UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class REBEKAH J. WATSON
United States Air Force

ACM S31746

06 July 2011

Sentence adjudged 13 October 2009 by SPCM convened at Shaw Air Force Base, South Carolina. Military Judge: Michael Savage (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 30 days, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford, Major Michael S. Kerr, Lieutenant Colonel Darrin K. Johns, and Major Bryan A. Bonner.

Appellate Counsel for the United States: Major Deanna Daly, Major Coretta E. Gray, and Gerald R. Bruce, Esquire.

Before

BRAND, ORR, and WEISS
Appellate Military Judges

PER CURIAM:

Consistent with the appellant's pleas, a military judge found the appellant guilty of indecent acts and providing alcohol to a minor, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934. The military judge sentenced the appellant to a bad-conduct discharge, 30 days of confinement, and reduction to E-1. The convening authority approved the sentence as adjudged. As an act of clemency, the convening authority granted the appellant's request for entry into the Air Force Return to Duty Program.

On appeal, the appellant argues that the sentence was inappropriately severe considering the punishment that her co-actor received "for engaging in the same indecent conduct."[1] We find no prejudicial error and affirm.

Background

On 21 December 2008, while stationed and residing at Fort Gordon, Georgia, the appellant provided a minor, LT, with three alcoholic beverages containing rum while the two were in the appellant's base housing unit. LT was the 17-year-old daughter of the appellant's neighbor, a noncommissioned officer (NCO) in the United States Army, who would allow LT to visit the appellant's home because the appellant was a Senior Airman[2] in the United States Air Force and had small children. As a result, the neighbor trusted the appellant and thought that she could be a positive influence on her daughter. The appellant developed a close friendship with LT during the previous summer and treated her like a sister. Occasionally, LT would drink Hurricanes and Bahama Mamas, and the appellant knew that it wouldn't take long for LT to "get drunk, get belligerent, come on to people, and try to fight."

Armed with this knowledge, the appellant called Sergeant (SGT) JW, an Army NCO who also lived on Fort Gordon, and asked whether he would be willing to engage in sexual activity with her and a friend. SGT JW agreed and the appellant drove LT to SGT JW's house for that purpose. After arriving at SGT JW's house, the appellant and LT drank more alcoholic beverages containing rum. Once they finished their drinks they walked into SGT JW's bedroom. The appellant and LT performed oral sex on each other with full knowledge that SGT JW was in the same room, observing them. Approximately 20 minutes later, the appellant asked SGT JW to join in. He agreed and LT and the appellant took turns engaging in vaginal and oral sex with SGT JW.

The appellant pled guilty to the charged offenses and did not introduce any evidence of SGT JW's punishment in response to his actions on 21 December 2008. However, during presentencing argument, trial defense counsel alluded to disparate treatment when she argued "if [Soldiers and Airmen are] looking at what the Air Force does, it's clear that it's more stringent than what the Army did to [SGT JW]. She's not getting a 15 for this . . . ." Trial counsel objected to the defense counsel's argument on the basis that trial defense counsel was arguing facts not in evidence and the military judge sustained the objection. On appeal, the appellant submitted an affidavit claiming that SGT JW "was given an article [sic] 15 and loss of one rank," and asked this Court to reassess her sentence.

[1] This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[2] The appellant's commander subsequently reduced the appellant to the rank of Airman First Class (E-3) through nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815, for an unrelated offense committed prior to the court-martial.

Sentence Appropriateness

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384-85 (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) (citing *United States v. Mamaluy*, 27 C.M.R. 176, 181 (C.M.A. 1959)); *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009).

We are not required to "engage in sentence comparison with specific cases 'except in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.'" *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999) (quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985). Closely related cases include those which pertain to "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Lacy*, 50 M.J. at 288. The appellant bears the burden of demonstrating that the cases cited are "closely related" to the appellant's case and that the sentences are "highly disparate." *Id.* If both factors exist, "then the Government must show that there is a rational basis for the disparity." *Id.*; *United States v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001). We have a great deal of discretion in determining whether a particular sentence is appropriate but are not authorized to engage in exercises of clemency. *United States v. Nerad*, 69 M.J. 138, 148 (C.A.A.F. 2010); *Lacy*, 50 M.J. at 288; *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

Turning to the present case, even if we assume arguendo that the appellant has appropriately identified a qualifying co-actor in a closely related case, the appellant has not met her burden of showing that her case meets the criteria for this Court to engage in a sentence comparison. The appellant asserts that SGT JW received nonjudicial punishment which reduced him by one rank and she was tried by a court-martial and reduced by two ranks for the same incident. The crux of her argument is that she was tried by a court-martial and SGT JW was not. *See United States v. Noble*, 50 M.J. 293, 294-95 (C.A.A.F. 1999). Our superior court has made the distinction that, when only one co-actor is brought to court-martial, it "is not one of those 'rare instances' involving 'disparate sentences adjudged in closely related cases.'" *Id.* at 294. If the co-actor was not tried, convicted, or sentenced,[3] "[t]here is no court-martial record of findings and sentence that can be compared, which means that the issue of sentence uniformity is not present." *Id.* at 294-95. Like *Noble*, while the appellant does not allege discriminatory prosecution or other unlawful proceedings, the issue "involves differences in initial disposition rather than sentence uniformity." *Id.* at 295.

[3] In *United States v. Noble*, 50 M.J. 293 (C.A.A.F. 1999), the co-actor's commander permitted the member to receive an Honorable service characterization based upon an unrelated administrative separation proceeding that was pending at the time of the offense.

While not engaging in sentence comparison, we considered whether there was any evidence of discriminatory or otherwise illegal prosecution or referral. We began by considering whether the fact that the appellant and SGT JW were in different branches of the military was a basis for the disparity in the initial disposition of the two cases. We concluded that it was not.

We find that the record establishes significant aggravating facts in the appellant's case that support her convening authority's decision to proceed to a trial by court-martial. First, the appellant knowingly provided the alcoholic beverages to the minor child of her neighbor and then orchestrated the rendezvous with the intent of engaging in such sexual acts. Unlike SGT JW, the appellant was uniquely entrusted with the welfare of the minor, having established a mentorship relationship based in part on credibility extended to the appellant due to her status as a member of the United States Air Force. The appellant admitted that it was prejudicial to good order and discipline to intoxicate the minor child of a fellow servicemember because "it could have harmed her health." The record does not provide evidence that SGT JW was even aware that LT consumed an alcoholic beverage while in his home. Next, the appellant adversely impacted LT by the statements she made to others after the incident about LT's conduct that night, which led to an anonymous note addressed to LT's mother. Additionally, the appellant's personnel file includes a record of nonjudicial punishment for drunk driving between the incident and subsequent court-martial. The pre-trial agreement indicates that the convening authority had some evidence that the appellant may have been driving while intoxicated on the night of the charged misconduct as well. In fact, as consideration for the pretrial agreement between the appellant and her convening authority, the convening authority agreed not to refer to court-martial an additional charge of driving while intoxicated on 21 December 2008. There is no evidence that SGT JW engaged in any such behavior. Thus, there is sufficient evidence of disparity between the overall conduct of these two individuals to warrant differing decisions at the initial disposition stage. Upon reviewing the entire record, we find no cause to believe that the appellant was subjected to unlawful or discriminatory prosecution.

The appellant's guilty plea was provident and the approved sentence was well below the maximum permissible, as the appellant was sentenced to 30 days of confinement in the face of a possible 12 months. Having reviewed the entire record, the character of the offender, and the nature and seriousness of the offenses, we find that the sentence was not inappropriately severe.

Conclusion

The approved 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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court