UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JOSHUA A. SMITH
United States Air Force

ACM 37816

19 June 2013

Sentence adjudged 5 November 2010 by GCM convened at Ramstein Air Base, Germany. Military Judge: Dawn R. Eflein (sitting alone).

Approved sentence: Dishonorable discharge, confinement for life without parole, and reduction to E-1.

Appellate counsel for the appellant: Major Michael S. Kerr; Major Daniel E. Schoeni; Captain Shane A. McCammon; Captain Robert D. Stuart; and Dwight H. Sullivan, Esquire.

Appellate counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; and Gerald R. Bruce, Esquire.

Before

GREGORY, ROAN, and MARKSTEINER
Appellate Military Judges

OPINION OF THE COURT

PER CURIAM

A general court-martial composed of a military judge sitting alone convicted the appellant, in accordance with his pleas of rape of a child under the age of 12, aggravated sexual contact with a child, and taking indecent liberties with a child, as well as manufacturing, possessing, and viewing child pornography, in violation of Articles 120

and 134, UCMJ, 10 U.S.C. §§ 920, 934.[1] The adjudged sentence consisted of a dishonorable discharge, confinement for life without parole, and a reduction to the lowest enlisted grade. The convening authority approved the sentence as adjudged.

On appeal, the appellant asserts that the "without parole" portion of his sentence is inappropriately severe.

Background

For approximately ten years, the appellant searched for and downloaded adult and child pornography from the Internet. By late 2009, the appellant claimed he was addicted to these materials and, when that addiction "took over" and "got the better of him," he began molesting young girls.

From approximately November 2009 to April 2010, the appellant sexually assaulted three girls, aged 7, 4, and 3, whom he babysat at either his own or their homes. He also videotaped and photographed some of the sexual acts he committed upon the 4- and 3-year-olds. He manufactured these images so that he could keep and view them as masturbatory aids, in furtherance of what he himself termed as his "addiction."

The appellant found his victims through a baby-sitting service he provided at Ramstein Air Base. He advertised his services on the base's web-based classified advertisement service and was ultimately hired to baby-sit each of the children, two of whom were military dependents and one who was a German citizen. The appellant secured time alone with his victims after gaining their parents' trust by advertising his affiliation with the military community and lying about his qualifications as a babysitter. Specifically, the appellant described himself as a staff sergeant who was the "father of a wonderful 3 year old son" and an eight month old. He also claimed that he had more than eight years of experience working with children, he had worked at the military Child Development Center for two years, he taught parenting classes, and he was certified in First Aid and CPR.

To further his plan to gain access to children, the appellant created a fictitious reference, Yvonne, which he would use when making or replying to babysitting inquiries. The 7-year-old's mother testified at trial that "I was surfing Ramstein Yard Sales one day when a chat popped up from a woman, whose name was Yvonne, who said that she saw my post and that I should consider using her babysitter . . . that she had good luck with her babysitter and that she was trying to be friendly and help me out." The appellant communicated with the parents and others about the problems and discrimination he sometimes encountered as a male babysitter, and he claimed those concerns were unfounded.

[1] Consistent with his pleas, the court found the appellant not guilty of seven additional sexual assault specifications under Charge I and the single specification of larceny under Charge II.

After the 7-year-old child reported to her parents that she had seen the appellant's penis while he was reading her a Bible story and that he had taken naked pictures of her, the appellant was questioned by agents from the Air Force Office of Special Investigations (OSI). He initially denied engaging in inappropriate behavior, claiming the 7-year-old had inadvertently seen him naked when she walked in on him while he was preparing to take a shower, that he helped the girl shower because she came into contact with his cats, and that she may have mistaken his cell phone for a penis. After being informed that his home was being searched, he admitted they would find child pornography, both from the Internet, and from pictures and videos that he created showing sexual acts between himself and several children. He later admitted that babysitting was a "convenient" way for him to get access to children. In a written statement, the appellant claimed that he hated hurting the children, hated himself for doing it, and started to become "less and less careful because I wanted to get caught. . . . I guess I'm glad I got caught now, maybe I can get some help."

