

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman JEFFREY E. KERNS
United States Air Force**

ACM S32088

19 September 2013

Sentence adjudged 20 July 2012 by SPCM convened at Dover Air Force Base, Delaware. Military Judge: Matthew D. van Dalen (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 60 days, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Jane E. Boomer.

Appellate Counsel for the United States: Colonel Don M. Christensen; Captain Thomas J. Alford; and Gerald R. Bruce, Esquire.

Before

**ORR, HARNEY, and MITCHELL
Appellate Military Judges**

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, consistent with his pleas, of one specification of disrespect towards a superior commissioned officer; one specification of assault consummated by a battery; and one specification of breaking restriction, in violation of Articles 89, 128, and 134, UCMJ, 10 U.S.C. §§ 889, 928, 934. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 60 days, and reduction to E-1. The convening authority approved the sentence as adjudged.

On appeal, the appellant argues his sentence is inappropriately severe. We disagree and affirm the findings and sentence.

Background

The appellant was assigned to the 436th Dental Squadron at Dover Air Force Base (AFB), Delaware. Around 10 May 2012, the appellant was talking to a co-worker who asked why he looked so stressed. In response, the appellant banged together two biohazard containers he was carrying and said, in a voice loud enough to be heard by others, “This is what I could do to [Lieutenant Colonel (Lt Col) EC]” Lt Col EC was the appellant’s commander. He was not present when the appellant made this statement; however, another officer in the vicinity heard the appellant utter these words.

Previously, on 2 May 2012, Lt Col EC had imposed nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815, on the appellant that consisted, in part, of restriction to base for 30 days. Despite the restriction order, the appellant arranged for a friend, CP, to pick him up at the Dover AFB Visitor’s Center parking lot on or about 12 May 2012 so they could go off base. The appellant, CP, and another friend went to a local bar, where the appellant had about five drinks and got into an altercation with an unidentified male.

Very early the next morning, while driving back to the visitor’s center, the appellant got angry at CP for interfering in the altercation. Upon arriving at the visitor’s center, CP asked the appellant to exit the car. The appellant complied, but continued to yell at CP and demanded that CP also get out of the car. As CP exited the car, the appellant grabbed him by the shirt. The appellant pushed CP on the chest with both hands and CP pushed back. Security Forces personnel were called to intervene.

Sentence Severity

The appellant argues that his sentence consisting of a bad-conduct discharge is inappropriately severe. To support his claim, the appellant cites how his personality changed after he was in two car accidents. First, in March 2010, the appellant was in a car accident in which he sustained serious head and body trauma. Later, on 7 February 2011, the appellant was in a second car accident from which he sustained spinal injuries. The appellant asserts that he suffered physical and emotional trauma from the accidents and claims that his unit did not help him, causing him to self-medicate. The appellant argues that his misconduct stemmed from his self-medication. The appellant continues to aver that this mitigating and extenuating evidence, combined with the minor nature of his offenses, demonstrates a punitive discharge is inappropriately severe.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We “may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact

and determine[], on the basis of the entire record, should be approved.” Article 66(c), UCMJ, 10 U.S.C. § 866(c). We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant’s record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff’d*, 65 M.J. 35 (C.A.A.F. 2007). 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. Healy*, 26 M.J. 395, 396 (C.M.A. 1988).

We have given individualized consideration to this particular appellant, the nature and seriousness of the offenses, the appellant’s record of service, and all other matters contained in the record of trial. We note the appellant has a considerable disciplinary history consisting of letters of admonishment, counseling, and reprimand; two nonjudicial punishment actions under Article 15, UCMJ; and a prior special court-martial. His first court-martial, which ended approximately three months before his second court-martial began, resulted in a sentence without a punitive discharge. Moreover, in this case, the appellant entered into a pretrial agreement (PTA), which stated that if a bad-conduct discharge was adjudged, the convening authority would approve no more than 60 days confinement. The military judge’s sentence was completely in-line with the negotiated PTA: a bad-conduct discharge and 60 days of confinement. Under these circumstances, we find that the approved sentence was clearly within the discretion of the convening authority, was appropriate in this case, and 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. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c).

Accordingly, the approved findings and sentence are

AFFIRMED.



FOR THE COURT

STEVEN LUCAS
Clerk of the Court