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

Before
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ANTHONY P. BALLAN
MACHINIST'S MATE SECOND CLASS (E-5), U.S. NAVY

NMCCA 201000242
GENERAL COURT-MARTIAL

Sentence Adjudged: 17 December 2009.
Military Judge: Maj Glen Hines, USMC.
Convening Authority: Commander, Navy-Region, Mid-Atlantic, Norfolk, VA.
Staff Judge Advocate's Recommendation: CAPT M.A. O'Brien, JAGC, USN.
For Appellant: LT Ryan Santicola, JAGC, USN.
For Appellee: LCDR Sergio Sarkany, JAGC, USN.

27 January 2011

OPINION OF THE COURT

IN ACCORDANCE WITH RUE 18.2, NMCCA RULES OF PRACTICES AND PROCEDURE, 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 specification of indecent acts with a child, sodomy with a child under age 12, and eight specifications of indecent acts with another, in violation of Articles 120, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, and 934. The appellant was sentenced by members to confinement for 25 years, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority (CA) approved the sentence as

adjudged, and except for the punitive discharge, ordered it executed. Pursuant to a pretrial agreement, the CA suspended all confinement in excess of 20 years for the period of confinement served plus 12 months.

The appellant raises a single assignment of error, alleging that the military judge abused his discretion in accepting the appellant's guilty pleas to Specifications 6, 7 and 8 under Charge III, each individually alleging indecent liberties taken with his three minor children, in that the providence inquiry fails to establish greater interaction than mere presence. The appellant avers that the specifications be set aside and, based on a change in the sentencing calculus, the case be sent back for a rehearing on sentence.

The Government concedes the error but disputes the remedy, recommending we affirm general disorders under Article 134, conclude that there has not been a dramatic change in the sentencing landscape, and affirm the sentence.[1]

Having examined the record of trial, the appellant's brief, and the Government's answer, we conclude that the findings as approved herein and the sentence as reassessed are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant is a thirteen-year Sailor, rated as a Machinist's Mate but who had recently provided service to the Naval Legal Service Office, MIDLANT, working out of his rating in support of the Tax Assistance Center (TAC). Domestic issues surfaced within the civilian community, wherein his very young children exhibited age-inappropriate sexual behavior. The ensuing criminal investigation led to the referral of the instant charges to a general court-martial. All of the offenses at bar involve the appellant's three minor children. The Commonwealth of Virginia has terminated all of the appellant's parental rights regarding his children.

Improvident Pleas

As briefed by the parties, we likewise find, based on our review of the record, that the appellant's guilty pleas to Specifications 6, 7, and 8 of Charge III, alleging indecent liberties with his three minor children but pled to as indecent acts with another, fail to adequately establish the requisite affirmative interaction with another. *See generally United States v. Miller*, 67 M.J. 87 (C.A.A.F. 2008). The essence of the facts elicited from the appellant establish indiscreet, frequent masturbation, with his minor children being exposed to and

[1] Government's Answer of 20 Sep 2010 at 5.

observing his actions by inadvertence, rather than circumstances amounting to deliberate interaction. Record at 675-90.

We review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from a guilty plea *de novo*. In order to reject a guilty plea on appellate review, the record must show a substantial basis in law or fact for questioning the plea. *United States v. Inabinette*, 66 M.J. 320 (C.A.A.F. 2008). Applying the *de novo* standard, we find that the military judge did abuse his discretion in accepting the appellant's pleas to these three specifications, in that the elements and the holding in *Miller* require more than mere presence or inadvertent observation. As such, we are left to conclude there is in fact a substantial basis in law and fact to question the pleas. The findings of guilty to Specifications 6, 7, and 8 under Charge III are set aside.

