UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic CODY R. CROSS
United States Air Force

ACM 35236

15 December 2004

Sentence adjudged 29 May 2002 by GCM convened at Malmstrom Air Force Base, Montana. Military Judge: Timothy D. Wilson.

Approved sentence: Bad-conduct discharge and confinement for 3 months.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Jefferson B. Brown, and Captain L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Lane A. Thurgood.

Before

MALLOY, JOHNSON, and GRANT
Appellate Military Judges

PER CURIAM:

The appellant was tried by a general court-martial composed of officer and enlisted members at Malmstrom Air Force Base, Montana. The court members found him not guilty of sodomy, in violation of Article 125, UCMJ, 10 U.S.C. § 925, but did find him guilty of willful dereliction of duty, in violation of Article 92, UCMJ, 10 U.S.C. § 892. The court members sentenced the appellant to a bad-conduct discharge and confinement for 3 months. The convening authority approved the sentence as adjudged.

The appellant has submitted two assignments of error: (1) Whether the evidence is legally and factually insufficient to support a finding of guilty to Charge I and its Specification because the evidence did not establish beyond a reasonable doubt that the appellant had a duty to refrain from entertaining a civilian visitor for one or more

consecutive hours, and (2) Whether the court members imposed an inappropriately severe punishment on the appellant.

Background

The appellant was a Security Forces troop assigned to work the mid-shift on 23 August 2001. Part of those duties included posting at the main gate as an Entry Controller guarding the gate. Sometime during the shift, the appellant invited a female civilian acquaintance to visit him at the gate. The civilian accepted the invitation and visited the appellant inside the gate facility for several hours. A local Security Forces Operating Instruction was in effect at the time that prohibited post visitation inside the gate facility for "long periods of time."

Factual and Legal Sufficiency of the Evidence

The test for legal sufficiency is whether any rational trier of fact, when viewing the evidence in the light most favorable to the government, could have found the appellant guilty of all elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Our superior court has determined that the test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, this Court is convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

The evidence introduced at trial established a duty prescribed to appellant. Testimony from witnesses, and admission into evidence of the squadron operating instruction, outlined the duties of entry controllers and the limitations relating to visitors at the gate facilities. Further, testimony describing the actions of the appellant during the evening of the offense (i.e. concealing his young female visitor when cars approached) established his awareness of the limitations on visitation at the gate facilities and his intentional disregard of those limitations.

We find that there is sufficient evidence to convince a rational trier of fact beyond a reasonable doubt that the appellant is guilty of the offense of willful dereliction of duty. Furthermore, weighing all the evidence admitted at trial and mindful of the fact that we have not heard the witnesses, this Court is convinced beyond a reasonable doubt that the appellant is guilty of the offense.

Sentence Appropriateness

The appellant also alleges that his sentence was inappropriately severe. Article 66(c), UCMJ, 10 U.S.C. § 866(c), requires that we affirm only so much of the sentence as we find "should be approved." In determining sentence appropriateness, we must

exercise our judicial powers to assure that justice is done and that the appellant receives the punishment he or she deserves. Performing this function does not authorize this Court to exercise clemency. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). The primary manner in which we discharge this responsibility is to give individualized consideration to an appellant, including the nature and seriousness of the offenses, and the character of the appellant's service. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Considering the character of the offender, the nature and seriousness of the offense, and the entire record, the appellant's sentence is not inappropriately severe.

Conclusion

The 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; *Reed*, 54 M.J. at 41. Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court