UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman KOREY A. BYARD
United States Air Force

ACM S31566

30 June 2009

Sentence adjudged 09 September 2008 by SPCM convened at Elmendorf Air Force Base, Alaska. Military Judge: Don M. Christensen (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Maria A. Fried, Major Shannon A. Bennett, and Captain Tiffany M. Wagner.

Appellate Counsel for the United States: Major Jeremy S. Weber, Captain Megan E. Middleton, and Gerald R. Bruce, Esquire.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

PER CURIAM:

In accordance with his pleas, the appellant was found guilty of one specification of violating a lawful general order on divers occasions, one specification of violating a lawful order, one specification of dereliction of duty, one specification of wrongfully using cocaine on divers occasions, one specification of wrongfully using ecstasy, and two specifications of wrongfully using marijuana, in violation of Articles 92 and 112a, UCMJ, 10 U.S.C. §§ 892, 912a. The approved sentence consists of a bad-conduct discharge, confinement for six months, and reduction to E-1.

The issue on appeal is whether the appellant's approved sentence is inappropriately severe considering his co-actor received less confinement in a closely related case.

Background

On 30 August 2007, the appellant was assigned to the 3rd Security Forces Squadron (SFS) at Elmendorf Air Force Base (AFB), Alaska (AK). He became acquainted with Airman (Amn) JE from his squadron and Airman First Class (A1C) KW from the 3rd Logistics Readiness Squadron at Elmendorf AFB.

Sometime between 12 and 16 November 2007, the appellant went to Anchorage, AK, with A1C KW and Amn JE. They drove in Amn JE's vehicle to an off-base residence and picked up a civilian. The appellant and A1C KW each purchased $40 worth of cocaine from the civilian, and they proceeded to the parking lot of a local restaurant. While in the parking lot, the appellant used cocaine with A1C KW. Afterwards, they drove to the parking lot of Fantasies on Fifth Avenue (Fantasies), a local strip club in Anchorage, AK. While in the parking lot of Fantasies, the appellant and A1C KW used cocaine for a second time that night.

Sometime later in the week of 12-16 November 2007, the appellant and A1C KW went to the off-base residence of a civilian named Matt who lived in Anchorage, AK. While at Matt's house, the appellant and A1C KW arranged to buy cocaine from Matt's friend. While waiting for the cocaine to be delivered, the appellant and A1C KW smoked a marijuana cigarette. When the cocaine arrived, the appellant and A1C KW each purchased $40 worth of cocaine and proceeded to use it.

After using the cocaine, the appellant purchased three ecstasy pills from Matt's friend and used one of the pills that same night. A1C KW did not purchase or use ecstasy on this occasion.

On 20 April 2007, Fantasies was placed off-limits by general order of the 3rd Wing Commander, Elmendorf AFB, AK. Between 30 August 2007 and 30 January 2007, the appellant violated the order by entering Fantasies with several other Airmen on more than ten separate occasions.

On 7 June 2007, the 3rd Wing Commander issued a written order prohibiting the possession and consumption of any alcoholic beverages in any of the dormitories on Elmendorf AFB. In the late evening of 16 December 2007 and into the early morning of 17 December 2007, the appellant possessed and drank alcohol in his dormitory room on Elmendorf AFB. On the same occasion, the appellant, who was of the legal drinking age, furnished alcohol to two other airmen, including A1C KW, who were both under the legal drinking age.

On or about 31 July 2008, shortly after A1C KW was released from confinement due to his court-martial conviction on 6 May 2008, the appellant used marijuana with A1C KW in the Fantasies parking lot.

Inappropriately Severe Sentence

The appellant asserts that his sentence is inappropriately severe when compared to A1C KW's sentence, which only included confinement for four months. We disagree.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). 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). 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. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A 1988). "Courts of Criminal Appeals are required to engage in sentence comparison only 'in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.'" *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). Sentence comparison is generally inappropriate, unless this Court finds that any cited cases are "closely related" to the appellant's case and the sentences are "highly disparate." *Lacy*, 50 M.J. at 288. "[A]n appellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.' If the appellant meets that burden . . . then the [g]overnment must show that there is a rational basis for the disparity." *Id.*

The maximum punishment in this case was the jurisdictional limit for a special court-martial, which includes a maximum of 12 months confinement and a bad-conduct discharge. The appellant's adjudged sentence was a bad-conduct discharge, confinement for 190 days,[1] and reduction to E-1.

Comparing the appellant's case to A1C KW, the appellant claims the two sentences are highly disparate. We disagree. A1C KW pled guilty to, and was convicted of: (1) violating a lawful general order by wrongfully going to Fantasies; (2) wrongfully consuming and possessing alcohol in a dormitory; (3) underage drinking; (4) driving on

[1] The approved period of confinement was six months.

base after receiving a lawful order not to; (5) wrongfully using cocaine; (6) wrongfully using marijuana on two separate occasions; and (7) attempting to wrongfully possess oxycodone on divers occasions. He was sentenced to a bad-conduct discharge, confinement for four months, and reduction to E-1.

Although the two cases are closely related, their sentences are not highly disparate. Considering the seriousness and number of offenses committed by the appellant and A1C KW, we find their sentences to be very consistent. A two-month and 10-day difference in the amount of confinement is minimal and cannot be considered highly disparate. Additionally, even if we were to find that the sentences are highly disparate, the government has provided a rational basis for the disparity. Unlike in A1C KW's case, the appellant was charged with and found guilty of wrongfully using cocaine on divers occasions; wrongfully using ecstasy, a third illegal substance; violating the order not to enter the premises of Fantasies on divers occasions; serving alcohol to minors; and wrongfully using marijuana with A1C KW after A1C KW had been released from confinement, which was also after the appellant had been served with the original charges in this case.[2] Accordingly, the appellant's conduct warranted a more severe punishment.

Having given individualized consideration to this particular appellant, the nature of the offenses, the appellant's record of service,[3] and all other matters in the record of trial, we hold that the approved sentence is not 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. Article 66(c), UCMJ; *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000).

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[2] The original charges in this case, including one charge that was subsequently withdrawn, were served on the appellant on 12 June 2008.

[3] We note that the appellant received nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815, for driving while intoxicated and two letters of reprimand for failure to go.

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court