UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant MELISSA A. CORDERO
United States Air Force

ACM 37828

18 January 2013

Sentence adjudged 24 November 2010 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: David S. Castro (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 13 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Michael S. Kerr and Captain Andrew J. Unsicker.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Lieutenant Colonel Nurit Anderson; Major Lauren N. DiDomenico; Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HECKER, Judge:

A general court-martial composed of a military judge sitting alone convicted the appellant, consistent with her pleas, of one specification of violating a lawful general order, two specifications of wrongful use of heroin and hashish, one specification of wrongfully distributing steroids, and one specification of importing hashish, in violation of Articles 92 and 112a, UCMJ, 10 U.S.C. §§ 892, 912a. The adjudged sentence consisted of a bad-conduct discharge, confinement for 13 months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged. On appeal,

the appellant asserts her sentence should be set aside because the military judge admitted evidence of uncharged misconduct. Finding no error that materially prejudices the appellant, we affirm.

Background

During two deployments to Bagram Air Base, Afghanistan, between 2007 and 2009, the appellant was involved with illegal drugs. She smoked hashish with several other Air Force members, on 5-10 occasions, while driving around Bagram in a Government vehicle. On one occasion, she smoked it while on a 90-minute drive to Kabul with several Government contractors. When she learned another Airman was going to purchase heroin, the appellant said she wanted to try it. After snorting it in a Government vehicle, she immediately lost all motor function and became incoherent. After the other two Airmen began to drive her to the base hospital, her condition improved and she insisted on returning to her dormitory room.

In addition to using illegal drugs, the appellant was involved in distributing and selling anabolic steroids to other Airmen on 5 occasions. She also mailed some hashish from Afghanistan to a civilian friend in California. Lastly, she sold alcohol to other military members on the base, in violation of the combatant commander's lawful general order regarding use of alcohol in Afghanistan.

Sentencing Evidence

We test a military judge's admission of sentencing evidence over defense objection for an abuse of discretion. *United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009). For the ruling to be an abuse of discretion, it must be "more than a mere difference in . . . opinion"; rather, it must be "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997) (internal quotation marks and citations omitted).

Rule for Courts-Martial (R.C.M.) 1001(b)(4) sets forth the general contours of permissible evidence of aggravation at sentencing: "The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." The Drafters' Analysis notes "this subsection does not authorize introduction in general of evidence of bad character or uncharged misconduct. The evidence must be of circumstances directly relating to or resulting from an offense of which the accused has been found guilty." Drafters' Analysis, *Manual for Courts-Martial, United States*, A21-72 (2008 ed.). This evidence may be presented by the Government during sentencing "so that the circumstances surrounding that offense or its repercussions may be understood by the sentencing authority." *United States v. Vickers*, 13 M.J. 403, 406 (C.M.A. 1982). Even if admissible under R.C.M. 1001(b)(4), the evidence must pass the test of Mil. R. Evid. 403, which requires balancing the probative value of any evidence against its likely prejudicial

impact. *Stephens*, 67 M.J. at 235. When a military judge fails to conduct such balancing, this Court gives the military judge no deference and examines the record ourselves. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000) (citing *Government of the Virgin Islands v. Archibald*, 987 F.2d 180, 186 (3d Cir. 1993)). We test the erroneous admission of evidence during the sentencing portion of a court-martial to determine if the error substantially influenced the adjudged sentence. *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005) (citations omitted).

Here, the Stipulation of Fact states the appellant smoked hashish on 5-10 occasions with other Air Force members, to include Staff Sergeant (SSgt) B and, on each of these occasions, "[the appellant] and her friends obtained the hashish from an Egyptian contractor" who worked on Bagram. She also admitted that fact during the guilty plea inquiry. While testifying for the Government in sentencing, SSgt B explained that, originally, it was the appellant who got the hashish from an Egyptian contractor on base and SSgt B paid the appellant $10-20 on these occasions. After the appellant did this the first "couple" of times, SSgt B then got to know the contractor and he picked up the hashish after that.

The trial defense counsel objected to this testimony on the basis that it constituted uncharged misconduct as it described distribution of hashish by the appellant. The military judge allowed the trial counsel to present it as "additional facts and circumstances" surrounding the appellant's drug use, stating he may or may not consider it in determining the appellant's sentence. He did not state later whether he had considered it, though he did say "[b]efore announcing sentence, . . . I specifically considered the parameters of [R.C.M.] 1001 . . . ."

Under these circumstances, we do not find an abuse of discretion in the admission of SSgt B's testimony that the appellant picked up the hashish from the supplier on several occasions and that SSgt B paid her for it, nor do we find that Mil. R. Evid. 403 would have precluded its admission. Evidence that the appellant was the group's contact with the supplier on some occasions was already before the military judge through the stipulation and guilty plea inquiry. We also find that evidence she was reimbursed by one of the other military members, even if not admissible as a circumstance surrounding the appellant's use of hashish, did not substantially influence her adjudged sentence and thus did not materially prejudice a substantial right. We presume the military judge knows the law in this area and followed it, as there is no clear evidence to the contrary. *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) (citing *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997)).

Conclusion

The 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, 10 U.S.C. § 866(c);

United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000).[*] Accordingly, the findings and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court

[*] We note that more than 18 months have elapsed between the time the case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court. Because such 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 the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *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 it 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. 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 was harmless beyond a reasonable doubt, and that relief is not otherwise warranted. *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).