UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Major WILFRED A. VARNO
United States Air Force

ACM 37409

24 November 2009

Sentence adjudged 23 January 2009 by GCM convened at Travis Air Force Base, California. Military Judge: Charles E. Wiedie (sitting alone).

Approved sentence: Dismissal and confinement for 4 months.

Appellate Counsel for the Appellant: Colonel Raymond J. Hardy, Jr., Major Shannon A. Bennett, and Captain Jennifer J. Raab.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain G. Matt Osborn, and Gerald R. Bruce, Esquire.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HELGET, Senior Judge:

In accordance with his pleas, the appellant was found guilty of one specification of willfully disobeying a superior commissioned officer, two specifications of assault consummated by a battery, five specifications of conduct unbecoming an officer and gentleman, and one specification each of unlawful entry, disorderly conduct, communicating a threat, contempt of court, and fraternization, in violation of Articles 90,

128, 133, and 134, UCMJ, 10 U.S.C. §§ 890, 928, 933, 934. The approved sentence consists of a dismissal and confinement for four months.[1]

The issue on appeal, raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), is whether the appellant's sentence that includes a dismissal is inappropriately severe.

Background

At the time of trial, the appellant was 39 years old. He was assigned to the 60th Medical Group, Travis Air Force Base (AFB), California (CA). He was married with three children. The appellant enlisted in the United States Air Force in September of 1987. He separated in August of 1991 with an honorable discharge. The appellant enlisted in the United States Army in January of 1993 and separated in April of 1993. He was commissioned as an officer in the United States Air Force in August of 1998.

The appellant and his wife, RV, had been married for 17 years. They lived on Travis AFB in the March Landing housing area. Beginning on or about 1 April 2007, the appellant and RV entered into an "open marriage." As a result, they both engaged in sexual relations with other people.

Beginning on or about 1 January 2007, RV became friends with Technical Sergeant (TSgt) RB and his wife, IB, who also lived in the March Landing housing area on Travis AFB. Between 1 January 2007 and 28 November 2007, the appellant and RV regularly socialized with TSgt RB and IB. Most of their gatherings were either at the appellant's home or TSgt RB's home. During these occasions, the appellant and TSgt RB would drink alcohol and TSgt RB would call the appellant by his first name. Others were aware that the appellant and TSgt RB had a personal relationship.

Between 1 April 2007 and 28 November 2008, RV engaged in sexual intercourse with three different men, including TSgt RB and another enlisted airman, while the appellant watched. After RV and the other men completed sexual intercourse, the appellant engaged in sexual intercourse with RV.

On three or four occasions between April 2007 and March 2008, the appellant and RV engaged in sexual relations in the presence of TSgt RB and IB. Each incident occurred at TSgt RB's on-base residence. On at least three occasions, the appellant watched RV have sexual intercourse with TSgt RB. On one of these occasions, the appellant engaged in sexual relations with IB in the presence of TSgt RB and RV. Specifically, IB performed oral sex upon the appellant while he watched RV and TSgt

[1] The convening authority waived the mandatory forfeitures of all pay and allowances from 6 February 2009 to 10 March 2009, provided the appellant was otherwise entitled to pay. The appellant was credited with 50 days of pretrial confinement.

RB engage in sexual intercourse. Additionally, during each of the occasions, the appellant also watched RV engage in sexual relations with IB. On one of these occasions, the appellant engaged in sexual intercourse with IB in the presence of RV.

On 19 April 2008, TSgt RB and IB hosted a birthday party for the appellant. At some point during the evening, RV started to show off her new breast implants to the other guests. She then decided to give the appellant a lap dance while exposing her breasts. The appellant told her to stop but she continued. He eventually hit RV on the side of her head with his hand causing her to fall to the ground.

