UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman RYAN D. HUMPHRIES
United States Air Force

ACM 37491

24 May 2010

Sentence adjudged 01 May 2009 by GCM convened at Dyess Air Force Base, Texas. Military Judge: Grant L. Kratz.

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Nicholas W. McCue.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Major Coretta E. Gray, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JACKSON, Senior Judge:

Contrary to the appellant's pleas, a panel of officer and enlisted members sitting as a general court-martial convicted the appellant of one specification of adultery and one specification of divers sodomy, in violation of Articles 134 and 125, UCMJ, 10 U.S.C. §§ 934, 925. The adjudged and approved sentence consists of a bad-conduct discharge and reduction to the grade of E-1.

On appeal, the appellant asks this Court to set aside his findings of guilty and to set aside his bad-conduct discharge or grant such other appropriate relief. As the basis

for his request, he opines that: (1) the military judge erred by excluding relevant evidence of the appellant's prior sexual relationship with AEH, one of the alleged victims; (2) the portion of his sentence which provides for a bad-conduct discharge is inappropriately severe; and (3) this Court should use its Article 66(c), UCMJ, 10 U.S.C. § 866(c), powers to set aside his findings of guilty because of the unique circumstances of this case. We find no prejudicial error; however, we decline to affirm the findings at this time. For the reasons set forth below, we find that portion of the sentence which provides for an unsuspended bad-conduct discharge inappropriately severe. Accordingly, we set aside the convening authority's action and return the record of trial to The Judge Advocate General for remand to the convening authority for reconsideration of the sentence.

Background

On or about 2 February 2005, the appellant, a married man, called AEH, a family friend and the wife of a deployed airman, and asked her if he could visit her at her on-base home. AEH invited the appellant to her home and after AEH's children had gone to bed, the appellant and AEH engaged in oral and anal sodomy and sexual intercourse. Two days later, AEH met with agents from the Air Force Office of Special Investigations (AFOSI) and reported that the appellant had sexually assaulted her. The appellant was subsequently charged with, inter alia, raping and forcibly sodomizing AEH.

At trial, the appellant moved to admit evidence of his alleged prior consensual sexual intercourse with AEH. As the basis for his motion, he opined that the prior consensual sex was relevant on the issue of consent and that it would impeach AEH on the issue of consent. The government opposed the motion and the military judge, after hearing argument from counsel, made detailed findings of fact and conclusions of law and granted the motion in part and denied the motion in part. More specifically, the military judge ruled that given the passage of time since the alleged consensual sexual intercourse,[1] the act was not relevant and even assuming relevance, its probative value was substantially outweighed by the danger of misleading the members.

Exclusion of Alleged Relevant Evidence

We review a military judge's ruling regarding admissibility of evidence for abuse of discretion. *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005) (quoting *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997)); *United States v. Gilbride*, 56 M.J. 428, 430 (C.A.A.F. 2002) (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). Under an abuse of discretion review, we examine a military judge's findings of fact using

[1] The appellant alleged that the consensual sexual intercourse with AEH occurred in the summer of 2004, approximately seven to nine months prior to the alleged rape and forcible sodomy of AEH. However, testimony from the appellant's ex-wife indicated that the alleged consensual sexual intercourse with AEH occurred in the summer of 2002, approximately 31 to 33 months prior to the alleged rape and forcible sodomy of AEH.

a clearly-erroneous standard and conclusions of law de novo. *United States v. Larson*, 66 M.J. 212, 215 (C.A.A.F. 2008); *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) (quoting *Ayala*, 43 M.J. at 298)). A military judge has broad discretion in applying Mil. R. Evid. 403, and when he conducts a Mil. R. Evid. 403 balancing test, his ruling will not be overturned unless there has been a clear abuse of discretion. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000).

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States as applied to members of the armed forces, the code, these rules, this Manual, or any Act of Congress applicable to members of the armed forces. Evidence which is not relevant is not admissible.

Mil. R. Evid. 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Mil. R. Evid. 401.

In the case at hand, the military judge made detailed findings of fact and conclusions of law. His findings are not clearly erroneous and his conclusions of law are correct. Evidence that the appellant allegedly engaged in consensual sexual intercourse with AEH approximately 31 to 33 months prior to the 2 February 2005 incidents was at best marginally relevant. Additionally, we defer to the military judge's ruling that any probative value was substantially outweighed by the danger of misleading the members. Lastly, even if we were to assume that the military judge erred, this Court is convinced that any error was harmless.[2]

Inappropriately Severe Sentence

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). 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), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we 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). Lastly, we "may affirm only . . . the sentence or such part or amount of

[2] On this point, we note that the members found the appellant not guilty of raping and forcibly sodomizing AEH and instead found him guilty of having consensual sexual intercourse (adultery) and consensual sodomy with AEH. Their findings suggest that they found AEH's rape and forcible sodomy allegations incredulous—precisely the result the appellant was seeking in attempting to admit evidence of his alleged prior consensual sexual intercourse with AEH.

the sentence, as [we find] correct in law and fact and determine[], *on the basis of the entire record, should be approved*." Article 66(c), UCMJ (emphasis added).

