appellant's dependents. Part of the clemency package was a statement by the appellant's wife that the reduction in grade will work a considerable economic hardship on the family. She said that she "respectfully [asks the convening authority] to lend your authority and compassion when deciding the timing of your action." The essence of the challenged comment in the addendum is that there is no way that hardship to the family can be avoided without delaying the case or granting the appellant clemency as to his reduction in grade, neither of which the SJA believed appropriate. As such, the comment is simply an opinion as to the reasonableness of a request submitted on behalf of the appellant and addresses matters explicitly raised by him.

E. "No military member convicted of raping and sodomizing a child should be allowed to retain any semblance of recognition from the Service he served in before his crimes. I therefore recommend you approved [sic] the sentence adjudged."

This comment was in reply to the appellant's request that the convening authority disapprove his reduction to E-1. Insofar as it refers to a matter raised by the appellant, as well as to matters contained in the SJAR, we conclude that it does not contain anything new.

The appellant relies closely on *Anderson* in arguing that the comments in the addendum constitute new matter. In that case, a convening authority's chief of staff clipped onto the SJAR the following comment: "Lucky he didn't kill the SSgt. He's a thug, Sir." *Anderson*, 53 M.J. at 376. This comment was not served on the accused. Counsel for the appellant in the case sub judice states, "[t]he comments in this case were far more egregious than the two comments in *Anderson* . . . the SJA wrote a lengthy

expose expressing his personal beliefs and opinions about Appellant's crimes and rehabilitation potential. The SJA's highly inflammatory comments completely undercut Appellant's post-trial presentation."

Our superior court characterized the statement in *Anderson* by the chief of staff as constituting a "post-trial reprimand" by an officer of considerable stature who did not testify at trial. *Id.* at 378. As such it injected a new matter into the SJAR and should have been served. The case sub judice differs from *Anderson*, however, in that the challenged comments came not from an officer who had theretofore played no role in the trial but, rather, from the legal officer who had composed the original SJAR. That recommendation examined in considerable detail the facts of the case as reflected in statements both by the appellant and by the victim, thereby inviting a comparison of the statements' relative credibility, and gave an opinion as to the appropriateness of the sentence. Unlike the chief of staff in *Anderson*, the SJA was performing a required duty in the processing of a court-martial. This duty includes making "fair comment" on the evidence, *United States v. Young*, 26 C.M.R. 232, 233 (C.M.A. 1958), and discussing the "correctness of . . . defense comments on the recommendation." R.C.M. 1106(f)(7), Discussion.

Taken as a whole, the comments in the addendum do not address any new decisions on issues in the case, any matter from outside the record of trial, or any issues not previously discussed. Therefore, we conclude that, though more extensive and impassioned than required by law, the challenged language in the addendum did not inject new matter into the case. As a consequence, failure to serve these comments on the appellant was not error.

III. Waiver of Forfeiture

After the trial, the convening authority waived mandatory forfeitures for a period of six months and directed that the money be paid to L.M. The convening authority did not, however, disapprove or suspend the adjudged forfeitures, as required by *Emminizer*.

This Court reviews post-trial processing de novo. Although technically incorrect, the post-trial action clearly reflects the convening authority's intention to waive the automatic forfeiture of pay and allowances under Article 58(b), UCMJ, § U.S.C. 858(b). Furthermore, the record provides no basis to believe that the dependents were not paid. We find that the action was effective; therefore, there is no cause to remand the case for a new action or to disapprove adjudged forfeitures. *United States v. Medina*, ACM 34783 (A.F. Ct. Crim. App. 11 Sep 2003).

IV. Legal and Factual Sufficiency of the Evidence--Indecent Liberties

We may affirm only those findings of guilty that we find are correct in law and fact, and that we determine, on the basis of the entire record, should be approved. Article 66(c), UCMJ, 10 U.S.C. § 866(c). The test for legal sufficiency is whether any rational trier of fact, when viewing the evidence in the light most favorable to the government, could have found the appellant guilty of all elements of the offense, beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Our superior court has determined that the test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, this Court is convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

In the case sub judice, we reviewed the testimony of S.M.B. and of her mother as they pertain to the contested specification of indecent liberties with a child. We find S.M.B.'s testimony to be sufficiently detailed and internally consistent to be worthy of belief. We find that there is sufficient evidence to convince a rational trier of fact beyond a reasonable doubt that the accused is guilty of the offense of committing an indecent act with a child in violation of Article 134, UCMJ, and that the case is, therefore, legally sufficient. Furthermore, weighing all the evidence admitted at trial and mindful of the fact that we have not heard the witnesses, this Court is convinced beyond a reasonable doubt that the accused is guilty of the offense.

V. Sentence Reassessment

The appellant was charged with committing indecent liberties on "divers occasions." The evidence adduced at trial revealed only one instance of such misconduct. The military judge, however, found the appellant guilty as charged. In his response to the SJAR, the appellant noted the error. The addendum, therefore, recommended that the words "on divers occasions" be deleted from the finding of guilt as to that charge, advice, which the convening authority followed. In addition, the addendum stated, "I also see no need to reduce the sentence you approve, as the gravamen of the case is the crimes the accused committed against [H.C.T.], not the relatively minor offenses involving [S.M.B.]."

Because the convening authority modified a finding of guilt, he was required to reassess the sentence. *See United States v. Reed*, 33 M.J. 98 (C.M.A. 1991); *United States v. Miller*, 1 M.J. 798 (A.F.C.M.R. 1976). In *Reed*, the SJAR advised the convening authority to dismiss one of the charges, due to the statute of limitations, and to reduce the period of confinement from seven years to five years. However, it provided no guidance to the convening authority as to the criteria to be used in performing sentence reassessment, methodology similar to that employed by appellate courts in

exercising a similar function. *Reed*, 33 M.J. at 99. See *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986) for a discussion of such criteria. The Court of Military Appeals held that, absent proper legal guidance, the convening authority's action on the sentence appeared arbitrary. *Reed*, 33 M.J. at 100. Accordingly, it set the action aside and returned the case to the convening authority for a new action following proper legal advice.

In the case sub judice, the SJA likewise failed explicitly to advise the convening authority of his duty to reassess the sentence. Additionally he failed to provide any guidance as to the criteria to apply in exercising that duty. Therefore, we conclude that the appellant is entitled to a new post-trial processing, one that includes full and complete legal advice in accordance with *Reed* and *Sales*.

We also note parenthetically that, as the record contains evidence of only one act in the specification under consideration, there is no ambiguity in the convening authority's action. The action did not fail "to reflect what facts constituted the offense." *United States v. Walters*, 58 M.J. 391, 392 (C.A.A.F. 2003).

The action of the convening authority is set aside. The record of trial is returned to The Judge Advocate General for remand to the convening authority for post-trial processing consistent with this opinion. Thereafter, Article 66(b), UCMJ, will apply.

OFFICIAL

HEATHER D. LABE
Clerk of Court