UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant STACY E. TROUTMAN
United States Air Force

ACM 37199

12 February 2009

Sentence adjudged 04 March 2008 by GCM convened at Vandenberg Air Force Base, California. Military Judge: Steven J. Ehlenbeck and Charles E. Wiedie (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 2 years, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Michael A. Burnat.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain G. Matt Osborn.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

PER CURIAM:

In accordance with the appellant's pleas, a military judge sitting as a general court-martial convicted him of one specification of divers indecent acts with another, in violation of Article 134, UCMJ, 10 U.S.C. § 934.[1] The adjudged and approved sentence

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[1] The appellant was charged with divers indecent acts with a child but pled and was found guilty of the lesser-included offense of divers indecent acts with another. The government elected not to go forward on the greater charge, and though the evidence supported a finding on the greater offense, the military judge found the appellant not guilty of the greater offense.

consists of a dishonorable discharge, two years confinement, and a reduction to E-1.[2] On appeal the appellant asks the Court to reduce his confinement or grant other appropriate relief. The basis for his request is that he opines his sentence to two years confinement is inappropriately severe.[3] We disagree. Finding no prejudicial error, we affirm.

Background

On 31 December 2006, the appellant attended a New Year's Eve party with his children. Upon returning home early the next morning, the appellant asked JT, his eleven-year-old daughter, if she wanted to sleep in his bed with him. JT initially declined but eventually decided to sleep in the appellant's bed with the appellant. JT fell asleep and awoke at approximately 0600 hours with the appellant digitally penetrating her vagina with his finger. During the incident JT pretended to be asleep. At the conclusion of the incident, JT left the appellant and went to her room. Shortly thereafter, the appellant followed JT into her room, laid on the bed with JT, and rubbed her vaginal area.

That same morning, JT reported the incident to neighbors who, in turn, convinced JT to report the incident to her mother. On 4 January 2007, JT's mother, the appellant's wife, reported the incident to the Naval Criminal Investigative Services (NCIS). On 9 January 2007 and again on 10 January 2007, the NCIS summoned the appellant to their office for an interview. After a proper rights advisement, the appellant waived his rights and told the NCIS agents that J''s sexual assault allegations were true.

Inappropriately Severe Sentence

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offense, 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), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, 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); *United States v. Dodge*, 59 M.J. 821, 829 (A.F. Ct. Crim. App. 2004), *aff'd in part and rev'd in part on other grounds*, 60 M.J. 368 (C.A.A.F. 2004).

In the case *sub judice*, the appellant's acts of sexually abusing his 11-year-old daughter seriously compromise his standing as a non-commissioned officer and a military member. While it is laudable that the appellant accepted responsibility for his actions, his

[2] The appellant and the convening authority signed a pretrial agreement wherein the appellant agreed to plead guilty to the lesser-included offense in return for the convening authority's promise not to approve confinement in excess of 48 months.

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

crime is one of the most heinous crimes recognized by society. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offense of which the appellant was found guilty, we do not find the appellant's sentence, a sentence which includes two years confinement, inappropriately severe.

Service of the Staff Judge Advocate's Pretrial Advice

Though not raised as an issue on appeal, we take this opportunity to address the service of the staff judge advocate's pretrial advice. Before any charge may be referred to a general court-martial, it must be referred to the respective convening authority's staff judge advocate for consideration and advice. Rule for Court-Martial (R.C.M.) 406(a). Moreover, an appellant is entitled to a copy of the staff judge advocate's pretrial advice if the charges are referred to a general court-martial. R.C.M. 406(c).

In the case at hand, the convening authority's staff judge advocate prepared his pretrial advice on 5 December 2007. On 10 December 2007, the convening authority, acting upon this advice, referred this case to a general court-martial. However, there is no evidence in the record that the staff judge advocate's pretrial advice was served on the appellant. In fact, there is evidence in the record to suggest the appellant was never served with a copy of it. Assuming the appellant was never served with a copy of the staff judge advocate's pretrial advice, such a failure is harmless. First, the pretrial advice is accurate and comports with the requirements of Article 34, UCMJ, 10 U.S.C. § 834, and R.C.M. 406(b). Second, by pleading guilty the appellant waived his right to enforcement of his right to receive a copy of the pretrial advice–a right which is neither jurisdictional nor the denial of which resulted in a deprivation of due process. *See Benton v. Maryland*, 395 U.S. 784 (1969); *United States v. Taylor*, 16 M.J. 882, 884 (A.F.C.M.R. 1983); *United States v. Henry*, 50 C.M.R. 685 (A.F.C.M.R. 1975).

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), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000).

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court