UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class ANTHONY J. DENICOLA
United States Air Force

ACM S31590

09 November 2009

Sentence adjudged 02 October 2008 by SPCM convened at Lackland Air Force Base, Texas. Military Judge: Grant L. Kratz (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 9 months, forfeiture of $898.00 pay per month for 9 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel James B. Roan, Major Shannon A. Bennett, Major Michael A. Burnat, and Captain Reggie D. Yager.

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

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

GREGORY, Judge:

A special court-martial composed of military judge alone convicted the appellant in accordance with his pleas of one specification of conspiracy to wrongfully introduce cocaine onto a military installation, one specification of wrongfully introducing cocaine onto a military installation on divers occasions, and one specification of wrongfully using cocaine on divers occasions, in violation of Articles 81 and 112a, UCMJ, 10 U.S.C. §§

881, 912a.[1] The convening authority approved the adjudged sentence of reduction to the grade of E-1, forfeiture of $898 pay per month for nine months, confinement for nine months, and a bad-conduct discharge.

Appellant challenges the providence of his guilty plea to divers wrongful introductions of cocaine and argues that his sentence to a bad-conduct discharge is inappropriately severe given the sentences of his coactors.[2]

Background

On 11 April 2008, Airman First Class (A1C) L, A1C B, A1C G, and the appellant decided to purchase some cocaine. After A1C G made phone contact with an off-base drug dealer, he and the appellant took a taxi to meet the dealer. The appellant contributed $50 toward the purchase. A1C G made the purchase, and they returned with the cocaine to the appellant's dormitory room on Lackland Air Force Base (AFB), Texas. Once in the appellant's room, A1C L, A1C B, A1C G, Airman Basic (AB) K, AB B, and the appellant snorted the cocaine. Later that night, the appellant laced a cigarette with some of the remaining cocaine and smoked it outside with several other airmen. He returned to his dormitory room where he snorted more cocaine and then made another cocaine-laced cigarette, which he again shared with other airmen outside the dormitory.

After they finished the second cocaine cigarette, A1C G told the appellant and A1C B that he wanted to buy more cocaine. After agreeing to do so, the three airmen took a taxi off base to meet another dealer. The appellant and A1C B remained in the taxi while A1C G made contact with the dealer. The appellant became concerned when A1C G failed to return within a few minutes. After repeatedly attempting to call him, A1C G returned with more cocaine. The appellant helped pay for the taxi and commented that A1C G purchased far less cocaine than on the first buy. They returned to Lackland AFB with the cocaine, and, while the appellant and A1C B watched a movie, A1C G used the cocaine.

Providence of the Plea

While conceding the providence of his guilty plea to one introduction of cocaine, the appellant disputes the military judge's finding that his guilty plea to the second introduction was provident and asks this Court to set aside the finding of guilty of divers introductions and reassess the sentence. Specifically, the appellant argues that the military judge failed to elicit a sufficient factual basis to establish that he either conspired

---

[1] Additional specifications alleging conspiracy to distribute cocaine and distribution of cocaine were dismissed after acceptance of the appellant's guilty plea pursuant to a pretrial agreement.

[2] The assignment of error alleging inappropriately severe sentence is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

with or aided and abetted the actual purchaser of the cocaine during the second wrongful introduction.

"A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion." *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) (quoting *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996)). An accused may not plead guilty unless the plea is consistent with the actual facts of his case. *United States v. Moglia,* 3 M.J. 216, 218 (C.M.A. 1977). An accused may not simply assert his guilt; the military judge must elicit facts as revealed by the accused himself to support the plea of guilty. *United States v. Jordan,* 57 M.J. 236, 238 (C.A.A.F. 2002) (quoting *United States v. Davenport,* 9 M.J. 364, 367 (C.M.A. 1980)); *United States v. Outhier,* 45 M.J. 326, 331 (C.A.A.F. 1996). "A guilty plea will be rejected only where the record of trial shows a substantial basis in law and fact for questioning the plea." *United States v. Hardeman*, 59 M.J. 389, 391 (C.A.A.F. 2004) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991); *Jordan*, 57 M.J. at 238).

