UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JOHN P. SCARBOROUGH
United States Air Force

ACM 36640

30 April 2008

Sentence adjudged 18 November 2005 by GCM convened at Scott Air Force Base, Illinois. Military Judge: Gary M. Jackson.

Approved sentence: Bad-conduct discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Anniece Barber, Captain Griffin S. Dunham, and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Major Amy E. Hutchens.

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges

OPINION OF THE COURT

HEIMANN, Judge:

Consistent with his pleas the appellant was found guilty of underage drinking, use of methamphetamines, alprazolam (Xanax), and marijuana. Contrary to his pleas, he was found guilty by a panel of officers and enlisted members of one specification of conspiracy to commit an indecent act, one specification of conspiracy to commit indecent liberties with a child, one specification of distribution of methamphetamines and one specification of fraudulent enlistment for failing to disclose prior drug usage. He was found not guilty of an additional methamphetamines use and carnal knowledge. The

panel sentenced the appellant to be confined for a period of four years, reduction to E-1, total forfeiture of all pay and allowances and a bad-conduct discharge. The convening authority approved the sentence as adjudged but reduced the confinement to three years.

On appeal, the appellant makes three assertions of error. We review each of the assertions of error in greater detail below. Having reviewed each of the assertions, including briefs from both parties and finding no error we affirm the findings and the sentence.

Member Selection

The appellant contends the military judge abused his discretion when he denied the appellant's challenge for cause against Captain C because his "interactions and relationships with command elements, the [Staff Judge Advocate] SJA and Convening Authority in particular, do not pass the test of public confidence contemplated by [Rule for Courts-Martial (R.C.M.)] 912(f)." The appellant argues that these relationships "would cause a reasonable member of the public to have substantial doubt as to legality, fairness and impartiality of the proceedings." Citing *United States v. Minyard*, 46 M.J. 229, 231-32 (C.A.A.F. 1997).

Background

The appellant's claim of error centers on Captain C's answers during individual voir dire. Of relevance in the voir dire, Captain C acknowledged that he was familiar with the local Staff Judge Advocate (SJA) because he had served as the Wing Commander's executive officer for a single week during which time he would regularly see the SJA. He indicated that the SJA would "come by and talk to us and chat with us just socially." He also indicated he "chatted" with him the week prior to trial when the SJA was serving as the distinguished visitor greeter. Finally, regarding the SJA, Captain C indicated that when he saw the SJA the week prior to the trial he mentioned to the SJA that he would be serving as a court member soon. When Captain C was asked how did the SJA respond to this comment, Captain C said: "I don't remember. I think he just said that, have you ever done it before? I told him no. He said that, it'll be a good experience for you." In addition to the comments highlighted by the appellant, we note that Captain C also indicated that he never discussed a pending case with the SJA and that nothing in his interaction with the SJA would influence him in either the findings or sentencing of the trial.

Regarding the convening authority, Captain C indicated in voir dire that he would fly the convening authority "[m]aybe once a month" over the course of the past 18 months to two years. When asked about these flights Captain C said he would "greet him [General W] on the way in. We might chat for a little bit, and then I take him to his destination." Captain C further indicated that the talking was "[j]ust random small talk,

the weather. [P]retty much that's about it, about the weather." Again, Captain C indicated that there was nothing in his relationship with the convening authority that would influence his actions in the trial.

After hearing arguments on the challenge based upon a claim of implied bias, the military judge advised the trial defense counsel that he did not see an implied bias based upon the fact that Captain C had flown the convening authority. The military judge made no comment about the SJA concerns. Trial defense counsel then declined the military judge's offer to call Captain C back in to see if he could further establish a basis for his challenge. Finally, the military judge denied the challenge for cause without mentioning the "liberal grant mandate for defense challenges for cause."

Discussion

Rule for Courts-Martial (R.C.M.) 912(f)(1)(N) requires removal of a court member for cause when it is "in the interest of having the court-martial free from substantial doubt as to legality, fairness and impartiality." Our superior court has interpreted this mandate to encompass two separate legal tests: actual and implied bias. *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004). Actual bias exists when, for example, a member has a "decidedly friendly or hostile attitude toward a party; or has an inelastic opinion concerning an appropriate sentence for the offense charged." *See* R.C.M. 912(f)(1), Discussion. Implied bias exist when, in the eyes of the public, leaving the member on the panel will do injury to the "perception of appearance of fairness in the military justice system." *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007). Here the appellant only claims implied bias.

On appeal, a military judge's denial of a challenge based on implied bias, while not reviewed de novo, is afforded less deference than a ruling on actual bias, because of the objective nature of the standard. *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998). This deference is only applied when the military judge indicates on the record an accurate understanding of the law and its application to the relevant facts. *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002); *United States v. Briggs*, 64 M.J. 285, 286-87 (C.A.A.F. 2007). In this case the military judge did not articulate for the record his understanding of the law, particularly the liberal grant standard, and therefore his ruling is entitled to no deference.