In the absence of sufficient proof of the charged offenses, the Government invites us to consider the remaining evidence adduced and otherwise affirm the specifications, under a lesser included offense theory, as "simple disorders." Government's answer of 20 Sep 2010 at 5-7. We decline to do so. *See generally United States v. Morton*, 69 M.J. 12 (C.A.A.F. 2010), *United States v. Jones,* 68 M.J. 465 (C.A.A.F. 2010), and *Miller*, 67 M.J. at 87.

Attention to Detail

While not assigned as error, two additional matters require our attention. Under Charge III, Specifications 3, 4, and 5, the appellant was charged with taking indecent liberties with each of his three young children by engaging in various sexual acts while in their presence. In pleading guilty to the lesser included offense of indecent acts with another as to these three specifications, the indecent act "with a certain person," as required by the specification, was clearly the appellant's spouse, not the children themselves. However, in the context of the indecent liberties specifications, it is the children who are necessarily named as victims. While there is imprecise use of language by the military judge in framing some of the questions in providency as to with whom the indecent acts were performed, it is clear from the record as a whole that the there was no resultant prejudice to the appellant. Through the original specification, he was fully on notice of the conduct to be defended. In selecting and entering pleas to the lesser included offenses, the same three parties remained in issue: the appellant, his spouse and successively, each of his children. Per the facts as stipulated by the parties, Prosecution Exhibit 9, the appellant took indecent liberties with his children by performing sexual acts with his wife in front of them to arouse his lust and sexual desires. On the record as a whole, we find no confusion on the part of the appellant relative to these pleas, nor do we find he was prejudiced in any way by the military judge's misstatements made in attempting to recast the

indecent liberties language into indecent acts with another, as a lesser included offense.

Next, we note that the court martial order of 9 April 2010 contains errors. In a 1000-plus page record, where the specifications have been subjected to numerous pen-and-ink changes, taken along with the entry of guilty pleas involving exceptions, substitutions, and lesser-included offense theories of culpability, greater attention must be paid in accurately capturing the final conduct at issue and crediting the appellant with his guilty pleas. The CA in this case was poorly served by staff work clearly more reflective of word processor expediencies than attention to nuanced pleas entered on oft-modified charges. While no prejudice is alleged and we find that the appellant has suffered none, he is nonetheless entitled to records that correctly reflect the results of court-martial proceedings. *See United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). We order corrective action below.

Sentence Reassessment

Because of our action on the findings, we will reassess the sentence in accordance with the principles set forth in *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), *United States v. Cook*, 48 M.J. 434, 438, (C.A.A.F. 1998), and *United States v. Sales*, 22 M.J. 305, 307-09 (C.M.A. 1986). A "'dramatic change in the penalty landscape gravitates away from the ability to reassess'" a sentence. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006)(quoting *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003)).

We find that there has not been a dramatic change in the sentencing landscape and we are able to reassess. The appellant faced the prospect of confinement for life without the possibility of parole for the offenses unrelated to those giving rise to the assigned error. The record as a whole and facts adduced on the affirmed charges and specifications paint a compelling justification for the sentence awarded. Frequent, recurrent, indiscreet masturbation, occurring in front of children of very tender years, however incongruously in this unfortunate context, was not something to dramatically change a sentencing calculus already involving numerous other indecent acts and sodomy. However, by our action on the findings, we have indeed removed some fifteen additional years of potential confinement jeopardy from the overall sentencing calculus. Giving the appellant every benefit of the doubt relative to the remaining offenses, we are confident that the members would have imposed, and the CA would have approved, a sentence which included a dishonorable discharge, forfeiture of all pay and allowances, and at least twenty-four years of confinement.

Conclusion

The findings of guilty to Specifications 6, 7, and 8 under Charge III are set aside and those specifications are dismissed. The remaining findings are affirmed. The punitive discharge and forfeitures, as approved by the CA, are affirmed. Upon reassessment, that much of the sentence as extends to twenty-four years of confinement is affirmed. The supplemental court-martial order shall correctly state the pleas and the findings of the court-martial.

For the Court

R.H. TROIDL
Clerk of Court