UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Major BRANDON L. BAILEY
United States Air Force

ACM 37746

19 March 2013

Sentence adjudged 14 July 2010 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: Terry A. O'Brien (sitting alone).

Approved sentence: Dismissal and confinement for 3 months.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; Major Ja Rai A. Williams; Captain Luke D. Wilson; and David P. Sheldon (civilian counsel).

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Lieutenant Colonel Nurit Anderson; Captain Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

A general court-martial composed of a military judge convicted the appellant, consistent with his pleas, of four specifications of wrongful use of a controlled substance, five specifications of wrongful possession of controlled substances, one specification of wrongful appropriation, and three specifications of theft, in violation of Articles 112a and 121, UCMJ, 10 U.S.C. § 912a, 921. The adjudged sentence consisted of a dismissal and 3 months of confinement. The convening authority approved the sentence as adjudged. On appeal, the appellant asserts that his sentence is inappropriately severe. We disagree and, for the reasons discussed below, we affirm the findings and sentence.

Background

In June 2004, the appellant was placed on active duty and has remained in that status continuously. In August 2008, the appellant deployed to Iraq to serve as a flight nurse on aeromedical evacuation flights. His duties primarily consisted of providing in-flight medical care. When tasked on such a mission, he was also entrusted with signing out an aeromedical evacuation box (Aero Med Evac Box) from the pharmacy. The Aero Med Evac Box contained narcotics, syringes, and other medical supplies for use in treating patients. Additionally, he was responsible for maintaining the box and then returning it to the pharmacy post-mission, with an accounting of any dispensations of the controlled substances it contained.

While in Iraq, the appellant roomed with Captain (Capt) R. On 19 and 20 October, Capt R observed the appellant behaving strangely, to include talking to persons who were not present. He also witnessed the appellant draw a controlled substance into a syringe and inject himself in the arm. A subsequent search of the appellant's locker and nightstand revealed an Aero Med Evac Box, multiple empty vials of various narcotics, syringes, and needles stashed in the appelant's locker and nightstand. A subsequent urinalysis tested positive for various controlled substances.

Pursuant to a pretrial agreement, the appellant pled guilty to the charges and specifications. During his *Care*[1] inquiry, the appellant admitted to wrongfully using Meperidine, Morphine, Oxycodone, and Lorazepam, between 20 September and 20 October 2008. He also admitted to wrongfully possessing some amount of Meperidine, Morphine Sulphate, Oxycodone/Acetaminophen, Diazepam, and Phenobarbital, all within the charged timeframes. He further admitted to wrongfully appropriating an "Aero Med Evac Box," between on or about 19 and 20 October 2008, as well as wrongfully stealing Promethazine and Meperidine, between 3 September 2008 and 20 October 2008. He admitted to committing each of these offenses while receiving special pay under 37 U.S.C. § 310.

Sentence Appropriateness

The appellant contends a sentence to dismissal is inappropriately severe in light of his medical conditions and exceptional service record. This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). In reviewing sentence appropriateness, we "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we] find[] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). *See also United States v. Healy,* 26 M.J. 394, 395 (C.M.A.1988) ("Sentence appropriateness involves the judicial function of assuring that

[1] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

justice is done and that the accused gets the punishment he deserves."). We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Rangel*, 64 M.J. 678, 686 (A.F. Ct. Crim. App. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate, but we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *Healy*, 26 M.J. at 395-96. Applying these standards to the present case, we do not find the dismissal to be an inappropriately severe punishment for the appellant's offenses.

An exemplary past military career is a mitigating factor to be considered in reviewing appropriateness of sentence. Article 66(c), UCMJ; *United States v. Shober*, 26 M.J. 501 (A.F.C.M.R. 1986). *See also United States v. Mack,* 9 M.J. 300, 317 (C.M.A.1980) (In sentencing, the "punishment should fit the offender and not merely the crime." (quoting *Williams v. New York,* 337 U.S. 241, 247 (1949))). However, military officers also hold special positions of honor and are held to a high standard of accountability. *United States v. Means,* 10 M.J. 162, 166 (C.M.A. 1981); *see also United States v. Tedder,* 24 M.J. 176, 182 (C.M.A. 1987) (A higher standard of conduct may be required of officers because of their special status); *United States v. Moultak,* 24 M.J. 316, 318 (C.M.A. 1987) (officers may be subjected to more stringent punishments for their violations of the UCMJ than might be appropriate for an enlisted member under the same circumstances.); *United States v. Harvey*, 67 M.J. 758, 762 (A.F. Ct. Crim. App. 2009) ("a 'higher code of termed honor' holds military officer to stricter accountability than their enlisted and civilian couterparts." (citing *Parker v. Levy*, 417 U.S. 733, 765 (1974))).

In the present case, the appellant's willful conduct failed to live up to the high standard of accountability expected of commissioned officers. Although the appellant's previous contributions during his career are excellent, he engaged in a course of conduct that included stealing drugs entrusted to him for the use of his comrades wounded in combat and causing himself to act in a bizarre and inappropriate manner. We also note that his pretrial agreement with the convening authority clearly contemplates a possible sentence to a dismissal.

We have given individualized consideration to this particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all other matters contained in the record of trial.[2] Considering the appellant and his record of service, his

[2] Regarding the appellant's claim that his misconduct was "fairly attributable" to injuries he suffered while deployed, we note that the appellant has not presented other evidence to support that claim and a sanity board concluded otherwise. To the extent he does suffer from such medical conditions, we have considered that as part of our review here.

misconduct and the other matters in the record of trial, we do not find his approved sentence, including the dismissal, to be inappropriately severe.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[3] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[3] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo,* 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).