UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JAMIE J. SHATUSKY
United States Air Force

ACM 36136

26 May 2006

Sentence adjudged 4 October 2004 by GCM convened at Beale Air Force Base, California. Military Judge: Anne L. Burman (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 9 years, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Christopher S. Morgan.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Kimani R. Eason.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT

JACOBSON, Judge:

We have reviewed the record of trial, the appellant's single assignment of error, and the government's response thereto. The appellant asserts his sentence is inappropriately severe. Finding no error, we affirm the findings, but modify the sentence.

Article 66(c), UCMJ, 10 U.S.C. § 866(c), provides that this Court "may affirm . . . the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." In *Jackson v. Taylor*, 353 U.S. 569, 576-77 (1957), the Supreme Court considered the statute and its legislative history, and concluded it gave the (then) Boards of Review the power to review not only the legality of a sentence, but also whether it was appropriate. Our superior court has

likewise concluded that the Courts of Criminal Appeals have the power to, "in the interests of justice, substantially lessen the rigor of a legal sentence." *United States v. Lanford*, 20 C.M.R. 87, 94 (C.M.A. 1955); *see also United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002).

We carefully reviewed the facts and circumstances of this case, and all the matters presented in the sentencing phase of the trial. The appellant was a new father who, when left alone with his 7-week-old son for the first time, became frustrated with the infant's crying, shook him, and threw him, buttocks first, on the bed. Shortly thereafter, the infant began showing signs of distress, so the appellant called 911. He did not, however, inform emergency responders or hospital personnel about the cause of the child's injuries until confronted by the health care providers. There was no evidence presented to indicate that the baby would have survived had the appellant immediately confessed.

At trial, the appellant pled guilty to involuntary manslaughter. During sentencing, he was supported by co-workers, his family, and his wife. Sentencing evidence showed that the appellant had a record of excellent on- and off-duty behavior, had no previous disciplinary actions against him, and was currently providing for the welfare of his wife and newborn son.[1]

The offense to which the appellant pled guilty is extremely serious and warrants significant punishment. The maximum punishment the appellant faced for the crime to which he pled guilty included a dishonorable discharge, confinement for 10 years, and reduction to E-1. The approved sentence is within legal limits and no error prejudicial to the appellant's substantial rights occurred during the sentencing proceedings. Nonetheless, we find that a lesser sentence of a dishonorable discharge, confinement for seven years, and reduction to E-1 should be affirmed.

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). However, we affirm only so much of the sentence as includes a dishonorable discharge, confinement for 7 years, and reduction to E-1. Accordingly, the findings and sentence, as modified, are

AFFIRMED.

JOHNSON, Judge (dissenting):

A sentence of a dishonorable discharge, confinement for nine years, and reduction to the grade of E-1 is a legal and appropriate sentence for the involuntary manslaughter of

[1] The appellant's wife gave birth to a second child during the intervening period between their first child's death and the date of the court-martial. The appellant was allowed by the State of California to visit the couple's second child only during supervised visits.

a 7-week-old helpless dependent infant. The military judge got it right. I therefore respectfully dissent from the majority.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator