UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman NAKOA M. BOYD
United States Air Force

ACM S29916

6 February 2002

Sentence adjudged 26 September 2000 by SPCM convened at Goodfellow Air Force Base, Texas. Military Judge: Patrick M. Rosenow (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 3 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel James R. Wise, Lieutenant Colonel Timothy W. Murphy, and Captain Patience E. Schermer.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo.

Before

SCHLEGEL, ROBERTS, and PECINOVSKY
Appellate Military Judges

OPINION OF THE COURT

SCHLEGEL, Senior Judge:

The appellant was convicted, contrary to his pleas, of making a false official statement, and assault and battery, in violation of Articles 107 and 128, UCMJ, 10 U.S.C. §§ 907, 928. The sentence, pronounced by the judge and approved by the convening authority, included a bad-conduct discharge, confinement for 3 months, and reduction to E-1. Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant assigns two errors. First, he alleges that the preferral of court-martial charges against him was the result of an equal opportunity complaint that he filed. We find the appellant's vague and unsupported allegation to be little more than a "collateral- style" attack on his court-martial conviction. *United States v. Ingham*, 42 M.J. 218, 224 (1995). He also

complains that his sentence is inappropriately severe. We affirm the findings and sentence.

The appellant assaulted his ex-girlfriend in her dormitory room on Goodfellow Air Force Base, Texas, on Sunday, 16 July 2000.[1] The evidence established that he choked her with his hands and tossed her around the room. According to information in his clemency submissions to the convening authority, the appellant filed an equal opportunity complaint on 23 July 2000 against a staff sergeant in the training squadron. On 23 August the appellant's commander, after reviewing the investigation of the complaint, administered a written letter of admonishment to the staff sergeant. The commander also concluded that a "sidebar issue" about questions allegedly asked by the squadron's first sergeant and section commander were not substantiated.[2] The charges against the appellant were preferred and referred the next day. The appellant believes this chronology shows his court-martial was a reprisal for his complaint. There is no evidence that the appellant's commander, who preferred the charges, or the convening authority who made the referral were implicated in the appellant's complaint. The appellant did not raise this issue at trial.

ANALYSIS

Reprisal is defined as "any action taken by one person either in spite or as a retaliation for an assumed or real wrong by another." *Blacks Law Dictionary*, 1171 (5th ed. 1979). In view of the appellant's use of this term, we will examine his *Grostefon* submission as a claim of selective or discriminatory prosecution.

> The burden of persuasion on a claim of selective prosecution is on the moving party. To support a claim of selective or vindictive prosecution, an accused has a "heavy burden" of showing that "others similarly situated" have not been charged, that "he has been singled out for prosecution," and that his "selection . . . for prosecution" was "invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights." Prosecutorial authorities and convening authorities are presumed to act without bias. Appellant had the burden of rebutting that presumption.

United States v. Argo, 46 M.J. 454, 463 (1997) (citations omitted). *See also United States v. Gargaro*, 45 M.J. 99, 102 (1996). An appellant waives a claim of selective or discriminatory prosecution if it is not raised at trial, unless special circumstances exist. *United States v. Henry*, 42 M.J. 231, 234 (1995) (citing Rule for Courts-Martial (R.C.M.)

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[1] The false official statement also involved this incident. The appellant was acquitted of assaulting an active-duty Marine whom he believed was romantically involved with his ex-girlfriend.

[2] Three friends accompanied the appellant during both assaults. We conclude based on the commander's letter and testimony in the record of trial, that all four individuals filed complaints.

905-907; *Tracey v. United States*, 739 F.2d 679, 682 (1st Cir. 1984); *United States v. Taylor*, 562 F.2d 1345, 1356 (2d Cir. 1977)).

We find that the appellant waived this matter. He knew all the facts well before his trial began, but made no motion for appropriate relief to the judge. There are also no extraordinary circumstances that prevented him from knowing about or raising this issue. This was a fully litigated trial with over 25 witnesses. We have no hesitation in applying waiver here. We also find that, without some additional evidence, the appellant would not have been able to meet his burden at trial. We will not infer a selective or discriminatory prosecution based upon a simple sequence of events involving the resolution of the appellant's equal opportunity complaint, and the accusatory phase of his court-martial.

The appellant also asks us to find that his sentence is too severe. Article 66(c), UCMJ, 10 U.S.C. § 866(c) requires that we approve only so much of the sentence as we find "should be approved." In determining sentence appropriateness, we exercise our judicial power to assure that justice is done and that the accused gets the punishment he deserves. In performing this function, we are not authorized to exercise clemency. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). Instead, we discharge our responsibility by giving individualized consideration to an appellant, including the nature and seriousness of the offenses and the character of his service. *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982). After reviewing the record of trial, we do not find appellant's sentence inappropriately severe. Article 66(c), UCMJ.

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. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

LAURA L. GREEN
Clerk of Court