**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Airman MICHAEL W. DAVIDSON**
**United States Air Force**

**ACM S31770**

**07 February 2011**

Sentence adjudged 15 December 2009 by SPCM convened at Luke Air Force Base, Arizona. Military Judge: Joseph S. Kiefer (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 5 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Don M. Christensen, Captain Joseph J. Kubler, and Gerald R. Bruce, Esquire.

Before

BRAND, GREGORY, and ROAN
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

A special court-martial composed of military judge alone convicted the appellant in accordance with his pleas of one specification of distribution of Vicodin and Percocet on divers occasions in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The court sentenced him to a bad-conduct discharge, confinement for five months, and reduction to the grade of E-1. The convening authority approved the sentence adjudged. The appellant argues that his sentence is inappropriately severe particularly when compared to the actions taken against other Airmen for drug offenses at his base of assignment.[1] We disagree.

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

The appellant admitted during the plea inquiry that he sold about 40 Vicodin pills to another Airman for $150 in July 2009. Later that same month, he sold approximately 20 Percocet pills for $100 to a staff sergeant at work. He explained in his unsworn statement that he received a prescription for the pills following a car accident and sold some of them so he could pay for a trip to the funeral of an aunt. In his clemency matters submitted to the convening authority and now on appeal the appellant cites to base newspaper articles and a report of the result of trial in a general court-martial to support his argument that the lesser actions taken against other Airmen for drug offenses at the same base require that we set aside the adjudged and approved bad-conduct discharge.

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire 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). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we 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).

Sentence comparison is required only in closely related cases. *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006) (citing *United States v. Wacha*, 55 M.J. 266, 267-68 (C.A.A.F. 2001)), *aff'd in part*, 66 M.J. 291 (C.A.A.F. 2008). Closely related cases include, for example, those which pertain to "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Lacy*, 50 M.J. at 288. "At [this Court], an 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 Government must show that there is a rational basis for the disparity." *Id.* (emphasis added).

The matters cited by the appellant do not support reduction of his sentence on the basis of sentence comparison. The summary news articles and report of the result of trial on which the appellant relies fall far short of meeting the appellant's burden of showing the cases are closely related. Indeed, the summaries reveal no direct nexus between the cases cited and the appellant's; their only commonality is Article 112a, UCMJ. We note that the appellant limited his punitive exposure to the potential 15-year maximum for distribution by entering into a pretrial agreement that required referral to a special court-martial and that the approved sentence is less than half the authorized confinement for even a special court-martial. The test for whether sentences are highly disparate involves comparison of not only the raw numerical values of the sentences in the closely related cases but also consideration of any disparity in relation to the potential maximum. *Lacy*, at 289. In this context, even if sufficient information were provided to show another case

was closely related, it is highly unlikely that the appellant's sentence would be considered highly disparate.

We next consider whether the appellant's sentence was appropriate as judged by "individualized consideration" of the appellant "on the basis of the nature and seriousness of the offense and the character of the offender." *Snelling*, 14 M.J. at 268 (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.A.A.F. 1959)). This appellant facilitated illegal drug use by other military members by distributing Schedule II and Schedule III[2] controlled substances for a profit of about $250, and one of the sales occurred on a military installation. Some of the drugs he sold were prescribed to him while others were supplied by his girlfriend. After carefully examining the submissions of counsel, the appellant's military record, and all the facts and circumstances surrounding the offense of which he was found guilty, we find that the appellant's approved sentence is appropriate.

*Conclusion*

The approved findings and the 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 approved findings and the sentence are

AFFIRMED.

OFFICIAL


STEVEN LUCAS
Clerk of the Court

[2] As listed in the Controlled Substances Act of 1970, 21 U.S.C. § 812.