UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant RAYMOND M. ALLEN
United States Air Force

ACM 34174 (recon)

27 March 2003

Sentence adjudged 21 February 2000 by GCM convened at MacDill Air Force Base, Florida. Military Judge: Linda S. Murnane.

Approved sentence: Confinement for 1 year and reduction to E-4.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Karen L. Hecker, and Captain Antony B. Kolenc.

Appellate Counsel for the United States: Colonel LeEllen Coacher.

Before

BURD, STONE, and ORR, W.E.
Appellate Military Judges

OPINION OF THE COURT
UPON RECONSIDERATION

STONE, Judge:

The appellant was an Air Force recruiter. A general-court martial convicted him of multiple charges and specifications arising out of his efforts to develop improper relationships with three female recruits and one female recruiter's assistant. In our initial review of this case, we concluded these charges were legally and factually sufficient. *United States v. Allen*, ACM 34174 (A.F. Ct. Crim. App. 2 Jan 2003) (unpub. op.). On 3 February 2003, pursuant to the United States Air Force Court of Criminal Appeals, Rules of Practice and Procedure (A.F. Ct. Crim. App. Rules), Rule 19 (1 Sep 2000), the appellant moved this Court to reconsider our decision as to the factual and legal sufficiency of Specification 1 of Charge III. The government filed a response reflecting "no opposition" and declined to comment on the merits of the motion. On 24 February 2003, we granted the appellant's motion.

The specific offense we are asked to reconsider involves indecent acts, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The complainant in this particular allegation was DC, a 17-year-old Air Force recruit. The appellant lured DC to his residence on the pretext of obtaining a document critical to her enlistment application. After making a quick phone call, he attempted to forcibly sodomize DC while she sat on his couch. He then engaged in indecent acts with her. According to Specification 1 of Charge III, the appellant committed an indecent act on DC

> [b]y kneeling in front of her, spreading her legs apart with his hands, grabbing her on both arms, kissing her, touching her on or near her vagina and breasts, and positioning himself on top of her such that his penis was against her pelvic bone and by repeatedly saying how large his penis was or words to that effect, by removing his pants and exposing his penis.

In his motion for reconsideration, the appellant asks us to modify the language in this specification that states that one of the ways the appellant committed indecent acts on DC was by "positioning himself on top of her such that his penis was against her pelvic bone." The appellant argues that the evidence at trial does not reflect any evidence of penis-pelvis contact.

Evidence on this specification consists solely of DC's testimony. She testified that after the appellant attempted to forcibly sodomize her while she sat on a couch, she slid off the couch and onto the floor. She further testified that, among other things, he "was on top of me, but his--his body wasn't on top of me, just his legs[,] and his hands were holding onto my shoulders on the ground." While she was pinned to the floor, the appellant insisted DC look at his exposed penis, fondled her breasts and vaginal area, and tried to kiss her. DC testified that at one point, "it hurt to move my legs because his bone was like on my bone, on my shins." In an apparent attempt to establish that the appellant had placed his penis against DC's pelvis, the trial counsel asked, "While the accused was on top of you, where--what part of his body did he have against your genital area?" DC responded, "Just his hand, sir."

Although it is clear the appellant positioned himself on top of DC such that his exposed penis was "above" DC's pelvic bone, there is insufficient evidence indicating he placed his penis "against" her pelvic bone. We thus find that the portion of Specification 1 of Charge III alleging the appellant placed his penis "against" DC's pelvic bone was factually insufficient. Article 66(c), UCMJ, 10 U.S.C. § 866(c). We are otherwise satisfied that the evidence is legally and factually sufficient to sustain a finding of guilty under Specification 1 of Charge III by excepting the words: "such that his penis was against her pelvic bone."

In light of our decision to modify the guilty finding on Specification 1 of Charge III, we have decided to reassess the sentence rather than return the case for a rehearing. When reassessing a sentence, this Court must "assure that the sentence is appropriate in relation to the affirmed findings of guilty, but also . . . must assure that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed." *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985). We are guided in this endeavor by the principles announced in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986) and its progeny. This Court may reassess the sentence instead of ordering a rehearing if we are convinced the sentence "would have been at least of a certain magnitude" in the absence of the error--or in this case, in the absence of the excepted language in Specification 1 of Charge III. *Id.* at 307. "The standard for reassessment is not what would be imposed at a rehearing but what would have been imposed at the original trial absent the error." *United States v. Taylor*, 47 M.J. 322, 325 (1997), *aff'd*, 51 M.J. 390 (1999).

We are confident that despite the modification on Specification 1 of Charge III, the members' sentence would have been at least of the same magnitude as that which was adjudged--one year of confinement and reduction to the grade of E-4. In conducting our reassessment, we are mindful of the appellant's lengthy service and that three of the eight court members recommended clemency in the form of suspension of any confinement in excess of six months. We reach our conclusion for a number of reasons: the evidence presented to the members at trial would have been the same; the excepted language played an undeniably minor role in the overall case; the modification does not change the maximum confinement; and the appellant's adjudged sentence of confinement for one year and reduction to the grade of E-4 was lenient and well within the maximum punishment of a dishonorable discharge, 44 years and 6 months of confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1. *See generally* Article 57(c), UCMJ, 10 U.S.C. § 857(c); *United States v. Boone*, 49 M.J. 187 (1998).

Conclusion

The finding of guilty of Specification 1 of Charge III is modified as follows: Of Specification 1 of Charge III, guilty, except the words "such that his penis was against her pelvic bone." Of the excepted words, not guilty. Insofar as our decision of 2 January 2003 affirmed the findings of guilty of the remaining charges and specifications, it remains in effect. *See* A.F. Ct. Crim. App. Rules, Rule 19.1(d).

The approved findings, as modified, and the sentence, as reassessed, are correct in law and fact. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (2000). Accordingly, the approved findings, as modified, and the sentence are

AFFIRMED.

OFFICIAL

DEIRDRE A. KOKORA, Major, USAF
Chief Commissioner