At trial, the appellant admitted to molesting each of the three children on divers occasions during a 6-month period. His acts included instances of penetrating the girls' genitals with his penis, fingers, and a tube, aggravated sexual contact, indecent liberties, and the manufacturing, possession, and viewing of child pornography.

The Government's case in aggravation included the appellant's handwritten confession, a video recording of his interview by, and oral confession to, the OSI agents, the advertisements for his babysitting service as well as Internet chat postings created by the appellant to promote his babysitting services, the child pornography, and video recordings of his molestation of his victims. Three of the children's parents testified concerning the impact the appellant's offenses had on them and their children, which included the children acting in a sexualized manner and exhibiting fear of being alone or in close proximity to males.

The defense's case in extenuation and mitigation consisted of the appellant's unsworn statement and the testimony of Dr. RF, a forensic psychologist. Dr. RF reviewed the materials from the case, assessed the appellant over a three-day span, and also interviewed the appellant's parents. Dr. RF found the appellant had deficient social skills and difficulty in developing close and long-standing relationships with adults. He concluded that the appellant's risk of reoffending is "generally speaking, very low" as compared to other sex offenders and that he had "excellent rehabilitative potential," although he acknowledged it was difficult, if not impossible, to make accurate predictions about a specific individual. In a post-trial submission, Dr. RF stated, "In over 300 evaluations of military sex offenders in 32 years as a military psychologist and in private practice, I have found no offender with a lower risk of recidivism."

In his unsworn statement, the appellant expressed great remorse and discussed his troubled upbringing and the significant sexual and behavioral problems experienced by

him and his family. He acknowledged the seriousness of his offenses and told the military judge that he deserved a life sentence.

Discussion

The appellant asserts that he is the only Air Force member to be sentenced to life without parole (LWOP), a punishment so severe as to warrant relief under this Court's Article 66, UMCJ, 10 U.S.C. § 866, obligation to ensure sentence uniformity. In support of his argument, he cites to various cases in an attempt to illustrate a disparity in severity between his sentence and those imposed in other child molestation and homicide cases. The cited cases span the last 9 years and carry sentences consisting of confinement to life with the possibility of parole. None of the cases presented for comparison imposed LWOP. The appellant claims an appropriate remedy would be the disapproval of his sentence to LWOP and approval of confinement for life.

This court "may affirm only . . . 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." Article 66(c), UCMJ. In determining whether a sentence should be approved, our authority is "not legality alone, but legality limited by appropriateness." *United States v. Nerad*, 69 M.J. 138, 141 (C.A.A.F. 2010) (citing *United States v. Atkins*, 23 C.M.R. 301, 303 (C.M.A. 1957)). This authority is "a sweeping congressional mandate to the Courts of Criminal Appeal to ensure a fair and just punishment for every accused." *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005). This task requires "individualized consideration of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). In conducting this review, we must also be sensitive to considerations of uniformity and even-handedness. *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (citing *United States v. Lacy*, 50 M.J. 286, 287–88 (C.A.A.F. 1999)). Further, where the appellant demonstrates there are closely related cases with highly disparate sentences, we must examine whether there is a rational basis for the disparity. *Lacy*, 50 M.J. at 288. The appellant bears the burden of demonstrating that cases are closely related. *Id.*

The Court of Appeals for the Armed Forces has previously held that life without eligibility for parole is an authorized punishment for rape of a child under the age of 12. *United States v. Stebbins*, 61 M.J. 366, 368 (C.A.A.F. 2005); *United States v. Lovett*, 63 M.J. 211, 213 (C.A.A.F. 2006). However, we are also mindful that such a sentence is a severe punishment and should not be approved lightly. *Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010) (life without parole is "the second most severe penalty permitted by law").