Reviewing de novo, we agree with the military judge's denial of the challenge for cause. It is clear that Captain C is a junior officer who had passing casual conversations with both the SJA and the convening authority. He never discussed this case or any case with either of them. He clearly indicated this limited interaction would not effect his assessment and judgment of the case. Even applying the liberal grant mandate, we find none of these facts to raise any concerns that impact the perception of the fairness of the military justice system.

Legal and Factual Sufficiency

The appellant contends the appellant's conviction for conspiracy to commit an indecent act with AH cannot stand. He argues that the evidence fails in two respects. First he contends that the evidence does not show the existence of an agreement and second the actual filming of AH was not indecent because they only filmed her bare legs.

We review each court-martial record de novo to consider its legal and factual sufficiency. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). With regard to legal sufficiency, we ask whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all of the elements of the offense proven beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). For factual sufficiency, we weigh the evidence in the record of trial and, after making allowances for not having personally observed the witnesses, determine whether we ourselves are convinced beyond a reasonable doubt of the appellant's guilt. *United States v. Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002); *Turner*, 25 M.J. at 325.

Having reviewed the testimony and the admitted excerpts from the videotaping we find the appellant's conviction legally and factually sound. We agree that the original plan to "video" the two passed out naked girls was not the appellant's. Unfortunately, it is readily apparent that the appellant quickly joins with the videographer in the quest to garner some indecent video of the victims in this case. Further, while it is true that the indecent nature of the video of the two victims is different, the videos establish guilt as to both. As for AH, we note that the video was purposely focused first on her vaginal area and then on her panties, draped about her foot. When considered in the context of the entire video, it is clear that this was indecent conduct. The video is grossly vulgar and clearly executed with intent to excite the lust and deprave morals of the participants.

Sentence Appropriateness

The appellant asserts that three years of confinement is excessive when compared to the sentences of the other two airmen involved in the relevant weekend of misconduct. While the appellant concedes that his conviction includes the additional fraudulent enlistment conviction, he otherwise asserts that the remaining charges involved the same general activities occurring between 14 and 18 January 2005. Appellee responds by noting not only the additional fraudulent enlistment charge but also points out the aggravating fact that this charge stems from a prior drug usage.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005); *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006) *pet. granted on other grounds*, 65 M.J. 320 (C.A.A.F. 2007). We make

such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire 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). We have a great deal of discretion in determining whether a particular sentence is appropriate, but 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); *United States v. Dodge*, 59 M.J. 821, 829 (A.F. Ct. Crim. App. 2004).

In making a sentence appropriateness determination we are required to examine sentences in closely related cases and are permitted, but not required, to do so in other cases. *Christian*, 63 M.J. at 717 (citing *United States v. Wacha*, 55 M.J. 266, 267-68 (C.A.A.F. 2001)). "[A]n appellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.' If the appellant meets that burden . . . then the Government must show that there is a rational basis for the disparity." *Lacy*, 50 M.J. at 288.

Aside from the fraudulent enlistment we agree with the appellant that his case is closely related to that of the co-conspirator, Airman Basic (AB) G. We disagree as to the third airmen, AB K. AB K was not convicted of any charges related to the indecent acts and thus is not closely related. The appellant's case and that of AB G however included "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Lacy*, 50 M.J. at 288.

Having concluded that the two sentences must be compared, we then ask if there is a rational basis for the disparity in the two sentences. We think there is. Here we need look no further than the facts surrounding the appellant's fraudulent enlistment conviction. Not only did the appellant defraud the Air Force by not mentioning his drug usage during his delayed enlistment but he then engages in further drug usage after nearly completing all of the training necessary to make him a productive and critical component to the war effort. This confluence of facts is very aggravating. So, while we concede that we need to compare the appellant's sentence to that of the co-conspirator we also note that a rational basis exists for why one sentence was significantly more than the other. Finally, we look to the facts of this case on its own. In light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial we find the sentence 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. Article 66(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

Accordingly, the approved findings and sentence are

AFFIRMED.

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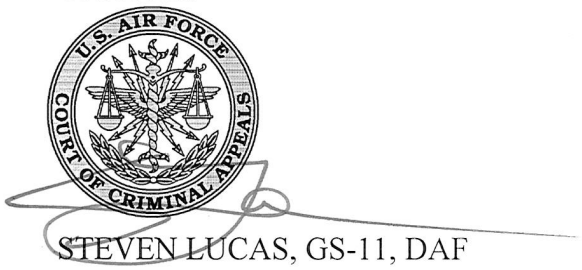

STEVEN LUCAS, GS-11, DAF
Clerk of the Court