UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain JASON K. PENDERGAST
United States Air Force

ACM 38047

23 May 2013

Sentence adjudged 22 September 2011 by GCM convened at Lackland Air Force Base, Texas. Military Judge: Matthew D. Van Dalen.

Approved sentence: Dismissal and forfeiture of all pay and allowances.

Appellate Counsel for the appellant: Major Daniel E. Schoeni and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Tyson D. Kindness; Major Jonathan D. Wasden; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

PER CURIAM:

At a general court-martial, the appellant was convicted, contrary to his pleas, of assault consummated by a battery and conduct unbecoming an officer for dating and having a sexual relationship with a female enlisted noncommissioned officer, in violation of Articles 128 and 133, UCMJ, 10 U.S.C. §§ 928, 933.[1] Officer members adjudged a sentence of a dismissal and forfeitures of all pay and allowances. The convening authority approved the sentence as adjudged.

[1] The appellant was also arraigned on a charge of violating a lawful general regulation, in violation of Article 92, UCMJ, 10 U.S.C. § 892, for his dating and sexual relationship with the female noncommissioned officer. Prior to the entry of pleas, the military judge granted a motion to dismiss this charge as multiplicious.

On appeal, the appellant contends that the convening authority erred by approving forfeiture of all pay and allowances when his sentence did not include confinement.[2]

Background

The appellant started his Air Force career as an enlisted member, rising to the rank of Technical Sergeant in the Air Force Reserve prior to being commissioned. When he was a Second Lieutenant, he became involved in a dating and sexual relationship with Staff Sergeant (SSgt) KB, who was an Airman First Class at that time. This relationship continued over a three year period and they kept it hidden from others in the military. At times they lived together as a couple, and the appellant proposed marriage at one point in 2008, although they never married. In April 2009, the couple stopped living together after SSgt KB was stationed overseas at two separate locations. By this time, there was tension in their relationship, based in part on her decisions to re-enlist and date other people.

In December 2010, the appellant visited SSgt KB in Turkey. Initially, that visit went well, but on the last day of his trip the situation changed. The couple spent several hours drinking at a local bar. After the couple returned to her apartment, SSgt KB told the appellant she was not going to drive him to the airport for his very early flight the next morning because she had to take her physical fitness test. The appellant began to speak loudly so she pushed him in an effort to calm him down. He pushed her back and called her an expletive, which led her to slap him. He then slapped her back, grabbed a cellular phone out of her hand, threw it, and then tried to carry her out of her apartment.

When that effort failed, the two ended up in her bedroom. The appellant pushed SSgt KB onto the bed, pulled her off, and pressed his knee into her. After she tried unsuccessfully to push him off, he slapped her again. A few minutes later, he grabbed her by the throat and pushed her head over the back of the chair she was sitting in, where he hit her again. When she tried to walk away, he pushed her, threw her to the ground, and began choking her. Ultimately, the appellant released her and apologized for his behavior. These apologies continued after the appellant returned to the United States, but their relationship was over.

For this conduct, the appellant was charged with and convicted of conduct unbecoming an officer (for his relationship with SSgt KB) and assault consummated by a battery (for the incident on 14 December 2010).

[2] The appellant raised an additional assignment of error contending that the record of trial was not substantially verbatim because a classified exhibit was omitted from our copy of the record and therefore not available for our consideration under Article 66, UCMJ, 10 U.S.C. § 866. The missing exhibit was subsequently delivered and reviewed by this Court. As such, this issue is moot.

Convening Authority's Action

On 22 September 2011, the court-martial panel sentenced the appellant to a dismissal and forfeiture of all pay and allowances. On 10 October 2011, the convening authority deferred the implementation of those adjudged forfeitures from 6 October 2011 until action, pursuant to Article 57(a)(2), UCMJ, 10 U.S.C. § 857(a)(2). On 20 November 2011, the convening authority approved the sentence as originally adjudged, and directed the appellant to be placed on appellate leave, pursuant to Article 76a, UCMJ, 10 U.S.C. § 876a.

The Discussion to Rule for Courts-Martial (R.C.M.) 1107(d)(2) states: "When an accused is not serving confinement, the accused should not be deprived of more than two-thirds pay for any month as a result of one or more sentences by court-martial and other stoppages or involuntary deductions, unless requested by the accused." *Id*. *See also United States v. Warner*, 25 M.J. 64, 67 (C.M.A. 1987); *United States v. Datavs*, 70 M.J. 595, 604 (A.F. Ct. Crim. App. 2011) (reassessed sentence by lowering forfeitures to two-third pay per month from the time sentence was adjudged until convening authority action); Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 9.23.1 (3 February 2010) ("[I]f no confinement is adjudged and a forfeiture exceeding two-thirds pay per month is adjudged, reduce the approved forfeiture to not more than two-thirds pay per month to run for a specified period of time or up until the punitive discharge is executed.").

We find the approved sentence materially prejudiced the substantial rights of the appellant because it exceeds the maximum authorized. *See* Article 59(a), UCMJ, 10 U.S.C. § 859(a). We now determine whether we can reassess the sentence. *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002). Before reassessing a sentence, this Court must be confident "that, absent any error, the sentence adjudged would have been of at least a certain severity." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). Ultimately, a sentence can be reassessed only if we "confidently can discern the extent of the error's effect on the sentencing authority's decision." *United States v. Reed*, 33 M.J. 98, 99 (C.M.A. 1991). In *United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000), our superior court decided that if the appellate court "cannot determine that the sentence would have been at least of a certain magnitude," it must order a rehearing. *See also United States v. Poole*, 26 M.J. 272, 274 (C.M.A. 1988).

The Government concedes that the forfeitures should have been limited to two-thirds of the appellant's pay. In contrast, the appellant asks us to disapprove all of the adjudged forfeitures, noting that it would be "pointless" to follow the remedy we ordered in *Datavs* because the convening authority here deferred the forfeitures until he took action. In the case before us, we are confident the convening authority would have approved a sentence which included only a dismissal. The convening authority had already deferred the adjudged forfeitures until action and, given the appellant's placement

in the non-pay status of appellate leave, we find he would not have approved any additional forfeitures if he had been aware of the limitations found in R.C.M. 1107(d)(2). Furthermore, we also find, after considering the appellant's character, the nature and seriousness of the offense, and the entire record, that the reassessed sentence is appropriate.

Conclusion

We affirm the findings and only so much of the sentence as provides for a dismissal. The approved findings and the sentence, as modified, 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). Accordingly, the findings and sentence, as modified, are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court