UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ANDREW H. BAKER
United States Air Force

ACM S31928

06 December 2012

Sentence adjudged 11 March 2011 by SPCM convened at Travis Air Force Base, California. Military Judge: W. Shane Cohen.

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for the Appellant: Captain Shane A. McCammon.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Roberto Ramirez; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and CHERRY
Appellate Military Judges

PER CURIAM:

A special court-martial composed of officer members convicted the appellant, contrary to his pleas, of violating a lawful general order by using spice and JWH-018, in violation of Article 92, UCMJ, 10 U.S.C. § 892, and sentenced him to a bad-conduct discharge and reduction to E-1. The convening authority approved the sentence adjudged. The appellant raises four issues concerning: (1) the legal and factual sufficiency of the evidence to support the conviction, (2) the appropriateness of the sentence, (3) the legal sufficiency of the staff judge advocate's recommendation, and (4) the military judge's decision not to sua sponte declare a mistrial.[1]

[1] The last issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

We have examined the evidence admitted at trial and specifically considered the arguments advanced by the appellant concerning the sufficiency of the testimony to support the conviction. Although the appellant claims that "not a single witness . . . definitively" said that the appellant used spice or JWH-018, the record shows otherwise. Airman Basic EF testified that she knew "for certain" that the appellant used spice and that she saw him smoke JWH-018 with another Airman. Airman First Class MZ testified that he saw the appellant use both spice and JWH-018 on multiple occasions. We hold that the evidence is legally and factually sufficient to support the conviction. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

In consideration of the entire record, we find the sentence appropriate for multiple uses of two intoxicating substances in violation of a general order. We further find that the appellant's sentence is not highly disparate as compared to those of his fellow substance abusers. Assuming for the sake of argument that the sentences were highly disparate, we find "a rational basis for the disparity" based on the pleas and posture of the respective cases. *See United States v. Anderson*, 67 M.J. 703, 705-08 (A.F. Ct. Crim. App. 2009), *pet. denied*, 68 M.J. 231 (C.A.A.F. 2009).

After service of a properly prepared staff judge advocate recommendation to the convening authority, trial defense counsel submitted a response which alleged that the evidence was insufficient to support the findings of guilt and that the bad-conduct discharge was inappropriately severe, especially when compared to the sentences of the appellant's co-actors. The staff judge advocate prepared an addendum to the recommendation, which stated that the matters submitted by the defense had been reviewed and that no corrective action was required. We find that the recommendation and addendum comply with the requirements of Rule for Courts-Martial 1106(d)(4). Even assuming error, we find no prejudice. *See United States v. Welker*, 44 M.J. 85 (C.A.A.F. 1996) (Failure to respond to an allegation of legal error causes no prejudice where the appellate court concludes no error occurred at trial.).

The remaining assignment of error concerning mistrial is without merit. *See United States v. Rushatz*, 31 M.J. 450, 456 (C.M.A. 1990) (Mistrial is "a drastic remedy . . . granted only to prevent manifest injustice," and the trial judge's decision on mistrial will not be reversed "absent clear evidence of abuse of discretion.").

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[2] Article 66(c), UCMJ,

[2] We note that the overall delay of over 18 months between the time the case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of

10 U.S.C. § 866(c); *Reed*, 54 M.J. at 41. Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court

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the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to timely review and appeal, and (4) prejudice. *See United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. The post-trial record contains no evidence that the delay has had any negative impact on the appellant. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.