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UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman DONALD E. TIPTON
United States Air Force

ACM 36205

20 February 2007

Sentence adjudged 9 December 2004 by GCM convened at Cannon Air Force Base, New Mexico. Military Judge: Mary M. Boone.

Approved sentence: Dishonorable discharge, confinement for 15 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall and Major Sandra K. Whittington.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Jefferson E. McBride.

Before

BROWN, MATHEWS, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

BROWN, Chief Judge:

The appellant was convicted, contrary to his pleas, of one specification of wrongful distribution of Ambien pills, one specification of forcible sodomy, and one specification of indecent assault, in violation of Articles 112a, 125, and 134, UCMJ, 10 U.S.C. §§ 912, 925, 934. The appellant was acquitted of an Additional Charge consisting of one specification of indecent assault and one specification of unlawful entry on divers occasions, both in violation of Article 134, UCMJ. A

general court-martial, consisting of officer members, sentenced the appellant to a dishonorable discharge, confinement for 15 years, forfeiture of all pay and allowances and a reduction to E-1. The convening authority approved the findings and the sentence as adjudged.

The appellant has submitted three assignments of error: (1) That his convictions for forcible sodomy and indecent assault are legally and factually insufficient;[1] (2) that the comments in the addendum to the staff judge advocate's recommendation (SJAR) constitute new matter; and (3) that his sentence is inappropriately severe. We do not find error with the issues raised by the appellant; however, although not raised by the appellant, we find that the military judge erroneously instructed the members that confinement was corrective rather than punitive. Ultimately, we affirm the findings of guilty but reassess and modify the approved sentence.

Background

On 28 March 2004, the appellant and the victim, A1C A, were drinking and socializing together in the dorms at Cannon Air Force Base, New Mexico. The appellant was known for mixing together a drink called the "superman" which was made up of a combination of several strong liquors. The appellant gave this drink to A1C A. In addition, the evidence established that on two occasions that evening the appellant also gave Ambien pills to A1C A. The Ambien pills were prescribed to the appellant to help him sleep; however, the appellant told A1C A that the pills were to prevent hangovers. Another airman at the party witnessed the appellant give A1C A the pills. Shortly after taking the pills the second time, A1C A passed out and the appellant helped take A1C A to his room. The appellant apparently stayed in the victim's room. Later, A1C A's friends stopped by his room to use the bathroom and check on him. They noticed A1C A was asleep and wrapped up in a quilt, and described him as looking like a "mummy." They also indicated that he would not respond to them, even when one of his friends yelled at him and slapped him on the face to try to wake him up. Nevertheless, they left him in his dorm room with the appellant.

The next morning, A1C A woke up and noticed his underwear was on backwards. He also noticed that his penis had abrasions on it, his anus hurt, and he noticed his stomach had a hickey on it. He also said that the room smelled of feces and his body was sticky as if he had been sweating during the night. He felt at the time the appellant had sexually assaulted him, but he did not have any memory of it. The appellant claims that he engaged in consensual petting, kissing, and anal and oral sodomy with A1C A.

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

Legal and Factual Sufficiency of the Evidence

The test for legal sufficiency is whether any rational trier of fact, when viewing the evidence in the light most favorable to the government, could have found the appellant guilty of all elements of the offense, beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Quintanilla,* 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Our superior court has determined that the test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, this Court is convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

Despite the appellant's contentions to the contrary, we conclude there is overwhelming evidence in the record of trial to support the court-martial's findings of guilty for forcible sodomy and indecent assault in violation of Articles 125 and 134, UCMJ. We are also convinced of the appellant's guilt of these offenses beyond a reasonable doubt. *See id.*; *see also* Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Rogers,* ACM 35028 (A.F. Ct. Crim. App. 19 Apr 2005) (unpub. op.).

New Matter in the Addendum

The appellant alleges that the comments in the addendum to the SJAR were not simply responses to his clemency request, and instead were "new matter" which warranted notice and an opportunity to respond. Therefore, the appellant claims he was prejudiced when he was not served with the SJA addendum.

