

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic BRANDON L. TONER
United States Air Force

ACM 35080

13 January 2006

Sentence adjudged 30 January 2002 by GCM convened at Keesler Air Force Base, Mississippi. Military Judge: James L. Flanary (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 15 months, and forfeiture of all pay and allowances.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Colonel Carlos L. McDade, Lieutenant Colonel Mark R. Strickland, Major Terry L. McElyea, Major Maria A. Fried, Major Sandra K. Whittington, Major L. Martin Powell, and Captain Christopher S. Morgan.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, Lieutenant Colonel Gary F. Spencer, and Major Thomas Taylor.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

ORR, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of one specification of assault consummated by a battery, one specification of assault upon a commissioned officer, and one specification of assault upon a person in the execution of law enforcement duties, in violation of Article 128, UCMJ, 10 U.S.C. § 928. The appellant was also charged with seven specifications of indecent assault, in violation of Article 134, UCMJ, 10 U.S.C. § 934. He was convicted, contrary to his pleas, of three of the seven specifications of indecent assault, in violation of Article 134, UCMJ. The military judge found the appellant not guilty of the remaining specifications

of indecent assault, but found the appellant guilty of four specifications of the lesser-included offense of assault consummated by a battery, in violation of Article 128, UCMJ. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 15 months, and forfeiture of all pay and allowances. The convening authority approved the findings and the sentence as adjudged.

The case is before this Court for review under Article 66, UCMJ, 10 U.S.C. § 866. The appellant originally asserted two errors for our consideration, that: (1) Specification 3 of Charge II is factually insufficient; and (2) The military judge erred in denying the appellant's speedy trial motion.¹ The appellant filed a supplemental brief requesting a sanity board because a substantial question had been raised concerning the appellant's mental capacity to conduct or cooperate intelligently in the appellate proceedings. This Court granted the appellant's request and ordered a sanity board. After receiving the results of the sanity board, the appellant filed a brief stating he was not submitting any additional assignments of error. Although we find no merit in the appellant's speedy trial claim, we reviewed the factual sufficiency issue and after finding error, we take corrective action.

Background

The appellant was charged with assaulting five female Airmen who were assigned to his squadron, over a four-day period. Each of the women testified that they had never met the appellant prior to the assaults. The appellant would typically approach the women and touch them until they either told him to stop or pushed him away. The appellant also kicked two Security Forces members as they were attempting to remove him from the hospital emergency room. All of the assaults took place on Keesler Air Force Base.

Factual Sufficiency

The issue regarding factual sufficiency arises from one instance of the appellant's indecent assault upon Airman Basic (AB) J, which is alleged in Specification 3 of Charge II. AB J testified that the appellant assaulted her on four occasions. However, only the first and third of these assaults are germane to this issue. The first assault occurred inside the women's bathroom. The appellant followed AB J into the bathroom and backed her up against the wall. The appellant was about a foot away from AB J when he leaned against the wall, putting his right hand on the wall and with his left hand pulled at AB J's uniform. AB J testified that the appellant was trying to pull up her Battle Dress Uniform (BDU) blouse and the black t-shirt she was wearing underneath her BDU blouse. The appellant succeeded in pulling up her clothes and his left hand grazed the bottom of her bra. AB J testified that the appellant attempted with his left hand to pull down her pants. While the appellant was pulling at AB J's clothing, he was also asking her if she would

¹ The speedy trial issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

kiss him. When she declined, the appellant backed up and left the bathroom. This incident is alleged in Specification 2 of Charge II.

The third assault upon AB J also occurred in the women's bathroom. The appellant walked into the bathroom before AB J had an opportunity to enter one of the bathroom stalls. When AB J noticed the appellant, she told him to leave. Instead, he asked AB J for a kiss. He then began to walk toward AB J and she backed up against the wall. The appellant was within six inches from AB J and was standing directly in front of her with his right hand on the wall. The appellant and AB J were facing each other as the appellant was leaning toward AB J and using his left hand to pull up her shirt. The appellant put his hand on AB J's stomach and slid his right arm down the wall and grabbed AB J's buttocks. While squeezing her buttocks, he again asked her for a kiss. AB J wriggled and pushed the appellant away. This is charged in Specification 3 of Charge II and is the specification that the appellant is asserting is factually insufficient.

After both counsel completed questioning AB J, the military judge stated to AB J that he had noticed, "in the Charge [that] it talks about pinning you against the wall of the female latrine." He then asked AB J, "Were you ever pinned against the wall during any of this?" AB J responded, "No, I was blocked in." After confirming that AB J was not pinned against the wall, the military judge stated, "Okay, and that's just what I wanted to do to clarify because that's what I had understood you to say, that you were sort of blocked in, but not actually physically pinned, but I wanted to verify that."

At the conclusion of the findings portion of the court-martial, the military judge announced the findings for Specifications 2 and 3 of Charge II, as follows: "Of Specification 2 of Charge II: Guilty, except the words, 'physically pinning her against the wall of the female latrine and'; Of the excepted words: Not Guilty; Of the remaining words: Guilty. Of Specification 3 of Charge II: Guilty." When asked by the trial defense counsel whether the excepted words in Specification 2 of Charge II were also meant to be excepted from Specification 3, the military judge responded, "No, that was only for Specification 2."

The test for factual sufficiency is, "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [this Court] are themselves convinced of the [appellant's] guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). This Court's review of the issue of factual sufficiency is limited to the "entire record" which includes only evidence admitted at trial. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223 (C.M.A. 1973).

The trial counsel presented evidence to establish that the appellant committed an indecent assault by grabbing AB J's buttocks, as alleged in Specification 3 of Charge II; however, AB J testified that the appellant did not physically pin her against the wall. Furthermore, the military judge stated that he understood AB J's testimony, with respect

to her encounters with the appellant in the bathroom, to mean that she was blocked in by the appellant but not actually physically pinned. Consequently, the military judge excepted the language pertaining to pinning AB J against the wall in Specification 2 of Charge II, but failed to do so in Specification 3 of Charge II. This was error. Additionally, although not raised by the appellant, Specification 3 of Charge II, alleges that the appellant reached for AB J's breasts; however, trial counsel failed to present evidence to support the allegation. Thus, we find that the evidence is legally and factually sufficient to sustain a modified finding of guilty under Specification 3 of Charge II, which alleges indecent acts with AB J, by excepting the words "physically pinning her against the wall" and "breasts and."

Sentence Reassessment

In light of the modified finding, we must determine whether this Court can reassess the appellant's sentence. We can reassess the appellant's sentence if we are, "convinced that even if no error had occurred at trial, the [appellant's] sentence would have been at least of a certain magnitude." *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986). "No sentence higher than that which would have been adjudged absent error will be allowed to stand." *United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000) (quoting *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990)). However, even within this limit we must determine that a sentence this Court affirms will be appropriate, as required by Article 66(c). *Sales*, 22 M.J. at 308.

We are confident that even with the modified findings, the appellant would have received the same sentence as that which was adjudged. The modified findings do not change the maximum allowable punishment and the essential facts of the offenses upon which the original sentence was based remain the same.

Conclusion

Therefore, the approved findings, as modified, and the sentence, as reassessed, 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). Accordingly, the approved findings, as modified, and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court