UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman RYAN D. HUMPHRIES
United States Air Force

ACM 37491 (rem)

03 August 2011

Sentence adjudged 1 May 2009 by GCM convened at Dyess Air Force Base, Texas. Military Judge: Grant L. Kratz.

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Shannon A. Bennett; Major Michael S. Kerr; and Captain Nicholas W. McCue.

Appellate Counsel for the United States: Colonel Don M. Christensen; Colonel Douglas P. Cordova; Lieutenant Colonel Jeremy S. Weber; Major Coretta E. Gray; and Gerald R. Bruce, Esquire.

Before

BRAND, ORR, and WEISS
Appellate Military Judges

UPON FURTHER REVIEW

ORR, Senior Judge:

Contrary to the appellant's pleas, a panel of officer and enlisted members sitting as a general court-martial found the appellant guilty of one specification of adultery and one specification of sodomy on divers occasions, in violation of Articles 134 and 125, UCMJ, 10 U.S.C. §§ 934, 925. The adjudged and approved sentence consists of a bad-conduct discharge and reduction to the grade of E-1.

This case is before this Court for further review. In an unpublished decision, issued 24 May 2010, this Court considered three errors asserted by the appellant. Under the unique circumstances of the case, this Court declined to affirm the findings, found no prejudicial error but found that portion of the sentence that provides for an unsuspended bad-conduct discharge inappropriately severe. *United States v. Humphries*, ACM 37491 (A.F. Ct. Crim. App. May 24, 2010) (unpub. op.). The Judge Advocate General of the Air Force certified the case to our superior court asserting that this Court erred by finding that the appellant's sentence was inappropriately severe. By decision issued 10 February 2011, the Court of Appeals for the Armed Forces (CAAF) found that we acted on the sentence without acting on the findings. *United States v. Humphries*, 69 M.J. 491 (C.A.A.F. 2011). As a result, our superior court returned the case to The Judge Advocate General of the Air Force for remand to this Court "for further action consistent with [their] order." Finding that the appellant's conviction was correct in law and fact, we affirm the findings and return the record of trial to the Judge Advocate General for further action by the convening authority.

Background

In his original assignment of errors, the appellant asserted that (1) the military judge erred by excluding relevant evidence of the appellant's prior sexual relationship with AEH, one of the alleged victims; (2) the portion of his sentence which provides for a bad-conduct discharge is inappropriately severe; and (3) this Court should use its Article 66(c), UCMJ, 10 U.S.C. § 866(c), powers to set aside his findings of guilty because of the unique circumstances of this case. We disagreed. Specifically, we determined that the appellant's convictions are legally and factually sufficient and his convictions do not unreasonably exaggerate his criminality. However, after reviewing the record of trial, the submission of briefs from both sides, we set aside the convening authority's action because we believed that an unsuspended bad-conduct discharge was inappropriately severe. We provided the following as our rationale for our decision to set aside the convening authority's action.

Rationale for the Original decision

The charged offenses arose out of a phone call from the appellant, a married man, on 2 February 2005, to AEH, a family friend and the wife of a deployed Airman. The appellant asked her whether he could visit her at her on-base home. AEH welcomed the appellant into her home believing that the appellant came over to watch a movie. After AEH's children had gone to bed, the appellant and AEH engaged in oral and anal sodomy and sexual intercourse. Two days later, AEH met with agents from the Air Force Office of Special Investigations (AFOSI) and reported that the appellant had sexually assaulted her. The appellant was subsequently charged with, inter alia, raping and forcibly sodomizing AEH. The panel members found the appellant guilty only of consensual sexual offenses. After taking into account all the facts and circumstances surrounding the

offenses, we concluded that the portion of the sentence that provides for an unsuspended bad-conduct discharge was inappropriately severe.

Sentence Reconsideration

In finding the appellant's unsuspended punitive discharge inappropriately severe, we were left with several options. We could have disapproved or modified the punitive discharge. Article 66(c), UCMJ; Rule for Courts-Martial 1203, Discussion; *see also United States v. Simmons*, 6 C.M.R. 105, 106 (C.M.A. 1952). We also could have returned the appellant's case to The Judge Advocate General with a request that he use his Article 74, UCMJ, 10 U.S.C. § 874, authority to remit or suspend the appellant's punitive discharge. *See United States v. Silvernail*, 1 M.J. 945, 946 (N.C.M.R. 1976). Additionally, we could have set aside the convening authority's action and returned the record of trial to The Judge Advocate General for remand to the convening authority, who may upon further consideration approve an adjudged sentence no greater than a suspended bad-conduct discharge and a reduction to the grade of E-1. *See United States v. Clark*, 16 M.J. 239, 243 (C.M.A.1983) (Everett, C.J., concurring). Because the military justice system is ultimately a commander's program, we believe it is most appropriate to set aside the convening authority's action and return the record of trial to The Judge Advocate General for remand to the convening authority for reconsideration of the sentence "with full knowledge as to the upper limit on appropriateness." *Id.* (Everett, C.J., concurring).

In doing so, we once again emphasize that we find the appellant's crimes unacceptable and this decision should not be misconstrued as an act of clemency. Additionally, this decision should not be misinterpreted as a belief that a punitive discharge is no longer an authorized punishment for adultery.[1] A military judge's failure to instruct panel members that a punitive discharge is authorized for adultery is error. But, given the unique facts and circumstances of this case and the panel's determination that this appellant's crimes were consensual in nature, an unsuspended bad-conduct discharge is inappropriately severe.

Other Issues

Following the remand of this case, we granted the parties' request to file supplemental briefs. On 17 June 2011, the Government asked this Court to "correct the prior panel's erroneous decision" by affirming the approved findings and sentence. The Government provided three reasons for their request. First, they contend that the record

[1] In one case, a military judge ruled that a bad-conduct discharge was not an authorized punishment for adultery, citing *United States v. Humphries*, ACM 37491 (A.F. Ct. Crim. App. May 24, 2010) (unpub. op), as authority. We find this is error. The maximum punishment for adultery is a dishonorable discharge, forfeiture of all pay and allowances, confinement for one year, and reduction to E-1. *See* Article 134, UCMJ, 10 U.S.C. § 934.

demonstrates that an unsuspended discharge is not inappropriately severe. Second, they assert that the original decision in this case gives the impression a punitive discharge is no longer an authorized punishment for adultery. Third, the Government believes that this Court has inappropriately exercised appellate clemency. In response, on 24 June 2011, the appellant asked this Court to deny the Government's invitation to reconsider our 24 May 2010 decision.

The remand from CAAF stated that we "acted on the sentence without acting on the findings" and directed this Court to take "further action consistent with [their] order." *Humphries*, 69 M.J. at 492. On remand from CAAF, this Court "can only take action that conforms to the limitations and conditions prescribed by the remand." *United States v. Riley*, 55 M.J. 185, 188 (C.A.A.F. 2001). Because, the Government's request for reconsideration concerns the appellant's sentence rather than the findings, granting their request would exceed the scope of the remand. *See Riley*, 55 M.J. at 185. Accordingly, we deny the Government's request that we affirm the sentence as adjudged.

Conclusion

The approved findings 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). We affirm the findings and set aside the convening authority's action. The record of trial is returned to The Judge Advocate General for remand to the convening authority for reconsideration of the sentence "with full knowledge as to the upper limit on appropriateness." *Clark*, 16 M.J. at 243 (Everett, C.J., concurring). Thereafter, Article 66(c), UCMJ, shall apply.

OFFICIAL

STEVEN LUCAS
Clerk of the Court