UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant CHARLES L. WALTON
United States Air Force

ACM 37664 (rem)

28 October 2013

Sentence adjudged 25 February 2010 by GCM convened at Joint Base Lewis-McChord, McChord Field, Washington. Military Judge: Don M. Christensen (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 12 months, reduction to E-2, and a reprimand.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Nicholas W. McCue; Captain Isaac C. Kennen; and Captain Luke D. Wilson.

Appellate Counsel for the United States: Lieutenant Colonel Linell A. Letendre; Major Lauren N. DiDomenico; Major Charles G. Warren; Major Erika L. Sleger; Captain Matthew J. Neil; and Gerald R. Bruce, Esquire.

Before

ORR, HARNEY, and MITCHELL
Appellate Military Judges

OPINION OF THE COURT
UPON REMAND

PER CURIAM:

This case is before us on remand from our superior court. The appellant was tried

by a general court-martial composed of a military judge sitting alone and found guilty[1] of one specification of maltreatment; one specification of sodomy; one specification of assault consummated by a battery; and one specification of adultery, in violation of Articles 93, 125, 128, and 134, UCMJ, 10 U.S.C. §§ 893, 925, 928, 934.[2] The adjudged and approved sentence consists of a bad-conduct discharge, confinement for 12 months, reduction to E-2, and a reprimand.

This Court previously affirmed the findings and sentence in *United States v. Walton*, ACM 37664 (A.F. Ct. Crim. App. 18 July 2011) (unpub. op.). In a summary disposition, the Court of Appeals for the Armed Forces vacated that decision, finding the Article 134, UCMJ, specification failed to allege a terminal element, in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). *United States v. Walton*, 70 M.J. 375 (C.A.A.F. 2011) (mem.). We considered the granted issue in light of *Fosler* and subsequent cases, and again affirmed the findings and sentence. *United States v. Walton*, ACM 37664 (f rev) (A.F. Ct. Crim. App. 10 August 2012) (unpub. op.). Our superior court reversed our decision and set aside the finding of guilt to adultery in light of *United States v. Goings*, 72 M.J. 202 (C.A.A.F. 2013) and *United States v. Gaskins*, 72 M.J. 225 C.A.A.F. 2013). *United States v. Walton*, M.J.____No. 12-0026/AF (C.A.A.F. Daily Journal 14 August 2013). The Court also set aside the sentence and returned the record of trial to The Judge Advocate General of the United States Air Force for remand to this Court, directing us to either order a rehearing on the affected charge and the sentence, or to dismiss that specification and reassess the sentence. *Id*.

We dismiss Charge III and its specification and reassess the sentence.

Background

Airman First Class VL was 18 years old and fresh out of technical school when she reported to her first duty assignment at McChord Air Force Base (AFB), Washington. Upon her arrival on 9 October 2008, VL was met at the airport by the appellant, who was her sponsor and supervisor. The appellant was married to another Air Force member and had two children. During VL's first week on base, the appellant began sending a number of unwelcome and inappropriate text messages to her. The messages were of a personal and sexual nature.

[1] Due to an apparent oversight on the part of the military judge, the record of trial does not reflect an entry of pleas by the appellant. The appellant never raised the issue at trial or during post-trial, and the record makes clear the appellant's intent was to plead not guilty and to litigate all charges and specifications, which is what happened at trial. In our prior opinions, we found no prejudice to a substantial right of the appellant by this omission. We make the same finding in this opinion.

[2] The military judge entered a finding of not guilty to the greater charge of rape in violation of Article 120, UCMJ, 10 U.S.C. § 920, after defense made a motion pursuant to Rule for Courts-Martial 917. The appellant was found not guilty of a second specification of maltreatment, indecent conduct, and forcible sodomy, alleged in violation of Articles 93, 120, and 125, UCMJ, 10 U.S.C. §§ 893, 920, 925, as part of the announced findings.

