UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
M.D. MODZELEWSKI, E.C. PRICE, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ANDRE C. KELLMAN
MASTER-AT-ARMS SECOND CLASS (E-5), U.S. NAVY

NMCCA 201300138
SPECIAL COURT-MARTIAL

Sentence Adjudged: 12 February 2013.
Military Judge: CDR Lewis T. Booker, Jr., JAGC, USN.
Convening Authority: Commander, Electronic Attack Wing, U.S. Pacific Fleet, Naval Air Station, Whidbey Island, Oak Harbor, WA.
Staff Judge Advocate's Recommendation: LT A.T. Jennings, JAGC, USN.
For Appellant: CAPT Diane L. Karr, JAGC, USN.
For Appellee: CDR Gregory R. Dimler, JAGC, USN; LT Philip S. Reutlinger, JAGC, USN.

29 August 2013

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of one specification each of making a false official statement, wrongfully discharging a firearm, reckless conduct, and unlawful entry into a dwelling in violation of Articles 107 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 934. The

military judge sentenced the appellant to 10 months confinement, a $500.00 fine, and a bad-conduct discharge, and then recommended that the convening authority (CA) consider suspending or disapproving the bad-conduct discharge.[1] Pursuant to a pretrial agreement, the convening authority (CA) approved the sentence as adjudged, but suspended confinement in excess of 6 months.

The appellant avers that a bad-conduct discharge is unjustifiably severe due to his mental health state following his sister's suicide four years prior to his misconduct[2] that a punitive discharge is unjustifiably severe in light of his prior exceptional service and the military judge's clemency recommendation.[3] We disagree, and affirm the findings and sentence as approved by the CA.

Factual Background

In July 2012, the appellant, a master-at-arms, was moving a damaged target on a gun range, which resulted in minor injury to his hip. A rumor spread among his peers that he had been grazed by a bullet on the range. In keeping with this rumor and as a means of preserving his ego, when asked about the injury, the appellant reported to his command that he had suffered an injury as a result of a stray bullet, and then made a false official

[1] After announcing sentence, the military judge made the following statement:

> I invite the [CA's] attention to everything that [the appellant] has achieved in his career, to the statement that he made during the sentencing proceedings, and if in the [CA's] discretion he believes suspending or disapproving a bad conduct discharge is appropriate, with a substitution of an administrative discharge, I leave that to the discretion of the [CA].
>
> These are serious offenses. They were offenses that involve misuse of firearms by a rated master-at-arms and for that reason, the bad conduct discharge is appropriate. But I do recognize that [the appellant] has had a rough last four years or so. That he is a graduate of one of the finest public high schools in the nation. That he is an articulate Sailor and the [CA] may determine that there is future potential, good use to be made of [the appellant] and his talents.

Record at 130-31.

[2] The only evidence of the death of the appellant's sister and of the appellant's resulting "mental health state" is found in his unsworn statement at trial.

[3] Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

report to the same effect to the shooting range authority by filing a range safety incident report. Record at 26, 31. This report resulted in the rifle range being closed for 9 days and the cancellation of several scheduled shoots. *Id.* at 107. This incident formed the basis for the sole specification under Charge I for false official statement.

The appellant's disorderly behavior, prosecuted under Article 134, occurred in November 2012 and involved interactions with a female Sailor, Logistics Specialist Second Class (LS2) HH, stationed with the appellant at Naval Air Station Whidbey Island.[4] The appellant and LS2 HH were returning from a personal trip to Utah when they began to argue regarding some text messages that LS2 HH had sent to her friends complaining about the appellant's reckless driving and sour attitude. The appellant became very upset and retrieved his personal weapon, a .45 caliber pistol, from his holster and held it to his chin, threatening to shoot himself if LS2 HH did not stop talking, all the while driving at speeds in excess of 80 miles per hour. After LS2 HH attempted to call their command, the appellant threw the gun at LS2 HH's feet.

Two weeks later, the appellant went to LS2 HH's home, located in Navy base housing, uninvited. Finding that she was not home and the door was unlocked, the appellant entered the home without authority. While there, he found a flower arrangement that he had previously given to LS2 HH and subsequently told her to discard, became angry, and threw the arrangement in the trashcan before leaving. Upon finding the flowers in the trash, LS2 HH contacted the appellant and asked him not to contact her again. The appellant did not comply with LS2 HH's request and continued to call and text message her.

After receiving no response from LS2 HH, the appellant went to her home, emotional and begging to be let in. When LS2 HH refused, the appellant returned to his car, retrieved his personal firearm, and shot it into the ground with the intention of making her believe that he had shot himself. LS2 HH's home was located in close proximity to a playground and elementary school, as well as other base housing units. Record at 98. Due to LS2 HH's fear of the appellant, she moved out of base housing and signed a lease for a new apartment. However, when she

[4] According to LS2 HH's testimony, she and the appellant knew each other at a previous command in Japan and were friends. When LS2 HH was preparing to transfer to Whidbey Island, the appellant requested to be stationed close to LS2 HH. Record at 88.

learned that the appellant lived close to her new apartment, she terminated this lease and incurred a $500.00 penalty fee. *Id.* at 104. LS2 HH also began counseling as a result of the appellant's conduct. *Id.* at 100.

Discussion

This court reviews the appropriateness of the sentence *de novo*. *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005). Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). We engage in a review that gives "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

After review of the entire record, we find that the sentence is appropriate for this offender and his offenses. *Baier*, 60 M.J. at 384-85; *Healy*, 26 M.J. at 395-96; *Snelling,* 14 M.J. at 268. In addition to considering the nature and seriousness of the specific offenses committed by the appellant, we have carefully considered the individual characteristics of the offender. This includes the appellant's performance and awards during the course of his military career. Considering the entire record, we conclude that justice is done and the appellant gets the punishment he deserves by affirming the sentence as approved by the CA. Granting sentence relief at this point would be to engage in clemency, a prerogative reserved for the CA, and we decline to do so. *Healy*, 26 M.J. at 395-96.

Conclusion

The findings and the sentence as approved by the convening authority are affirmed.

For the Court

R.H. TROIDL
Clerk of Court