UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant DANIEL P. OPENSHAW
United States Air Force

ACM 38049

28 March 2013

Sentence adjudged 5 October 2011 by GCM convened at Joint Base Lewis-McChord, McChord Field, Washington. Military Judge: Martin T. Mitchell (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 13 years, and reduction to E-1.

Appellate Counsel for the Appellant: Major Daniel E. Schoeni and Major Bryan A. Bonner.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Daniel J. Breen; Captain Brian C. Mason; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and SOYBEL
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HARNEY, Judge:

The appellant was tried by a military judge sitting as a general court-martial, between 4 and 5 October 2011. Consistent with his pleas, the appellant was found guilty of six specifications of wrongful sexual contact upon a child who had not attained the age of 12 years and two specifications of indecent acts upon a female under the age of 16 years of age, all in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934. The military judge sentenced the appellant to a dishonorable discharge, confinement for

18 years, and reduction to E-1. Consistent with the terms of a pretrial agreement, the convening authority approved only so much of the sentence as called for a dishonorable discharge, 13 years of confinement, and reduction to E-1.[1]

Sentence Severity

On appeal, the appellant asserts that his sentence is inappropriately severe.[2] He argues that that his trial defense counsel submitted an extensive sentencing package that included 10 letters from family and friends expressing their confidence in his potential for rehabilitation. He also points out that he deployed to Kuwait and served in Korea during his eight years of military service. The appellant asks this Court to approve no more than eight years of confinement. We disagree.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005). 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. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *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). We have a great deal of discretion in determining whether a particular sentence is appropriate, but we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

In this case, the appellant clearly violated the standards of conduct expected of Airmen. The record shows that, on multiple occasions over a period of several years, the appellant sexually molested his biological daughter, his adopted daughter, and his stepdaughter. The appellant touched the genitalia of all three daughters through their clothing, touched the naked genitalia and buttocks of his adopted daughter, and touched the naked genitalia of his biological daughter. His biological and adopted daughters were under the age of 12 years old at the time of the molestations. His stepdaughter was under the age of 16 years old at the time of the molestations. We also note that the maximum punishment in this case was 134 years of confinement. The appellant negotiated a pretrial agreement with the convening authority that capped confinement at 13 years. The appellant received the benefit of his bargain in light of the fact that the military judge sentenced him to 18 years of confinement.

[1] The appellant pled not guilty to one specification of wrongfully committing indecent conduct and two specifications of wrongfully engaging in a sexual act upon a child who had not yet attained the age of 12 years, in violation of Article 120, UCMJ, 10 U.S.C. § 920, as well as three specifications of committing an indecent act upon a female under the age of 16 years, in violation of Article 134, UCMJ, 10 U.S.C. § 934. Consistent with the terms of the pretrial agreement, these specifications were withdrawn and dismissed with prejudice after arraignment.

[2] The appellant raises this issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

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. We find that the approved sentence was clearly within the discretion of the convening authority, was appropriate in this case, and was not inappropriately severe.

Conclusion

We have reviewed the record in accordance with Article 66, UCMJ. The findings and the sentence are determined to be correct in law and fact and, on the basis of the entire record, should be approved. *Id.*; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings of guilty and the sentence, as approved below, are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court