During the guilty plea inquiry, the military judge confirmed with the trial defense counsel that the theory of liability for the second introduction was either aiding and abetting or conspiracy and fully explained both theories of liability to the appellant. The appellant told the military judge that he and A1C G had "every intention to bring cocaine back onto the base" and that the conspiracy to do so continued to exist at the time of the second introduction. When asked how he helped bring about the commission of the offense, the appellant described himself as A1C G's "wingman." He also contributed $15 toward the taxi fare on the second trip. The military judge clarified with the appellant that the two introductions are the same acts discussed with regard to the overt acts in the conspiracy charge, which alleges travel off base on divers occasions to purchase cocaine and bring it onto Lackland AFB.[3]

The appellant correctly notes that simply accompanying someone who commits a crime without sharing in the other's criminal intent or assisting the other in the commission of an offense is insufficient to support a finding of guilt under an aiding and abetting theory. *United States v. Gosselin*, 62 M.J. 349, 352-53 (C.A.A.F. 2006); *United States v. Jacobs*, 2 C.M.R. 115, 117 (C.M.A. 1952). Here, however, the appellant was much more than an innocent bystander: he shared in the criminal purpose of buying cocaine and bringing it back to the installation; he took active steps to ensure A1C G's safety during the purchase; he provided money for the taxi fare to make the purchase; and, unlike the appellant in *Gosselin*, he had no purpose in the venture other than to assist in the purchase of cocaine. Under theories of both conspiracy and aiding and abetting, the appellant provided sufficient information for the military judge to find a provident guilty plea to the offense as charged.

[3] The appellant does not contest his plea to the conspiracy charge although he now claims that the conspiracy had ended at the time of the second introduction. We find, as did the military judge, that the plea of guilty to conspiracy is provident.

Examining the totality of the circumstances of the providence inquiry, including the stipulation of fact and the full range of the appellant's responses, we find no substantial basis in law or fact for questioning the appellant's guilty plea, and the military judge did not abuse his discretion in accepting that plea. *See United States v. Nance*, 67 M.J. 362, 366 (C.A.A.F. 2009).

Sentence Appropriateness

The appellant argues that a bad-conduct discharge is inappropriately severe, particularly in light of the sentences imposed on his coactors, and invites the Court to consider the sentences of others involved in cocaine use that night.

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. Rangel*, 64 M.J. 678, 686 (A.F. Ct. Crim. App. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate, but 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).

In making a sentence appropriateness determination, we are required to examine sentences in closely related cases and permitted, but not required, to do so in other cases. *United States v. Wacha*, 55 M.J. 266, 267-68 (C.A.A.F. 2001); *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006), *aff'd*, 66 M.J. 291 (C.A.A.F. 2008). "[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." *Lacy*, 50 M.J. at 288.

Of all the alleged coactors cited by the appellant in support of his argument, only the appellant and A1C G twice traveled off base to purchase cocaine and bring it back to the installation for use by the others. In these two closely related cases, A1C G, the actual purchaser of the cocaine on both occasions, was tried by general court-martial and received one year of confinement and a bad-conduct discharge. The sentences are not highly disparate and, indeed, appear quite equitable given the relative culpability.[4] Having given individualized consideration to this particular appellant, the nature of the

[4] The other airmen who used cocaine that night received lesser sentences. Airman First Class B received nonjudicial punishment, but the appellant does not assert any misuse of prosecutorial discretion. We have given this disposition appropriate consideration. *United States v. Noble*, 50 M.J. 293 (C.A.A.F. 1999).

offenses, 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.[5] 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

CHRISTINA E. PARSONS, TSgt, USAF
Deputy, Clerk of the Court

[5] The Court notes that the Court-Martial Order (CMO), dated 12 December 2008, incorrectly spells the military judges last name as "Cratz;" the correct spelling is "Kratz." The Court orders the promulgation of a corrected CMO.