After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offenses of which the appellant was found guilty, we find that portion of the appellant's sentence which provides for an unsuspended bad-conduct discharge inappropriately severe. So as to be clear, this Court does not condone the appellant's crimes—crimes aggravated by the fact that they were committed: (1) in base housing; (2) with the spouse of a deployed service member; and (3) at a time when he was married and the father of three minor children. Nor should our findings on this issue be misconstrued as a grant of clemency—an act which we recognize is solely within the bailiwick of the convening authority, The Judge Advocate General, and the Secretary of the Air Force. *See Healy*, 26 M.J. at 395-96 (noting the distinction between a sentence appropriateness determination and clemency). Put simply, the appellant's crimes are unacceptable and undermine his standing as a military member. He deserves punishment but given the consensual nature of his crimes, an unsuspended punitive discharge is inappropriately severe.

In finding the unsuspended punitive discharge inappropriately severe, we are left with several options. We could disapprove or modify the punitive discharge. Article 66(c), UCMJ; Rule for Courts-Martial 1203, Discussion; *see also United States v. Simmons*, 6 C.M.R. 105, 106 (C.M.A. 1952). We could return the appellant's case to The Judge Advocate General with a request that he use his Article 74, UCMJ, 10 U.S.C. § 874, authority to remit or suspend the appellant's punitive discharge. *See United States v. Silvernail*, 1 M.J. 945, 946 (N.C.M.R. 1976). We could set aside the convening authority's action and return the record of trial to The Judge Advocate General for remand to the convening authority, who may upon further consideration approve an adjudged sentence no greater than a suspended bad-conduct discharge and a reduction to the grade of E-1. *See United States v. Clark*, 16 M.J. 239, 243 (C.M.A. 1983) (Everett, C.J., concurring). As the military justice system is ultimately a commander's program, we believe it is most appropriate to set aside the convening authority's action and return the record of trial to The Judge Advocate General for remand to the convening authority for reconsideration of the sentence "with full knowledge as to the upper limit on appropriateness." *Id.* (Everett, C.J., concurring).

Nullification of the Appellant's Convictions

This Court recently decided that it has the authority under Article 66(c), UCMJ, to nullify or not approve a conviction that was correct in law and fact. *United States v. Nerad*, 67 M.J. 748, 751-52 (A.F. Ct. Crim. App. 2009). In *United States v. Nerad*, this Court nullified a factually and legally sufficient child pornography conviction because we found that the conviction unreasonably exaggerated the appellant's criminality. *Id.* at 752-53. We are mindful that our superior court has certified the issue of whether service

courts have the authority to nullify factually and legally sufficient convictions. Assuming that this Court's opinion in *United States v. Nerad* survives legal scrutiny, we decline to grant the appellant the requested relief. The appellant's convictions are legally and factually sufficient and his convictions do not unreasonably exaggerate his criminality.

Conclusion

The findings are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred.[3] Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). However, in light of the fact that this case is being returned to The Judge Advocate General for further action by the convening authority, we decline to affirm the findings at this time. The convening authority's action is set aside and the record of trial is returned to The Judge Advocate General for remand to the convening authority for reconsideration of the sentence "with full knowledge as to the upper limit on appropriateness." *Clark*, 16 M.J. at 243 (Everett, C.J., concurring). Thus, the convening authority may approve an adjudged sentence no greater than one including a suspended bad-conduct discharge. Should the convening authority elect not to do so, this Court would be obliged to disapprove or modify the bad-conduct discharge upon further review in accordance with Article 66(c), UCMJ.

OFFICIAL

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

[3] This Court notes that there are a number of errors in the court-martial order (CMO). First, in Specification 2 of Charge I and Specifications 3 and 4 of Charge II the word "between" was stricken from the charge sheet but the word erroneously appears in the respective specifications in the CMO. Second, the language "a married man" is erroneously missing from Specifications 1 and 3 of Charge II in the CMO. Third, the charge number is missing from the first charge in the CMO. Promulgation of a corrected CMO, properly reflecting the charge number and the specifications as they appear on the charge sheet, is hereby directed.