UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant BRANDON J. MILES
United States Air Force

ACM S32038

2 October 2013

Sentence adjudged 17 January 2012 by SPCM convened at Cannon Air Force Base, New Mexico. Military Judge: Scott E. Harding, Jr. (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Thomas Franzinger.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Matthew F. Blue; and Gerald R. Bruce, Esquire.

Before

HELGET, WEBER, and PELOQUIN
Appellate Military Judges

OPINION OF THE COURT

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, consistent with his pleas, of one specification of willfully discharging a firearm and one specification of communicating a threat, both in violation of Article 134, UCMJ, 10 U.S.C. § 934.[1] The military judge sentenced the appellant to a bad-conduct discharge, confinement for 5 months, and reduction to E-1. In accordance with a pretrial agreement,

[1] Pursuant to a pretrial agreement, the Government withdrew two specifications of assault charged under Article 128, UCMJ, 10 U.S.C. § 928, in exchange for the appellant's guilty plea.

the convening authority approved only 4 months of confinement and the remainder of the sentence as adjudged.

On appeal, the appellant asks this Court to disapprove the bad-conduct discharge as inappropriately severe.[2] He avers that in adjudging his sentence the military judge failed to account for all matters in mitigation and extenuation. He argues that his sentence should have been mitigated by his service record, the out-of-character nature of his offenses, and the implausibility of a victim's testimony. We find the sentence appropriate and affirm.

Background

On 4 June 2011, the appellant was on the common balcony/walkway of his off-base apartment, socializing with a female friend and drinking alcohol. He said he drank four to six alcoholic beverages and was slightly drunk, but able to control his behavior. About 50 to 60 feet away on the same balcony, then-Senior Airman (SrA) JS, Airman First Class (A1C) DW, and two civilians were also socializing and drinking. The appellant had fallen out of his former friendship with SrA JS and had a history of animosity with A1C DW. Earlier that day when the appellant saw A1C DW arrive at the apartments, the appellant decided to carry his handgun as "a show of force" in light of their contentious history. However, he admitted he did not feel threatened by A1C DW.

The appellant overheard the group's conversation, which he perceived to include disparaging comments about him and his friend. Although he tolerated the commentary for a while and even called his acting first sergeant to report the incident, he eventually decided to confront the group. With his .40 caliber firearm in hand, he approached the group and exchanged heated words with A1C DW, including a threatening question: "Do you want to die today, bitch?" Although he was primarily focused on A1C DW, his threat was directed at all four people. A1C DW replied by telling the appellant, "You're not going to do shit with that handgun." The appellant responded by discharging his weapon toward an open field in a residential area. No one was injured in the incident, but the appellant admitted his actions could have injured or killed someone.

In sentencing, the Government called now-Staff Sergeant (SSgt) JS, who testified the appellant's actions were completely unprovoked and that appellant had also wielded a shotgun in his other hand. SSgt JS testified that the appellant had shown him the handgun earlier in the evening as he told SSgt JS to back off, and that there were about 10 to 15 people around the apartments when the appellant discharged his weapon. On cross-examination, he stated that he thought alcohol was a factor in the appellant's actions that day, and that the appellant had not engaged in violent behavior before. The defense attempted to impeach SSgt JS's testimony that the appellant's actions were

[2] This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

unprovoked by eliciting his admission that he was involved in an earlier unrelated unprovoked altercation in which he had sustained a broken jaw.

Sentence Severity

This Court reviews sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). 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 assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial." *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). *See also United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Although we are accorded great discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Nerad*, 69 M.J. 142, 146 (C.A.A.F. 2010).

Applying these standards to the present case, we do not find the bad-conduct discharge to be an inappropriately severe punishment for the appellant's offenses. We have given individualized consideration to this particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all other matters contained in the record of trial. Whether he was the initial aggressor or not, the appellant carried and displayed a loaded firearm as a show of force and intentionally fired it in the vicinity of a populated residential area and in close proximity of four people after he had verbally threatened their lives. Additionally, he negotiated a pretrial agreement, from which he received a benefit of reduced confinement from his adjudged sentence. Under these circumstances we find that the sentence, including the bad-conduct discharge, was appropriate in this case.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c).[3]

[3] We note one issue with the record of trial. In sentencing, the Government introduced copies of the appellant's enlisted performance reports (EPRs). One EPR was a "referral" report, because the appellant was marked as not meeting standards in the area of standards, conduct, character and military bearing. The accompanying documentation indicates the appellant submitted a response to the referral EPR, but that response is not included in the record of trial, and it does not appear that the response was provided to the military judge. However, defense counsel did not object to the introduction of the EPRs, and the appellant provided the military judge his account of why he received this referral report in his unsworn statement. Under these circumstances, assuming that the appellant had responded to the EPR and the omission of the response was error, we find it did not materially prejudice a substantial right of the appellant.

Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

LEAH M. CALAHAN
Deputy Clerk of the Court