UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
WALKER, EWING[1], and PARKER
Appellate Military Judges
a
UNITED STATES, Appellee
v.
Sergeant First Class BYUNGGU KIM
United States Army, Appellant

ARMY 20200689

Headquarters, U.S. Military Academy
Mary C. Vergona and Troy A. Smith, Military Judges
Colonel William D. Smoot, Staff Judge Advocate

For Appellant: Lieutenant Colonel Autumn R. Porter, JA; Colonel Philip M. Staten, JA; Mr. Jonathan F. Potter, Esquire; Major Bryan A. Osterhage, JA (on brief).

For Appellee: Lieutenant Colonel Jacqueline J. DeGaine, JA; Major Kalin P. Schlueter, JA; Major Justin L. Talley, JA; Captain Joshua A. Hartsell, JA (on brief).

20 October 2023

SUMMARY DISPOSITION ON REMAND

WALKER, Senior Judge:

Appellant's case is before this court a second time. Our superior court set aside appellant's conviction for indecent conduct and dismissed both the charge and specification pertaining to that offense, affirmed the remaining findings, and set aside the sentence. Our superior court remanded this case to this court to reassess appellant's sentence in light of the remaining offenses of which appellant stands convicted. Appellant raises one new assignment of error: whether the dismissal of Charge VI for the indecent conduct warrants sentence relief.

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[1] Judge EWING decided this case on active duty.

BACKGROUND

A. Factual History

On 16 November 2020, a military judge found appellant guilty, in accordance with his pleas, of four specifications of sexual abuse of a child, one specification of making an indecent recording, one specification of assault consummated by a battery, and one specification of indecent conduct, in violation of Articles 120b, 120c, 128, and 134, Uniform Code of Military Justice, respectively. 10 U.S.C. §§ 920b, 920c, 928, and 934. Appellant was sentenced to a dishonorable discharge, confinement for 130 months, and reduction to the grade of E-1. In accordance with the plea agreement, the convening authority approved only so much of the sentence that extended to a dishonorable discharge, confinement for six years, and reduction to the grade of E-1.

Appellant's offenses stem from his sexual abuse of his step-daughter over the course of a two-year period beginning in 2018 when she was twelve years old.

Appellant's sexual attraction to his step-daughter began when he traveled alone with her for purposes of getting her a medical examination. While staying at a hotel, appellant slept in the same bed as his step-daughter. Upon returning home, appellant realized he missed the physical intimacy of spending time alone with his step-daughter as he had during their trip together. Thus, appellant began to keep his step-daughter awake late in the evenings in order to be alone with her either in the living room or her bedroom. During these encounters, appellant waited until his step-daughter was tired and falling asleep and began providing massages that began on her back and shoulders. Appellant provided these massages in order to gratify his sexual desires. Over time, the massages progressed to her buttocks, inner thigh, and genitalia, both over the clothing and under the clothing. The abuse continued despite appellant's step-daughter reporting the abuse to her mother in late 2018 after an incident in which appellant touched his step-daughter's genitalia under her clothing as she fell asleep in her bed. Appellant leveraged his step-daughter's medical issues in refuting her allegation by accusing his step-daughter of hallucinating the incident because he knew she was taking a prescription medication of which hallucinations were a side effect.

Appellant's behavior escalated during a family trip in January 2019. While staying at his parent's house, appellant tracked when his step-daughter was going to shower. Prior to his step-daughter entering the bathroom, appellant would stage his cell phone in an inconspicuous location and record his step-daughter in the bathroom in order to capture videos of her without any clothing. He staged the phone in certain locations he selected in order to ensure he captured her exposed genitalia. Appellant recorded several videos of his step-daughter, which he edited down to the most sexually explicit parts, and kept them on his cellphone in a folder labeled

"trash." Over the course of the next few months, appellant conducted searches on a pornographic website using the terms "rape sleep" and "drugged sleep." In April 2019, appellant's step-daughter reported him to law enforcement when he attempted to sexually abuse her while her mother was recovering in the hospital from giving birth.