The appellant was convicted and sentenced on 9 December 2004. On 21 January 2005, the appellant was served with a copy of the SJAR. On 29 January 2005, the appellant's trial defense counsel submitted his clemency matters. On 1 February 2005, the staff judge advocate (SJA) prepared an addendum to the original SJAR, which stated, in pertinent part:

> [The appellant] makes a general apology, but makes no mention of his victim, nor does he express any remorse for drugging his victim, anally sodomizing him by force and sexually assaulting him. He merely calls his crimes "disturbing" (see Atch. 3). Even in his unsworn statement during the sentencing portion of his court-martial, [the appellant] failed to accept responsibility or apologize, except to the members who had to be there (Record of Trial (ROT), pg. 568). The only apology out of [the appellant]'s mouth at trial was to say that he "apologizes greatly for anybody that I've hurt,

> anybody who was affected by me; not now, but always." (ROT, pg. 571). Meanwhile, his victim has had trouble working, sleeping and feels degraded and violated (ROT, pgs. 556-557).

This addendum was not served on the appellant.

Whether comments in an addendum to an SJAR constitute "new matter" requiring service on the accused is a question of law, to be reviewed de novo. *United States v. Key*, 57 M.J. 246, 248 (C.A.A.F. 2002). The Discussion to Rule for Courts-Martial (R.C.M.) 1106(f)(7) defines new matter as including:

> [D]iscussion of the effect of new decisions on issues in the case, matter from outside the record of trial, and issues not previously discussed. "New matter" does not ordinarily include any discussion by the staff judge advocate or legal officer of the correctness of the initial defense comments on the recommendation.

While there is not a comprehensive definition of what constitutes "new matter,"[2] examples of new matter include written comments by the convening authority's chief of staff that the accused, convicted of aggravated assault, was "[l]ucky he didn't kill" the victim and that he was a "thug", *United States v. Anderson*, 53 M.J. 374, 376 (C.A.A.F. 2000); reference to a positive urinalysis which was not presented at trial, *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997); and a statement that the accused's matters in extenuation and mitigation had been considered by "the seniormost military judge in the Pacific", *United States v. Catalani*, 46 M.J. 325, 327 (C.A.A.F. 1997). However, discussion in the addendum of comments raised by the appellant in post-trial submissions is not new matter. *See United States v. Komorous*, 33 M.J. 907, 910 (A.F.C.M.R. 1991); *United States v. Wixon*, 23 M.J. 570, 572 (A.C.M.R. 1986). *See also United States v. McMaster,* ACM 35153 (A.F. Ct. Crim. App. 24 Oct 2003) (unpub. op.); *United States v. Ortiz*, ACM S29343 (A.F. Ct. Crim. App. 19 Dec 1997) (unpub. op.); *United States v. Daulton*, ACM 30750 (A.F. Ct. Crim. App. 28 Feb 1995), (unpub. op.), *rev'd on other grounds,* 45 M.J. 212 (C.A.A.F. 1996); *United States v. Shepard*, ACM 28139 (A.F.C.M.R. 25 Sep 1991) (unpub. op.).

If a comment constitutes new matter, and if the appellant "makes some colorable showing of possible prejudice," then he or she will be entitled to relief. *Chatman*, 46 M.J. at 324. *See also United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998). To determine whether the appellant has made a colorable

[2] *United States v. Frederickson*, 63 M.J. 55, 56 (C.A.A.F. 2006) (citing *United States v. Catalani*, 46 M.J. 325, 326 (C.A.A.F. 1997)).

showing of possible prejudice, we must consider whether the proffered defense responses to the unserved addendum could have produced a different result by the convening authority. *United States v. Frederickson*, 63 M.J. 55, 58 (C.A.A.F. 2006).

In the case *sub judice,* the SJAR contains, in the cited paragraph, several statements which the appellant alleges constitute new matter. We will examine these statements to determine if that assertion is correct.

A. "In his clemency submission, [the appellant] makes a general apology, but makes no mention of his victim, nor does he express any remorse for drugging his victim, anally sodomizing him by force and sexually assaulting him."

In a declaration attached to the appellant's brief, the appellant asserts that he made no specific apology because he does not believe A1C A was a victim. He points out that he pled "not guilty" in the first place. However, in the first paragraph of the appellant's clemency request, he apologizes for his actions and the "affect that they have had on others." He further states that he is "willing to admit" he is wrong. In doing so, the appellant put his sincerity and the general nature of his apology and willingness to admit he was wrong into question. Therefore, comments about the level and specificity of the appellant's apology and lack of expression of remorse do not constitute new matter. *See Komorous,* 33 M.J. at 910.

