UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman KERRY A. DAVIS
United States Air Force

ACM S31561

25 January 2010

Sentence adjudged 01 October 2008 by SPCM convened at Moody Air Force Base, Georgia. Military Judge: Terry A. O'Brien (sitting alone).

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

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Michael A. Burnat, Major Jennifer J. Raab, Major Lance J. Wood, and Major Grover H. Baxley.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Major Kimani R. Eason, and Gerald R. Bruce, Esquire.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

PER CURIAM:

A special court-martial composed of military judge alone convicted the appellant in accordance with his pleas of one specification of being absent without leave (AWOL) for six days and one specification of divers wrongful use of methamphetamine, in violation of Articles 86 and 112a, UCMJ, 10 U.S.C. §§ 886, 912a.[1] The convening authority approved the adjudged sentence of reduction to E-1, confinement for six months, and a bad-conduct discharge. On appeal, he challenges the appropriateness of

[1] A specification alleging wrongful use of marijuana was withdrawn pursuant to a pretrial agreement.

his sentence.[2] Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Background

While at the China Doll Lounge in Valdosta, Georgia, a nightclub known for drug use, the appellant sought ecstasy from a civilian female named Britney and from other unidentified civilian males. Although urinalysis testing confirmed the presence of methamphetamine rather than ecstasy, the appellant stated that he intended to use a contraband substance, ecstasy, on each occasion. Approximately a month after the appellant's unit received his positive drug report, the appellant checked himself into an off-base mental health facility for depression with his commander's concurrence. The treatment facility recommended some additional time off from work after the appellant's release, but the recommendation was not approved. Despite his leave not being approved, the appellant took off approximately six days on his own initiative, during which time he told the military judge he was simply in "the greater Valdosta area." The providence inquiry supports acceptance of the guilty plea to both AWOL and wrongful use of methamphetamine.

Sentence Appropriateness

We review 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 offenses, the appellant's record of service, and all matters contained in the record of trial." *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006) (citing *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)), *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, 287-88 (C.A.A.F. 1999); *Healy*, 26 M.J. at 395-96.

The appellant argues that his sentence is too severe, emphasizing that his marital problems and other family tragedies contributed to his decisions to use illegal drugs and to go AWOL. While the appellant's family tragedies evoke sympathy, they do not show that the sentence for his crimes is inappropriately severe. The matters raised by the appellant were presented to the military judge who sentenced him, and his argument on appeal is essentially a request for clemency.[3] Having given individualized consideration

[2] The appellant raises this issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[3] The appellant waived his right to submit clemency matters to the convening authority.

to this particular appellant, the nature of the offenses, the appellant's record of service, 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). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

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