Appellant ultimately pleaded guilty to several offenses. During appellant's guilty plea, in addition to explaining how he sexually abused his step-daughter multiple times over the course of two years, he admitted that he committed the offense of indecent conduct by searching for videos on a pornographic website using the terms "rape sleep" and "drugged sleep." Appellant admitted that he used those search terms because he wanted to view pornographic videos "depicting simulated vulgar sex scenes involving sleep or sex with an individual that was pretending to be asleep." Specifically, appellant admitted that these videos reminded him of times that he sexually abused his step-daughter. Our superior court reversed appellant's conviction as to the offense of indecent conduct for conducting internet searches using the terms "rape sleep" and drugged sleep" but affirmed the remaining offenses to which he pleaded guilty.

B. Appellate History

Appellant filed his brief with this court on 9 August 2021, asserting his conviction for indecent conduct in violation of Article 134, Uniform Code of Military Justice [UCMJ] was in violation of the First Amendment to the United States Constitution and that the military judge erred in accepting appellant's guilty plea to that specification. On 26 May 2022, this court affirmed appellant's findings of guilty and the sentence. *See United States v. Kim*, ARMY 20200689, 2022 CCA LEXIS 321 (Army Ct. Crim. App. 26 May 2022) (summ. disp.). On 5 May 2023, our superior court reversed the decision of this court as to appellant's indecent conduct conviction and the sentence, affirmed the remaining findings, and remanded the case to this court for reassessment of the sentence. *United States v. Kim*, 83 M.J. 235, 240 (C.A.A.F. 2023).

LAW AND DISCUSSION

Our superior court has given Courts of Criminal Appeals "broad discretion" both in deciding whether we are able to reassess a sentence and "in arriving at the reassessed sentence" in a case. *United States v. Winckelmann*, 73 M.J. 11, 12 (C.A.A.F. 2013). We determine whether and how to reassess appellant's sentence by analyzing (1) whether there are dramatic changes to the penalty landscape; (2) the sentencing forum; (3) whether the remaining offenses capture the gravamen of appellant's criminal conduct; and (4) whether we have experience and familiarity with the remaining offenses to reliably determine what sentence would have been imposed at trial. *Id.* at 15-16. "[I]f the court can determine to its satisfaction that,

absent any error, the sentence adjudged would have been of at least a certain severity, then a sentence of that severity or less will be free of the prejudicial effects of error . . . ." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986).

Appellant remains convicted of four specifications of sexual abuse of a child, one specification of making an indecent recording, and one specification of assault consummated by a battery, all stemming from his pattern of sexually abusive behaviors towards his step-daughter beginning when she was only twelve years old. Assessing the first *Winckelmann* factor, the dismissal of appellant's indecent conduct conviction does not trigger a dramatic change to the penalty landscape in light of the offenses for which appellant remains convicted. Looking to the second factor, appellant's sentence to 130 months of confinement was adjudged by a military judge, which aids our reassessment of appellant's sentence.

The third *Winckelmann* factor addresses both whether the "nature of the remaining offenses capture[s] the gravamen of criminal conduct" and "whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses." *Winckelmann*, 73 M.J. at 16. Here, the dismissed charge addressed appellant's internet search for pornography that he stated reminded him of the occasions on which he sexually abused his step-daughter. Appellant remains convicted, however, of the four specifications of child sexual abuse stemming from the occasions on which he *actually* sexually abused his step-daughter, one specification of indecent recording of his step-daughter, and one specification of battery for kissing his step-daughter. The nature of the remaining offenses still captures the gravamen of appellant's criminal conduct and leaves admissible the aggravating circumstances in appellant's case—the sexual abuse, indecent recording, and battery of his step-daughter as well as his exploitation of the side effects of her medication to refute her early attempts at reporting his misconduct.

We have experience and familiarity with the remaining offenses such that we can reliably determine what sentence would have been imposed at trial in light of the dismissed charge and specification. We are confident the military judge would have imposed a sentence no less than a dishonorable discharge, confinement for six years, and reduction to the grade of E-1.

CONCLUSION

Upon consideration of the entire record, the sentence is AFFIRMED.

Judge EWING and Judge PARKER concur.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court