B. "He merely calls his crimes 'disturbing.'"

In his clemency submission, the appellant states, "I have been found guilty of some pretty disturbing things." The appellant asserts that this comment was taken out of context and that he "was hurt anyone would believe he was capable of the conduct for which he was found guilty." However, discussion in the addendum of comments raised by the appellant in post-trial submissions does not constitute new matter. *Id*. Therefore, it is fair comment for the SJA to point out to the convening authority how the appellant characterized the offenses in his post-trial submissions, and although it may not have been the exact interpretation that the appellant, in hindsight, desired, this does not constitute new matter.

C. *"Even in his unsworn statement during the sentencing portion of this court-martial, [the appellant] failed to accept responsibility or apologize except to the members who had to be there."*

The appellant asserts that this comment was an improper injection into the SJAR because he could not apologize for a crime he did not commit. We find that the SJA's comment about the absence of apology and the lack of acceptance of

responsibility is merely an observation about the contents of the appellant's request and an observation of the record of trial and did not inject anything outside of the record of trial. Therefore, the comment is not new matter. *See United States v. Key,* 57 M.J. at 249.

However, although not addressed by the appellant, this comment, standing alone, does appear to *omit* other apologies in the appellant's unsworn statement. For example, in the appellant's unsworn statement, he provides a general apology to people other than the members. He states, "I apologize greatly for anybody that I've hurt . . . ." He later reiterates, "I apologize again for any party that's involved in this . . . ." Therefore, while the addendum does not introduce new matter, the comment seems to minimize the apologies in the appellant's unsworn statement since the appellant made general apologies to others besides the members.

Under this analysis, if we assume, pursuant to *Frederickson*, that this portion of the addendum contained new matter because it incorrectly implied that the appellant did not apologize to anyone other than the members, we must determine whether the appellant has made a colorable showing of possible prejudice by considering whether the proffered defense responses to the unserved addendum could have produced a different result. *Frederickson,* 63 M.J. at 58.

An appellant must demonstrate that the proffered response to the unserved addendum "could have produced a different result." *United States v. Gilbreath,* 57 M.J. 57, 61 (C.A.A.F. 2002); *United States v. Brown*, 54 M.J. 289, 292-93 (C.A.A.F. 2000). The appellant claims he would have explained that he could not apologize for a crime he did not commit, nor could he be expected to accept responsibility for an offense to which he pled not guilty. He also claims he would have pointed out that some evidence was introduced wrongfully at trial, which tainted the opinion of the jury.

We conclude that this response could not have produced a different result. The convening authority was aware of the appellant's plea of "not guilty," and while the appellant does not specify which pieces of evidence were "wrongfully admitted," such a broad statement suggests this is merely the opinion of the appellant. Finally, while the appellant included other general apologies in his unsworn statement, the SJA's comment that he did not apologize to anyone but the members was not a clear mischaracterization since the appellant did not make any other specific apologies in his unsworn statement, and therefore, the proffered responses are insufficient to meet the defense burden of demonstrating that service

of the addendum on the appellant could have produced a different result by the convening authority. *See Frederickson*, 63 M.J. at 59.[3]

D. *"The only apology out of [the appellant]'s mouth at trial was that he apologizes greatly for any that I've hurt, anybody who was affected by me, not now, but always. Meanwhile, his victim has had trouble working, sleeping and feels degraded and violated."*

The appellant claims he would have responded that his court-martial was ultimately about his lifestyle, and he understood that many people who knew him would be hurt because he never told them or they might question their own sexuality because of it.

There is no evidence that the appellant faced a court-martial because of his sexual interest in other males. The SJA's statement is a fair comment on the appellant's post-trial submission and on evidence received at trial, including victim impact testimony from A1C A. It is, therefore, not new matter. *Komorous,* 33 M.J. at 910; *see also United States v. Young,* 26 C.M.R. 232, 233 (C.M.A. 1958).

