UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
ALDYKIEWICZ, EWING,[1] and FLEMING
Appellate Military Judges

UNITED STATES, Appellee
v.
Private E2 JACOB G. GRIEGO
United States Army, Appellant

ARMY 20160487

Headquarters, Fort Stewart
John S.T. Irgens, Military Judge
Colonel Steven M. Ranieri, Staff Judge Advocate

For Appellant: Colonel Michael C. Friess, JA; Lieutenant Colonel Angela D. Swilley, JA; Major Jodie L. Grimm, JA; Captain Catherine E. Godfrey, JA (on brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Craig Schapira, JA (on brief).

17 December 2020

SUMMARY DISPOSITION ON FURTHER REVIEW

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

EWING, Judge:

Appellant's case is before this court for a third time, this time following remand from the Court of Appeals for the Armed Forces (CAAF). *United States v. Griego*, 80 M.J. 188 (C.A.A.F. 2020). In its decision, the CAAF affirmed the judgment as to the findings but reversed as to the sentence.[2] *Id.*

[1] Judge Ewing decided this case while on active duty.

[2] A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of eight specifications of sexual assault of a child; eleven specifications of sexual abuse of a child; two specifications of willfully disobeying an order of his

(continued . . .)

BACKGROUND

In light of *United States v. Gonzalez*, 79 M.J. 466 (C.A.A.F. 2020) and *United States v. Wall*, 79 M.J. 456 (C.A.A.F. 2020), the CAAF held this court "prejudicially erred when [we] acted on Appellant's sentence after setting aside the convening authority's action." *Griego,* 80 M.J. at 188. Simply stated, we erred in our initial

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superior commissioned officer; one specification of production of child pornography; two specifications of sexual exploitation of a child under 18 U.S.C. § 2251; one specification of wrongful possession of child pornography; two specifications of obstruction of justice; and one specification of enticing a child for indecent purposes in violation of Ga. Code § 16-6-5 assimilated by 18 U.S.C. § 13; in violation of Articles 120b(b), 120b(c), 90, and 134, Uniform Code of Military Justice, 10 U.S.C. 920b, 890, and 934, respectively. The military judge sentenced appellant to a dishonorable discharge, confinement for twenty-five years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The military judge granted appellant 132 days of confinement credit. The convening authority approved the adjudged sentence.

In our first decision in this case, we set aside the enticing specification (Specification 2 of Additional Charge II) as improperly assimilated. *United States v. Griego*, ARMY 20160487, 2018 CCA LEXIS 418, *6 (Army Ct. Crim. App. 17 Aug. 2018) (summ. disp.). We further noted that appellant's first trial defense counsel submitted no matters to the convening authority pursuant to Rules for Courts-Martial 1105 and 1106, and therefore remanded for a new convening authority action. *Id.* at *6. As a result of our setting aside the enticing specification, in our remand order, we ordered that the convening authority could affirm no sentence "in excess of twenty-four years and nine months." *Id.* at *7.

In a second convening authority action following remand, the convening authority disapproved three months of the adjudged sentence, granted appellant an additional seven days of confinement credit—because appellant previously received nonjudicial punishment for violating the same military protective order at issue in his court-martial—for a total of 139 days of confinement credit, and otherwise approved the findings and sentence.

In our second decision in this case, we affirmed the findings and sentence as approved by the convening authority's second action. *United States v. Griego*, ARMY 20160487, 2019 CCA LEXIS 376, *12 (Army Ct. Crim. App. 20 Sep. 2019) (mem. op.). The period of confinement approved by the convening authority in the second action—twenty-four years and nine months—was the same as the maximum we established in our first decision after setting aside the initial action.

17 August 2018 decision when we—after setting aside the findings as to Specification 2 of Additional Charge II and the convening authority's action—limited the convening authority's power on remand to approve no period of confinement in excess of twenty-four years and nine months. *Griego*, 2018 CCA LEXIS 418 at *7–8. Having once again reviewed the entire record of trial, and informed by our superior court's decisions in *Gonzalez* and *Wall*, we correct our previous error by reassessing appellant's sentence.[3]

LAW AND DISCUSSION

In *Wall*, the CAAF held that a Court of Criminal Appeals (CCA) lacks the authority to conduct a sentence reassessment, or impose a sentencing cap on the convening authority, after setting aside a sentence. 79 M.J. at 461–62. In *Gonzalez*, after reiterating the analysis from *Wall*, the CAAF held that the permissible actions for a CCA after setting aside a specification are: "(1) dismiss the [set aside specification] and reassess the sentence; or (2) remand to the convening authority who shall (a) order a rehearing on the [set aside specification] and the sentence or (b) dismiss the [set aside specification] and order a rehearing on the sentence alone." 79 M.J. at 470.

Here, we follow one of the permissible *Wall/Gonzalez* options by reassessing appellant's sentence based on the affirmed findings of guilty. Considering the "totality of the circumstances presented" and the "illustrative, but not dispositive" factors articulated in *United States v. Winckelmann*, 73 M.J. 11, 15–16 (C.A.A.F. 2013), we are confident in our ability to reassess appellant's sentence rather than remand appellant's case to the convening authority for a rehearing on the sentence.

Appellant committed serious sex offenses involving three different children over a lengthy period. The offenses to which appellant pleaded guilty and remains convicted subjected him to a possible period of confinement of 445 years. The longevity and nature of appellant's sexual molestation of AB was particularly aggravating, as AB explained the lasting impact appellant's actions had on her in powerful sentencing testimony. Considering only those convictions that remain and after applying the principles of *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986) and *Winckelmann*, we are confident that the military judge would have adjudged a sentence no less severe than a dishonorable discharge, confinement for twenty-four years and nine months, forfeiture of all pay and allowances, and reduction to the grade of E-1. Further, on the record before us, we are convinced that the aforementioned sentence is appropriate and should be approved.

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[3] Appellant's sordid sexual misconduct against children is well-documented in our prior decision. *See Griego*, 2019 CCA LEXIS 376 at *1–4.

CONCLUSION

Upon consideration of the entire record, the sentence is AFFIRMED. Appellant is credited with 139 days of confinement credit.

Senior Judge ALDYKIEWICZ and Judge FLEMING concur.

FOR THE COURT:

(b) (6)

JOHN P. TAITT
Chief Deputy Clerk of Court