UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Cadet DONCOSTA E. SEAWELL
United States Air Force

ACM 35531

17 November 2005

Sentence adjudged 16 October 2002 by GCM convened at Los Angeles Air Force Base, California. Military Judge: Patrick M. Rosenow and James L. Flanary (sitting alone).

Approved sentence: Dismissal, confinement for 18 months, and forfeiture of all pay and allowances.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Colonel Carlos L. McDade, Major Terry L. McElyea, Major James M. Winner, and Frank J. Spinner, Esq.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major John C. Johnson.

Before

STONE, MATHEWS, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MATHEWS, Judge:

The appellant was convicted, in accordance with his pleas, of forcible sodomy, in violation of Article 125, UCMJ, 10 U.S.C. § 925. He was sentenced by a military judge sitting as a general court-martial to dismissal from the service, confinement for 2 years, and forfeiture of all pay and allowances. Pursuant to a pretrial plea agreement, the convening authority reduced the appellant's term of confinement to 18 months, but otherwise approved the sentence as adjudged.

The facts relevant to the disposition of this appeal are as follows: On 28 December 2001, while visiting Los Angeles, California, the appellant went to the home of EH, a former high-school classmate. EH is confined to a wheelchair, suffering from a severe form of cerebral palsy. When EH opened the door, the appellant went into her home, refusing her entreaties to leave. He then proceeded to pull her from her wheelchair and, ignoring her repeated pleas to stop, pinned her down and repeatedly anally sodomized her. The force of his assault was sufficient to cause persistent, visible bleeding, and left EH in pain and in shock. When he finished, the appellant patted EH on the head, saying "Sorry it had to be like this." He put her back in her wheelchair, with her pants still pulled down around her ankles, and left.

On appeal, he urges us to find that the convening authority in his case, the Superintendent of the United States Air Force Academy (USAFA), was "disqualified . . . because he was under intense scrutiny" regarding sexual assault allegations involving USAFA cadets. We review claims concerning disqualification of the convening authority de novo. *United States v. Taylor,* 60 M.J. 190, 194 (C.A.A.F. 2004). The appellant bears the burden of making a prima facie case for disqualification. *Id.* (citing *United States v. Wansley,* 46 M.J. 335, 337 (C.A.A.F. 1997)).

We conclude that the appellant has failed to meet his burden. The documents provided by the appellant's counsel show that the convening authority "was scheduled to retire" and that his pending retirement was a matter of public record prior to taking action on the appellant's case. Thus, we find that – contrary to the appellant's claims – the convening authority did not permit concerns about his career to influence his action. Article 66(c), UCMJ, 10 U.S.C. § 866(c). Further, we find that the appellant waived any error related to the "immense," "national" scrutiny of the Academy by failing to raise it prior to the convening authority's action. *See United States v. Jeter,* 35 M.J. 442, 447 (C.M.A. 1992).

The appellant also points to an e-mail sent by the convening authority, in his capacity as the USAFA Superintendent, suggesting that the Air Force and the USAFA have "zero tolerance for sexual assault." As noted by our superior appellate court, the phrase "zero tolerance" may be interpreted in many ways, ranging from benign to prejudicial. *United States v. Simpson,* 58 M.J. 368, 375 (C.A.A.F. 2003). A reminder that the service will not overlook some forms of misconduct is in itself innocuous. *Id.* We conclude that the convening authority's e-mail was such a reminder and not an endorsement of any particular result.

Viewed in context with its caution that news reports "typically don't reflect all the factors that must be considered in judging whether these cases have been handled fairly," as well as references to the need for justice, "appropriate" discipline, and the importance of fairness to both parties, the e-mail falls clearly on the benign side of the spectrum.

Moreover, we note that the convening authority the appellant now complains was biased, is the same one who signed the appellant's pretrial plea agreement. It is difficult to envision how the appellant – who faced the possibility of confinement for life, without parole – could realistically have expected a more lenient deal.

We have considered the appellant's remaining assignments of error and resolve them adversely. *See United States v. Pena,* ___ M.J. ___, ACM 35397 (A.F. Ct. Crim. App. 15 September 2005). The 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; *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court