Taken as a whole, the comments in the addendum do not address any new decisions on issues in the case, any matter from outside the record of trial, or any issues not previously discussed. Therefore, we conclude the challenged language in the addendum, although more extensive than required by law, did not inject new matter into the case. As a consequence, failure to serve these comments on the appellant was not error.

Sentence Appropriateness

The appellant contends his sentence is too severe because a dishonorable discharge and confinement for 15 years was excessive punishment in light of the circumstances and included additional punishment based on the appellant's sexual orientation. We disagree.

Article 66(c), UCMJ, "requires this Court to approve only that sentence, or such part or amount of the sentence, as it finds correct in law and fact and determines should be approved." *United States v. Amador*, 61 M.J. 619, 626 (A.F. Ct. Crim. App. 2005). The determination of sentence appropriateness "involves the judicial function of assuring that justice is done and that the accused gets the

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[3] While we do not find a requisite showing of prejudice in the case *sub judice*, we join our superior court in cautioning SJAs to broadly construe the term "new matter" for purposes of providing service members with an opportunity to respond to addenda. *Frederickson*, 63 M.J. at 59 (citing *United States v. Leal,* 44 M.J. 235, 237 (C.A.A.F. 1996)).

punishment he deserves." *Id.* (quoting *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988)).

Sentence appropriateness is judged by individualized consideration of the particular appellant on the basis of the nature and seriousness of the offense, the appellant's record of service, the character of the offender, and all matters contained in the record of trial. *Id.; United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959).

We have given individualized consideration to this particular appellant and carefully reviewed the facts and circumstances of this case. There is no indication in the record of trial that the appellant received extra punishment based on his sexual orientation. We find that inclusion of a dishonorable discharge and confinement for 15 years as part of the appellant's sentence is appropriate.

The Military Judge's Instruction on Military Confinement Facilities

Although not raised by the appellant, we find that the military judge committed prejudicial error by instructing the members that confinement facilities are corrective rather than punitive. While the military judge properly instructed the members, both orally and in writing, that confinement is a form of authorized punishment,[4] she also instructed the court members that military confinement facilities are corrective rather than punitive. The trial defense counsel did not object to either instruction. In *United States v. Holmes*, 61 M.J. 148, 149 (C.A.A.F. 2005) (summary disposition), our superior court held it was prejudicial error for the military judge to instruct the court members that military confinement facilities are corrective rather than punitive. Accordingly, the Court affirmed the findings, but reversed as to sentence. We find the military judge in this case committed prejudicial error when she erroneously instructed the members that confinement facilities are corrective rather than punitive. *See id*. Having found error, we must determine whether we can reassess the sentence or should order a sentence rehearing.

In *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), our superior court summarized the analysis required in sentence reassessment:

> In *United States v. Sales*, 22 M.J. 305 (CMA 1986), this Court set out the rules for sentence reassessment by a Court of Criminal Appeals. If the court can determine that, absent the error, the sentence would have been at least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a

[4] *See* Article 58(a), UCMJ, 10 U.S.C. § 858(a).

> sentence rehearing. Id. at 307. A sentence of that magnitude or less "will be free of the prejudicial effects of error." Id. at 308. If the error at trial was of constitutional magnitude, then the court must be satisfied beyond a reasonable doubt that its reassessment cured the error. Id. at 307. If the Court "cannot reliably determine what sentence would have been imposed at the trial level if the error had not occurred," then a sentence rehearing is required. Id.

After carefully reviewing the record of trial, we are convinced we can determine that, absent the sentencing instruction error, the sentence would have been at least of a certain magnitude. Although we believe the members would have adjudged the same amount of confinement absent the sentencing instruction error, we are convinced beyond a reasonable doubt that by reducing confinement by six months, we will have assessed a punishment clearly no greater than the sentence the members would have imposed in the absence of error. *See Doss,* 57 M.J. at 185.

Accordingly, under the criteria set out in *Sales*, we reassess the sentence as follows: dishonorable discharge, confinement for 14 years and 6 months, total forfeitures, and reduction to E-1. We also find this sentence appropriate.

Conclusion

The findings and sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *Reed*, 54 M.J. at 41. We affirm only so much of the sentence as includes a dishonorable discharge, confinement for 14 years and 6 months, forfeiture of all pay and allowances, and reduction to E-1. Accordingly, the findings and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator