

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

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UNITED STATES

v.

Airman First Class GILBERT GERSON-MARTINEZ  
United States Air Force

ACM 36927

30 October 2008

Sentence adjudged 09 January 2007 by GCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: Steven Ehlenbeck (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 15 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, and Captain Megan E. Middleton.

Before

HEIMANN, ZANOTTI, and PLACKE  
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PLACKE, Judge:

On 9 January 2007, a general court-martial composed of a military judge sitting alone at Davis-Monthan Air Force Base, Arizona, convicted the appellant, in accordance with his pleas, of one charge and one specification of assault consummated by a battery on Airman First Class (A1C) EK, in violation of Article 128, UCMJ, 10 U.S.C. § 928, and one charge and one specification of indecent assault on Airman (Amn) CR and one specification of assault with intent to commit rape on Amn CR, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 15 months, and reduction to E-1. The convening authority approved the sentence as adjudged.

On appeal, the appellant makes one assertion of error. He claims that his sentence is inappropriately severe. In addition, we address one issue raised by our review of the case, that is, delay in appellate review.

### *Sentence Appropriateness*

The appellant was born in the Dominican Republic and grew up in poor and difficult circumstances after his parents separated when he was four. The appellant eventually moved to the United States and enlisted in the Air Force at age 17, in the hopes of becoming a pilot. Although he was a hard worker who liked to stay busy, his overall duty performance was no better than satisfactory.

The appellant's assault of A1C EK was minor. He grabbed her from behind in a bear hug and did not let go until she told him to several times. When he did, he pushed her. However, she did not fall, was not injured, and accepted his apology later that day. She even testified for the appellant at sentencing, described him as a hard worker, and confirmed she was not scared of him.

The appellant's assault of Amn CR was much more serious. They knew each other from technical training school, but were never more than acquaintances. On the night of the assault, the appellant went to Amn CR's dorm room after midnight. He had been drinking heavily. When Amn CR opened her door in response to the appellant's knock, he yelled "boo" or "gotcha," then entered her room. Amn CR told him to leave. Instead, he pinned her down on her bed by holding her hands above her head, admittedly intending to rape her. Although he did not rape her, he digitally penetrated her vagina, which, she testified, hurt. He also rubbed her breasts and touched her buttocks. Amn CR told the appellant to stop, struggled with him, and kned him in the groin. At one point, she used her cell phone to send a "help" text message to her boyfriend. After Amn CR kned him a second time, the appellant stopped and left, saying, "What am I doing here?" Amn CR did not immediately tell anyone about the assault. The next morning, she did tell fellow airmen, who in turn contacted authorities. Amn CR did not suffer any injuries requiring medical attention. She testified to having difficulty sleeping and bad dreams about the assault; however, she was not receiving mental health treatment or taking sleep medication. She did not miss any duty as a result of the assault.

The appellant confessed when interviewed by the Air Force Office of Special Investigations. He consented to a search of his room and a sexual assault examination. In his unsworn statement at sentencing, the appellant first apologized, and then described his difficult childhood, his long-held desire to be an Air Force pilot, and his concerns about potential sex offender registration and deportation.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005); *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct.

Crim. App. 2006). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006). 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, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

The appellant's maximum punishment, after the military judge properly ruled the specification of indecent assault of Amn CR was multiplicitous for sentencing with the specification of assault with intent to commit rape, included confinement for 20 years and 6 months and a dishonorable discharge. The appellant's adjudged and approved sentence includes 15 months confinement and a bad-conduct discharge. Appellant argues we should reassess the sentence and approve neither the bad-conduct discharge nor confinement in excess of 11 months.\* After considering the character of the offender, the nature and circumstances of his offenses, and the entire record of trial, we do not find that the appellant's sentence is inappropriately severe.

#### *Delay in Appellate Review*

The record of trial was docketed with this Court on 6 February 2007. After ten enlargements, the appellant's brief was filed 4 June 2008. The appellant's first seven requests for enlargement cited appellate defense counsel's heavy caseload, the eighth added a second justification of the appellant's then-ongoing efforts to retain civilian counsel, and the final two were based entirely on his ultimately unsuccessful efforts to retain civilian counsel.

In this case, the delay of more than 18 months in the completion of appellate review is presumptively unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Because the delay is presumptively unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Moreno*, 63 M.J. at 135-36. When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. Having considered the totality of the circumstances and the entire

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\* The appellant suggests, without any citation to authority, that reducing confinement to 11 months will "likely result in his ability to remain in the United States." See *United States v. Denedo*, 66 M.J. 114, 129 (2008) (regarding the importance of accurate analysis and advice on collateral consequences of a court-martial conviction). However, we also note the appellant acknowledged his fear of deportation in his unsworn statement, and trial defense counsel explicitly argued the likelihood of deportation as a matter in extenuation.

record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt and that no relief is warranted.

*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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

Judge ZANOTTI did not participate.

OFFICIAL



STEVEN LUCAS, YA-02, DAF  
Clerk of the Court