UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 38957

UNITED STATES
Appellee

v.

Seth L. THOMAS
Captain (O-3), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 13 June 2017

Military Judge: James R. Dorman.

Approved sentence: Dismissal and confinement for 6 months. Sentence adjudged 18 November 2015 by GCM convened at Cannon Air Force Base, New Mexico.

For Appellant: Major Annie W. Morgan, USAF; Major Lauren A. Shure, USAF; Brian L. Mizer, Esquire.

For Appellee: Major Jeremy D. Gehman, USAF; Gerald R. Bruce, Esquire.

Before MAYBERRY, J. BROWN, and MINK, *Appellate Military Judges.*

Chief Judge MAYBERRY[1] delivered the opinion of the court, in which Senior Judge J. BROWN and Judge MINK joined.

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[1] Chief Judge Drew recused himself from this case based on his participation as the staff judge advocate for the general court-martial convening authority. In a memorandum dated 22 July 2016, The Judge Advocate General of the Air Force designated Senior Judge Mayberry as the Chief Appellate Military Judge in cases where Chief Judge Drew recused himself. Therefore, Chief Judge Mayberry designated the special panel in this case.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4.

MAYBERRY, Chief Judge:

At a general court-martial composed of a military judge sitting alone, Appellant pleaded guilty, pursuant to a pretrial agreement (PTA), to conduct unbecoming an officer and a gentleman in violation of Article 133, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 933.[2] The court sentenced Appellant to a dismissal, six months of confinement, and a reprimand. The convening authority approved the sentence except for the reprimand, and waived the automatic forfeitures for the duration of Appellant's confinement.

Appellant asserts only one assignment of error: that his sentence is inappropriately severe. We find no prejudicial error and affirm.

I. BACKGROUND

Appellant is a 2006 graduate of the United States Air Force Academy. After one year as an Intelligence Analyst, he was selected for Undergraduate Pilot training. His first airframe was the PC-12 and then he transitioned into the AC-130 gunship. He was assigned to Cannon AFB for his entire rated career. Appellant and his wife had a circle of friends, many of them pilots and their spouses, who were like family to them. Captain (Capt) MC and his wife, LC, were among that group. In early 2015, Capt MC received short notice orders to an OCONUS base. Appellant and his wife, KT, welcomed LC into their home until she could join her husband later in the year. LC considered KT her best friend. LC had her own bedroom, and a bathroom that she had exclusive use of except for a brief period of time when another friend stayed in the home. Appellant and his wife treated the area of the home that LC occupied as "her space." LC lived in Appellant's home from 20 February 2015 until 9 April 2015, the date Appellant surreptitiously videotaped her in the shower and in her bedroom.

LC was employed and worked from home. On 9 April 2015, she was sitting in her bedroom in Appellant's home and noticed something on top of a decorative basket on a shelf. She retrieved it and noticed it was a pen that had a lens on the ends and a USB plug. LC took a photo of the device and sent it to her husband, texted a friend asking "Am I being crazy?" and tried plugging the

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[2] Appellant pleaded not guilty to indecent visual recording in violation of Article 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920c. In accordance with the pre-trial agreement, this charge was withdrawn after sentencing on the Article 133 offense.

device into her laptop but was unsuccessful in accessing the content at that time. LC testified that she was "freaking out" about the device, wondering why it was there, what it meant, and if she should call KT. After going for a run to try to clear her head, she returned to the house. Appellant came home for lunch, which LC testified had never happened during the time she lived there. On that day, Appellant entered her room on a few occasions, again something he did not ordinarily do, each time chatting with her about whether she wanted lunch and other generic topics. Eventually, Appellant asked LC about a piece of jewelry he knew his wife had indicated she wanted and asked if LC would go with him to the store. She did, and when they returned home, Appellant returned to work.

After Appellant again left the house, LC received a message from her husband telling her to try plugging the device into her computer again. She did, and this time a number of videos popped up. LC viewed the videos, seeing that the first one depicted appellant's face, then herself, naked, in the shower drying herself off. There were three other videos which were all recorded in her bedroom immediately following the shower incident (they depict a single event, but were captured in separate files). The opening frame of the next video started with Appellant being visible placing the device on top of the basket, looking straight up into the camera, and recording the area near the dresser and bed. The last three videos did not depict LC naked.

LC testified that she felt sick to her stomach, shocked, betrayed, violated, and heartbroken for KT. She called her husband and some local friends to come help her pack her things to leave Appellant's home. Those friends, Capt DP and his wife MCP, came to the house and were gathering her things when Appellant again returned to the home. Capt DP met Appellant at the door and informed him that LC, MCP, and he knew about the videos. Appellant fell to his knees and stated "I f*cked up, my marriage is over, I can't believe this is happening," or words to that effect.