In preparation for VL's First Term Airman Class (FTAC), the appellant drove her to the Base Exchange to buy an iron and ironing board to press her uniforms. He then drove her back to her dorm and insisted on showing her how to iron her uniform properly. VL reluctantly agreed, and they went to her dorm room. While there, the appellant showed VL how to iron and, while she was ironing, unexpectedly grabbed her buttocks. As VL was putting the ironing board away, the appellant approached her from behind and put his hands on her hips, which she pushed away. He again placed his hands on her hips, and she again pushed them away. Finally, the appellant put his hands back on her hips and then put his hands down the front of her pants. He pulled her pants down, bent her over, and briefly engaged in sexual intercourse. He then turned VL around, guided her head down onto his penis, and ejaculated into her mouth. When he was finished, the appellant pulled up his pants and told VL he would pick her up the next day to take her to FTAC. He then walked out of the room.

Sentence Reassessment

The appellant argues that with the absence of the adultery charge, we should not affirm a bad-conduct discharge in this case. He argues the remaining charges for which he was convicted are minor. He also points to his 12 years of service, the lack of any prior convictions or nonjudicial punishments, and his two combat tours as reasons for not affirming his bad-conduct discharge. The Government disagrees, arguing the bad- conduct discharge is appropriate based on the facts of this case.

Before reassessing a sentence, we must be confident "that, absent any error, the sentence adjudged would have been of at least a certain severity." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). A "dramatic change in the 'penalty landscape'" lessens our ability to reassess a sentence. *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003). Ultimately, a sentence can be reassessed only if we "confidently can discern the extent of the error's effect on the sentencing authority's decision." *United States v. Reed*, 33 M.J. 98, 99 (C.M.A. 1991). If we cannot determine that the sentence would have been at least of a certain magnitude, we must order a rehearing.

We are confident that we can reassess the sentence in accordance with the above authority. Setting aside the adultery specification in Charge IV decreases the appellant's punitive exposure by only 1 year out of a maximum punishment of 7 years and 6 months. Thus, we find that the penalty landscape is not substantially changed by the dismissal of that specification. Furthermore, even if the appellant had never been charged with adultery, evidence that he was married with dependents would still have been before the court as part of the personal data sheet. Rule for Courts-Martial (R.C.M.) 1001(b)(2).

Applying the criteria set forth in *Sales*, we are confident that if the military judge had not convicted the appellant of adultery, he would have sentenced him to at least a bad-conduct discharge, 12 months confinement, reduction to E-2, and a reprimand. *See*

Sales, 22 M.J. at 308. Even without that specification, the appellant remains convicted of assault consummated by a battery, sodomy, and maltreatment. As VL's supervisor with the rank of staff sergeant, the appellant held a position of trust and authority over her as a new Airman. Within one week of meeting VL and becoming her supervisor, the appellant abused that trust and authority when he committed the offenses for which he remains convicted. The appellant took advantage of a teenage airman who considered staff sergeants "scary" after some negative experiences at basic training and technical training.

The appellant contends the military judge offered no insight as to why he did not find the sexual intercourse to be rape or forcible sodomy when he found the appellant not guilty of those offenses but guilty of the lesser included offenses of assault consummated by a battery and consensual sodomy. The appellant also argues "the military judge did not view the remaining offenses to be very serious" when he convicted the appellant of those lesser offenses. We disagree. First, the military judge engaged in a lengthy discourse with trial and defense counsel on the record about the element of force before granting the defense motion under R.C.M. 917 for a finding of not guilty to the rape offense. Second, we find no evidence the military judge "viewed" the remaining offenses as less serious simply by virtue of the findings. The military judge applied the evidence to the facts and found the appellant guilty to the offenses the evidence supported.

We find a bad-conduct discharge, 12 months confinement, reduction to E-2, and a reprimand appropriate in light of the facts of this case. We reassess the sentence accordingly. We also find, after considering the appellant's character, the nature and seriousness of the offenses, and the entire record, the reassessed sentence is appropriate. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *Sales*, 22 M.J. at 307-08.

Conclusion

The Specification of Charge III and Charge III are dismissed.[*] The remaining findings and sentence, as reassessed, are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the remaining findings and sentence, as reassessed are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[*] An earlier version contained a typographical error dismissing Charge IV. Charge III is the adultery offense under Article 134 UCMJ. Charge IV addresses an allegation of cruelty and maltreatment under Article 93, UCMJ. This version corrects that typographical error.