In *Jackson v. Taylor*, 353 U.S. 569, 576–77 (1957), the Supreme Court considered the text of Article 66, UCMJ, and its legislative history, and concluded it gave the courts

of criminal appeals the power to review not only the legality of a sentence but also its appropriateness. Invoking our interest in maintaining sentence uniformity, and arguing that his "sentence is disproportionate to those adjudged and approved in comparable, and even more egregious, Air Force cases," the appellant invites us to compare his case to other cases in which military members who committed other crimes—some similar to his own, some not—were treated more leniently than he. He specifically proffers six Air Force cases in which life *with* the possibility of parole was adjudged, two of which involved molestation of children.

We are required to examine sentence disparities when appropriateness can be fairly determined *only* by reference to closely related cases, and we are permitted—but not required—to do so in other cases. *United States v. Wacha*, 55 M.J. 266, 267-68 (C.A.A.F. 2001); *Lacy*, 50 M.J. at 288; *United States v. Olinger*, 12 M.J. 458, 460 (C.M.A. 1982) (citation omitted); *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006). "Cases are 'closely related' where, for example, they involve 'co-actors involved in a common crime, service members involved in a common or parallel scheme, or some other direct nexus between the service members whose sentences are sought to be compared.'" *United States v. Anderson*, 67 M.J. 703, 706 (A.F. Ct. Crim. App. 2009) (quoting *Lacy*, 50 M.J. at 288). The appellant bears the burden of demonstrating that any cited cases are closely related to his and that the sentences are highly disparate. *Sothen*, 54 M.J. at 296 (citing *Lacy*, 50 M.J. at 288).

The appellant argues that his adjudged and approved sentence of confinement for life without eligibility for parole is unduly severe and highly disparate as compared to the cases cited in his brief. The appellant relies heavily on the argument that his is the only court-martial in the Air Force to receive life without the eligibility of parole.[2] He asks this court to affirm a sentence to confinement for life with the eligibility of parole.

The appellant fails to demonstrate that the six cases cited in his brief are closely related to his. His assignment of error contains only a brief description of the charged offenses but offers no facts that may have affected the sentences. We are therefore not required pursuant to *Lacy*, to engage in sentence comparison. Nonetheless, based on our collective experiences as judge advocates and appellate judges and taking into account the principles of sentencing, the matters in aggravation as balanced by the matters in mitigation, to include the appellant's guilty plea and the unrebutted opinion of Dr. RF concerning the appellant's high degree of rehabilitative potential, we conclude that the appellant's sentence to LWOP is unduly severe. In making this determination, we are not engaging in an act of clemency; rather, we are fulfilling our duty under Article 66(c), UCMJ, to maintain uniformity and even-handedness of court-martial sentencing decisions. *Sothen*, 54 M.J. at 296. Our decision is not made lightly and was the product

[2] Contrarily, the Government cites to *United States v. Cron*, ACM 38138 (A.F. Ct. Crim. App. 9 February 2012) (unpub. op.), a recent Air Force case involving premeditated murder, conspiracy to commit murder, and obstruction of justice, wherein the adjudged and approved sentence included life without parole.

of considerable reflection, discussion and debate. *See Lacy*, 50 M.J. at 288 ("Under Article 66(c), [UCMJ,] Congress has furthered the goal of uniformity in sentencing in a system that values individualized punishment by relying on the judges of the Courts of Criminal Appeals to utilize the experience distilled from years of practice in military law to determine whether, in light of the facts surrounding [the] accused's delict, his sentence was appropriate.") (citing *Olinger*, 12 M.J. at 461). We find that a sentence of a dishonorable discharge, confinement for life and reduction to the grade of E-1 should be affirmed.

Conclusion

The approved findings and sentence, as modified, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c).[3] Accordingly, the findings and sentence, as modified, are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[3] The overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).