II. DISCUSSION

Appellant contends that a dismissal is inappropriately severe for his offense. 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, 10 U.S.C. § 866(c). 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) (quoting *United States v. Atkins*, 23 C.M.R. 301, 303 (C.M.A. 1957)). This authority is "a sweeping congressional mandate to ensure a fair and just punishment for every accused." *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (quoting *United States v. Bauerbach*, 55 M.J.

501, 504 (Army Ct. Crim. App. 2001)). 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) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180–81 (C.M.A. 1959)). In conducting this review, we must also be sensitive to considerations of uniformity and evenhandedness. *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)). However, 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. *Lacy*, 50 M.J. at 288; *United States v. Healy*, 26 M.J. 394, 395–96 (C.M.A. 1988).

Appellant had nine years and six months of service at the time of his court-martial. He was a graduate of the United States Air Force Academy and a rated pilot. He provided significant evidence of his career accomplishments, including combat missions in Iraq and Afghanistan, as well as combat support missions in Africa, the Philippines, and other hostile areas. Family members and numerous current and former military members offered evidence on his behalf.

The maximum sentence for the offense to which Appellant pleaded guilty was a dismissal, forfeiture of all pay and allowances, and confinement for five years.[3] Furthermore, Appellant entered into a PTA with a confinement cap of either six months if a dismissal was adjudged or 12 months if no dismissal was adjudged.

In arguing that a dismissal is inappropriately severe, Appellant renews two arguments he made at trial: that his combat record does not warrant the punishment imposed and the criminal statute of New Mexico characterizes similar criminal conduct as a misdemeanor.

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[3] The staff judge advocate recommendation (SJAR) erroneously states the maximum imposable period of confinement was one year. Appellant did not object to this error in his clemency submission. Failure to comment in a timely manner on matters in the SJAR, or on matters attached to the SJAR, forfeits any later claim of error in the absence of plain error. Rule for Courts-Martial 1106(f)(6); *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005). An error in the SJAR, however, "does not result in an automatic return by the appellate court of the case to the convening authority." *United States v. Green*, 44 M.J. 93, 95 (C.A.A.F. 1996). "Instead, an appellate court may determine if the accused has been prejudiced by testing whether the alleged error has any merit and would have led to a favorable recommendation by the [staff judge advocate] or corrective action by the convening authority." *Id*. To the extent that the erroneous maximum confinement contained within the SJAR was the maximum authorized pursuant to the pretrial agreement in this case, we are confident that no corrective action would have been taken by the convening authority.

Appellant's reliance on the fact that New Mexico, and a few other states, characterize voyeurism as a misdemeanor is inapplicable for two reasons. First, the UCMJ authorizes five years of confinement, thereby eliminating this argument. Additionally, this assertion misses the critical point. In requesting to plead to an offense under Article 133, Appellant transformed his conduct from a "simple" criminal offense to one that additionally required evidence that his conduct dishonored and disgraced himself, and seriously compromised his standing as an officer. Despite his counsel's argument that a dismissal is reserved for offenses recognized in civilian jurisdictions as felonies or for offenses of a military nature requiring severe punishment, Rule for Court-Martial 1003(b)(8)(A) expressly allows for the imposition of a dismissal for *any* offense of which a commissioned officer has been found guilty. We are not persuaded by Appellant's reliance on *United States v. Aurich*, 31 M.J. 95, 96 n.* (C.M.A. 1990) or *United States v. Fleener*, 43 C.M.R. 974 (A.F.C.M.R. 1971).

Appellant, an officer, unlawfully and surreptitiously videotaped a guest in his home while she was naked in the shower and again in the privacy of her bedroom. Furthermore, Appellant pleaded guilty to the indecent recording as a military-specific offense of Article 133—which prohibits conduct by a commissioned officer that is "punishable by any other article, provided these acts amount to conduct unbecoming an officer and a gentleman." Article 133(c)(2), UCMJ. Such conduct is "action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer." *Id*.

The convening authority was well aware of Appellant's military achievements when he referred the charges, entered into the PTA, and when he took final action in this case. The trial judge who sentenced him was aware of his military achievements when he imposed the sentence. Nevertheless, Appellant asks this court to find the sentence inappropriately severe and remove the possibility of a dismissal that he bargained for. While the dismissal is certainly a severe punishment, we cannot say that it is *inappropriately* severe.

After reviewing the entire record and giving individualized consideration to the nature and seriousness of the offense and the character of the offender, including his combat record. We are not persuaded that his combat record mitigates the severity of the offense to exclude dismissal from consideration when fashioning an appropriate sentence. We are personally convinced the sentence is appropriate. *See Snelling*, 14 M.J. at 268.

III. CONCLUSION

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and the sentence are **AFFIRMED**.

FOR THE COURT

KURT J. BRUBAKER
Clerk of the Court