On 27 November 2008, the appellant and RV went to a Thanksgiving party at a friend's house on Travis AFB. During the party, he met LC, the wife of Staff Sergeant (SSgt) JC. They also lived in the March Landing subdivision on Travis AFB. LC had been drinking and wanted to go to the Shoppette to buy some vodka. The appellant agreed to take her because he had not been drinking. En route, LC requested to use the bathroom so the appellant drove her to his home so she could use his restroom. While at the appellant's house, they engaged in sexual intercourse. Upon returning to the party, RV learned that the appellant had sexual intercourse with LC. As a result, they went into the garage and started to argue. During the argument, the appellant pushed RV with his hands, grabbed her by the arms and shoulders, and pushed her to the ground. They then proceeded home where their argument continued. At some point, the appellant hit RV with his hand on the side of her head, causing her to fall to the ground.

During their argument, RV indicated that she wanted to go to IB's house. She left their house, and the appellant went looking for her. Since she had talked about going to IB's house, the appellant went there first. He knocked on the door but no one answered. He eventually opened the door and went inside without permission. TSgt RB and IB were asleep at the time. The appellant encountered SSgt TA, who was sleeping on the couch. SSgt TA informed the appellant that RV was not there.

At approximately 0125 on 28 November 2008, RV called 911 to report the assault. The security forces investigators responded at approximately 0130. The appellant was not at home so they started searching the area for him. The appellant had gone to the home of SSgt FR, who also lived in the March Landing subdivision on Travis AFB. SSgt FR and his wife had been sleeping. At about 0300, the appellant called RV at home. The caller ID indicated that the call was placed from SSgt FR's residence. Based on this, security forces investigators proceeded to SSgt FR's residence. Upon arrival, the appellant told SSgt RF to tell the investigators he was not there. The investigators ultimately searched the residence and found the appellant hiding in the laundry room under SSgt FR's dirty laundry.

At approximately 0500 on 28 November 2008, the appellant's commander, Lieutenant Colonel (Lt Col) FW, issued the appellant an oral and a written order to have

no contact with RV. Between 28 and 29 November 2008, the appellant violated the order by calling RV 6-10 times and by seeing her at their residence on one occasion. The no contact order was lifted on 1 December 2008.

On 4 December 2008, Lt Col FW ordered the appellant into pretrial confinement. That night, after being placed in pretrial confinement at the Solano County Detention Facility, CA, the appellant attempted to call RV 22 times. The appellant left RV multiple voicemail messages. In one of the messages, he threatened to injure her by using the word, "death."

On 4 December 2008, the appellant was served with a temporary restraining order (TRO), issued by the Solano County Superior Court, CA. The TRO prohibited the appellant from contacting RV in any manner. On 9 December 2008, the appellant was escorted by Major (Maj) JH to the area defense counsel's (ADC) office on Travis AFB. Unbeknownst to the ADC, the appellant called RV on the phone and talked to her. Maj JH instructed the appellant to cease several times but the appellant ignored him. This contact with RV was in violation of the TRO which was still in effect.

Inappropriately Severe Sentence

The appellant asserts that his sentence which includes a dismissal is inappropriately severe. We disagree.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006) (citing *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). 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, 287-88 (C.A.A.F. 1999); *Healy*, 26 M.J. at 395-96.

The maximum punishment in this case was a dismissal, confinement for 18 years and 7 months, and total forfeiture of all pay and allowances.[2] The appellant's approved sentence was a dismissal and confinement for four months.

[2] The military judge merged four specifications for purposes of sentencing. This reduced the maximum amount of confinement from 33 years and 7 months to 18 years and 7 months.

The appellant asserts that his sentence is overly severe in light of his immediate acceptance of responsibility, his good duty performance, including his deployment history, the health care needs of his son, and his dedication to the United States Air Force as shown by his long and distinguished career. However, as the government points out, all of this information was provided to the military judge for his consideration in determining an appropriate sentence.

Having given individualized consideration to this particular appellant, the reprehensible and repugnant nature of the offenses, the appellant's record of service, and all other matters in the record of trial, we hold that the sentence is not inappropriately severe.

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; *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