UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant HECTOR SAUSEDA
United States Air Force

ACM 35484

3 June 2005

Sentence adjudged 20 November 2002 by GCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: R. Scott Howard (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 42 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Andrew S. Williams, Major Sandra K. Whittington, Major James M. Winner, and Captain Diane M. Paskey.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major Michelle M. Lindo.

Before

MALLOY, ORR, and JOHNSON
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the three assignments of error, and the government's reply thereto. We find that the convening authority was not disqualified to act on the appellant's case post-trial. Prior to committing the offenses that led to the charges at bar, the appellant had served as an enlisted aide to the General Court-Martial Convening Authority for approximately one year. Before trial, he negotiated a pretrial agreement with the same convening authority. He did not object to the convening authority's involvement in that negotiation. At trial, he pleaded guilty under the terms of this pretrial agreement. He did not assert that the convening authority was disqualified from convening his court-martial as a result of their past duty relationship. After trial, the appellant did not object to the convening authority taking action on his case. Indeed, he

sought to capitalize on the convening authority's personal knowledge of his duty performance and of his family background in seeking clemency. Although unsuccessful in his bid for clemency, he was successful in obtaining deferral and waiver of mandatory forfeitures of pay.

The appellant now objects to the convening authority's post-trial involvement in the case based on circumstances that were clearly known to him and his counsel at the time of trial. We find his objection without merit. There is nothing in this case to suggest that the convening authority was disqualified as an accuser because of either a personal interest in the matter or bias toward the appellant. *United States v. Davis*, 58 M.J. 100, 102 (C.A.A.F. 2003). Given the appellant's repeated failure to raise the issue when it was in his interest not to do so, we find that it was not plain error for the convening authority to act on this case. *United States v. Voorhees*, 50 M.J. 494, 500 (C.A.A.F. 1999).

Next, we consider the appellant's argument that his sentence to confinement for 42 months is inappropriately severe in light of the sentence his brother, and co-conspirator, a noncommissioned officer in the Marine Corps, received in his court-martial for the role he played in the appellant's crimes.[1] This Court may only affirm those findings and sentence that we find are correct in law and fact and determine, based on the entire record of trial, should be affirmed. Article 66(c), UCMJ, 10 U.S.C. § 866(c). In exercising this authority, we must ensure that justice is done and the appellant receives the punishment he deserves. Performing this function does not allow us to grant clemency. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). We do not perform this function by comparing sentences "except in those rare instances" of "disparate sentences adjudged in closely related cases." *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999).

The primary manner in which we discharge this duty is by giving individual consideration to an appellant on the basis of the nature and seriousness of the offense and the character of the appellant. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Here, we are not privy to the circumstances of the appellant's brother's court-martial or his record of service in the Marine Corps. We will not compare his sentence to the appellant's in performing our task of ensuring that the appellant's sentence is appropriate. After carefully considering the entire record, we conclude that confinement for 42 months is an appropriate component of the appellant's sentence. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005).

As noted, the convening authority waived mandatory forfeitures for a period of six months and directed that the money be paid to the appellant's wife. Unfortunately, he failed to first modify, disapprove, or suspend the adjudged forfeitures, as required by

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

United States v. Emminizer, 56 M.J. 441 (C.A.A.F. 2002). In light of our superior court's holding in *United States v. Lajaunie*, 60 M.J. 280 (C.A.A.F. 2004), we conclude that it is necessary to return this case to the convening authority for a new action that expressly complies with *Emminizer*.

The record of trial is returned to The Judge Advocate General for remand to the convening authority for a new action consistent with this opinion. Thereafter, Article 66(c), UCMJ, shall apply.

OFFICIAL

ANGELA M. BRICE
Clerk of Court