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

Before
J.R. PERLAK, R.Q. WARD, J.R. MCFARLANE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

BRANDON L. KRASTA
AVIATION MACHINIST'S MATE AIRMAN (E-3), U.S. NAVY

NMCCA 201300097
SPECIAL COURT-MARTIAL

Sentence Adjudged: 21 November 2012.
Military Judge: CAPT Kevin O'Neil, JAGC, USN.
Convening Authority: Commanding Officer, Strike Fighter Squadron NINE FOUR, Naval Air Station, Lemoore, CA.
Staff Judge Advocate's Recommendation: LT D.A. Christenson, JAGC, USN.
For Appellant: CAPT Ross Leuning, JAGC, USN.
For Appellee: CDR James E. Carsten, JAGC, USN; Capt Samuel C. Moore, USMC.

8 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 two specifications of assault consummated by battery in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928. The military judge sentenced the appellant to reduction to pay grade E-1, 185 days of confinement, and a bad-conduct discharge. The convening authority disapproved confinement in excess of 106

days as an act of clemency, and approved the remaining sentence as adjudged.[1]

The appellant avers that the punitive discharge awarded and approved was unjustifiably severe.[2] We disagree.

It is well-settled that "a court-martial is free to impose any sentence it considers fair and just." *United States v. Turner,* 34 C.M.R. 215, 217 (C.M.A. 1964). We review the appropriateness of the sentence *de novo*. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). 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)).

Although the appellant pled guilty to assault consummated by battery, the record of trial reveals that his offensive touching of the victim, Ms. B, was sexual in nature. While she lay sleeping on a couch, the appellant placed his hand on Ms. B's breast and later placed her hand onto his groin. Ms. B awoke to the unwelcome and unpleasant experience of feeling the appellant masturbating with her hand on his penis. Ms. B testified in sentencing that when she realized what he was doing, she "got really freaked out . . . [and] really scared . . . [and] just didn't know what to do." Record at 60. Both these effects and the nature of the crime make the sentence, including the bad-conduct discharge, appropriate as adjudged. To grant relief at this point would be engaging in clemency, a prerogative reserved for the convening authority, and we decline to do so. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). We are convinced that justice was done and that the appellant received the punishment he deserved. *Id*. at 395.

Conclusion

We conclude that the findings and the sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a)

[1] To the extent that the convening authority's action purports to direct that the punitive discharge will be executed after final judgment it is a legal nullity. *See United States v. Tarniewicz*, 70 M.J. 543 (N.M.Ct.Crim.App. 2011).

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

and 66(c), UCMJ. The findings and the sentence as approved by the convening authority are affirmed.

For the Court

R.H. TROIDL
Clerk of Court

Chief Judge PERLAK participated in the decision of this case prior to detaching from the court.