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

Before
E.E. GEISER, R.G. KELLY, L.T. BOOKER
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JOHN H. MAZE
CHIEF ELECTRONICS TECHNICIAN (E-7), U.S. NAVY

NMCCA 200900027
GENERAL COURT-MARTIAL

Sentence Adjudged: 19 September 2008.
Military Judge: CAPT Dennis G. Bengtson, JAGC, USN.
Convening Authority: Commander, U.S. Naval Forces, Japan, Yokosuka, Japan.
Staff Judge Advocate's Recommendation: CDR Glenn R. Hancock, JAGC, USN.
For Appellant: Maj Christian J. Broadston, USMC.
For Appellee: LCDR Christopher C. Burris, JAGC, USN; Maj Elizabeth A. Harvey, USMC.

28 May 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of one attempted act of sodomy with a child under 12 and of sodomy on divers occasions with a child under the age of 12. The convening authority (CA) approved the sentence of confinement for 25 years, six months; reduction to pay grade E-1; and a dishonorable discharge from the Naval Service.

The appellant personally asserts before us, *see United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), three errors: that the military judge erred in admitting evidence of

rehabilitative potential; that the sentence is inappropriately severe; and that the trial counsel improperly argued that the appellant had groomed and trained his victim to perform certain sexual acts. After carefully considering the parties' briefs and the record of trial, we are convinced that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), Uniform Code of Military Justice, 10 U.S.C. §§ 859(a) 866(c). Accordingly, we affirm the findings and the approved sentence.

The appellant had two children, a daughter aged 7 and a son aged 2, and lived with them and his wife in Navy housing in Japan. During his noon meal break, the appellant would frequently return to his quarters and view adult pornography. On several occasions over the course of two months, his daughter happened upon him as he masturbated, and he persuaded her to commit fellatio upon him. During his plea colloquy, the appellant admitted to at least eight such instances.

During its sentencing case, the Government offered the testimony of a psychologist, CDR R, with particular experience in treating child victims of sexual abuse. The psychologist spent the large majority (upwards of 80%) of his time on the stand discussing the effects on victims of the sort of abuse to which the daughter had been subjected. He also, over defense objection as to lack of foundation, offered a general opinion on the appellant's potential for rehabilitation, basing his opinion on his review of the appellant's videotaped inculpatory statements (played in open court and attached, in transcription, as an Appellate Exhibit) and discussions with a defense witness, a forensic psychologist. The Government also offered the stipulation of fact supporting the pleas and the transcribed interviews in its sentencing materials.

In its sentencing case, the defense offered the testimony of a forensic psychologist who had had several sessions with the appellant before testifying. This psychologist, Dr. K, offered tailored opinions about the appellant's amenability to treatment. She also discussed general rates of recidivism in incest cases and the efficacy of various treatment regimes. Her cross-examination provided the military judge with additional information about the appellant's approach to his daughter and his gratification at her expense.

A military judge has wide discretion in admitting evidence during the sentencing case, and we will reverse a ruling admitting evidence over objection only for an abuse of discretion. *Cf. United States v. Prevatte*, 40 M.J. 396, 398 (C.M.A. 1994). This standard is even more pronounced in a judge-alone trial, as a military judge is presumed to know and to apply the law and to disregard any arguably improper matter offered. *Id*.

Having reviewed the testimony of both CDR R and Dr. K, we are satisfied that the military judge did not abuse his discretion in receiving any of their evidence. We note that one of the principles of sentencing is rehabilitation of the offender, and the testimony of both witnesses informed the sentencing authority, the military judge, of the general (from CDR R) and specific (Dr. K) challenges of such efforts.

As for the appellant's second assignment of error, we note that he was aware that the maximum punishment he faced was life without the possibility of parole. Record at 23. A court-martial is free to impose any sentence up to the maximum permissible sentence. *See, e.g., United States v. Turner*, 34 C.M.R. 215, 217 (C.M.A. 1964). Our duty under Article 66 is to ensure that the sentence is correct in law and fact and to determine whether it should be approved. In this regard, we are cautioned against exercising clemency, the sole prerogative of the CA. *See United States v. Dedert*, 54 M.J. 904, 909 (N.M.Ct. Crim.App. 2001).

The appellant committed unspeakable acts against his young daughter, and only stopped when his daughter refused to engage in further acts of sodomy. It is not unreasonable to infer that he would have concealed these offenses had his daughter not reported them. He admitted to approximately eight instances of fellatio during a charged two-month period. He admitted during a forensic interview that he praised his daughter when she swallowed his ejaculate. His wife and children anticipate a lifetime of hardship and counseling as a result of his offenses. The appellant did have a good record during his sixteen years of active duty, and he did profess amenability to treatment, but we are satisfied that the sentence imposed and approved is appropriate for this offender and his offenses.

The appellant's third assignment of error is without merit. A trial counsel is free to argue reasonable inferences from evidence adduced at trial, and in fact Dr. K agreed that the appellant's interactions with his daughter over time could be characterized as grooming. Record at 157. There was no error, plain or otherwise, in this respect.

Having reviewed the evidence in aggravation and the evidence in extenuation and mitigation, in the context of the offenses of which the appellant was convicted, we are independently satisfied that the sentence announced by the military judge and approved by the CA is appropriate for this offender and for his offenses. *See United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005).

We see no basis to alter the sentence under Article 66(c). The findings and approved sentence are therefore affirmed.

For the Court

R.H. TROIDL
Clerk of Court