UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class PERRY M. DOIG
United States Air Force

ACM S31527

09 June 2009

Sentence adjudged 11 July 2008 by SPCM convened at Goodfellow Air Force Base, Texas. Military Judge: Le T. Zimmerman (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 8 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Imelda L. Paredes and Captain Michael A. Burnat.

Appellate Counsel for the United States: Major Jeremy S. Weber, Captain G. Matt Osborn, and Gerald R. Bruce, Esquire.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

OPINION OF THE COURT

HELGET, Judge:

In accordance with his pleas, the appellant was found guilty of one specification each of wrongfully using ecstasy, cocaine, and marijuana, two specifications of wrongfully distributing ecstasy, one specification of wrongfully introducing ecstasy onto a military installation, and one specification of wrongfully misusing Percocet, in violation of Articles 112a and 134, UCMJ, 10 U.S.C. §§ 912a, 934. The approved sentence consists of a bad-conduct discharge, confinement for eight months, and reduction to E-1.

The appellant asserts three errors. First, he argues his plea to wrongfully misusing Percocet was improvident because he had a prescription for the medication and used the prescribed dosage for a legitimate medical purpose. Second, he asserts the action of the convening authority should be set aside because the addendum to the Staff Judge Advocate's Recommendation (SJAR) indicates that only a portion of the defense clemency submissions were forwarded to the convening authority. His final argument, raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), is that the portion of the adjudged sentence which includes a bad-conduct discharge is inappropriately severe.

Providence of Guilty Plea

The appellant asserts that his plea to wrongfully misusing Percocet under Article 134, UCMJ, was improvident, and requests that we set aside the finding of guilty for this charge and specification and order a rehearing on sentence, or provide such other appropriate relief. The basis for his request is there is no evidence that his use was wrongful. We agree.

During the *Care*[1] inquiry, the appellant stated that on two occasions between 1 and 28 February 2008, he crushed and inhaled, through his nose, one tablet of prescribed Percocet, instead of consuming it orally. The appellant did this to accelerate the painkilling effects of the Percocet to help relieve the pain he was experiencing from a herniated disc in his right hip. The military judge found his plea to be provident because the appellant stated that this manner of using Percocet slightly incapacitated him as the side effects of the narcotic took effect more rapidly and were much more prominent and stronger. The appellant also indicated that he put himself at substantial physical risk and jeopardized his ability to perform his duties.

"A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion." *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996) (citing *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995)). 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)) (emphasis added). Where there is "a substantial basis in law and fact" for questioning the appellant's plea, the plea cannot be accepted. *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).

[1] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

In the case at hand, the evidence is insufficient to support the military judge's findings that the appellant's use of Percocet was wrongful. It is well settled that a valid doctor's prescription for a controlled substance provides the legal justification and authorization to use the prescribed controlled substance for its intended purpose to treat a valid medical condition. *United States v. Pariso*, 65 M.J. 722, 724 (A.F. Ct. Crim. App. 2007) (citing *United States v. West*, 34 C.M.R. 449, 452 (C.M.A. 1964); *United States v. Greenwood*, 19 C.M.R. 335 (C.M.A. 1955); *United States v. Bell*, ACM 30813 (A.F. Ct. Crim. App. 14 Dec 1994) (unpub. op.)), *rev. denied*, 66 M.J. 94 (C.A.A.F. 2008). In *United States v. Ennis*, ACM S31415 (A.F. Ct. Crim App. 29 Jan 2009) (unpub. op.), we set aside the finding of guilty for a charge and specification of wrongfully using Adderall, a Schedule II controlled substance, in violation of Article 112a, UCMJ. *Ennis*, unpub. op. at 3. In *Ennis*, as in this case, the accused crushed and snorted the controlled substance to get it into his system more quickly. *Id.* We found the evidence supported a finding that the appellant's use of Adderall was for a legitimate medical reason even if the appellant used the drug in a method contrary to the method prescribed. *Id.* Although in this case the appellant was charged under Article 134, UCMJ, we likewise hold that his use of Percocet was not wrongful. Accordingly, we set aside the finding of guilty for Charge II and its Specification.

Consideration of Clemency Matters

We review post-trial processing issues de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004). Prior to taking final action, the convening authority must consider clemency matters submitted by the accused. *United States v. Craig*, 28 M.J. 321, 324-25 (C.M.A. 1989); Rule for Courts-Martial (R.C.M.) 1107(b)(3)(A)(iii). The preferred method of documenting a convening authority's review of clemency submissions is completion of an addendum to the SJAR. *United States v. Godreau*, 31 M.J. 809, 811 (A.F.C.M.R. 1990). The addendum should: (1) "inform the convening authority that the accused has submitted matters and they are attached to the addendum"; (2) "inform the convening authority that he must consider the matters submitted by the accused before taking action on the case"; and (3) "list as attachments the matters submitted by the accused." *Id.* (citing *United States v. Foy*, 30 M.J. 664, 665 (A.F.C.M.R. 1990)).

The appellant asserts that the action of the convening authority should be set aside because the convening authority did not receive his entire clemency submission. Specifically, the appellant argues the convening authority never received Defense Exhibits O and N, consisting of the appellant's unsworn statement and a DVD recording of a briefing given by the appellant to encourage others not to misuse drugs. There is no indication in the Record of Trial that these two exhibits were included with the rest of the appellant's clemency submission, which was attached to the addendum to the SJAR and forwarded to the convening authority.

Upon receipt of the appellant's brief, appellate government submitted a declaration from the convening authority, Colonel (Col) RA, who states, "I also specifically remember reviewing the clemency matters submitted by the defense, including Amn Doig's 'scared straight' videotaped discussion with other Airmen about the perils of illegal drug use, as well as his unsworn statement." In a post-trial declaration form the convening authority's staff judge advocate, Major (Maj) JG, he states, "I specifically recall discussing the anti-drug video that AB Doig made and AB Doig's unsworn statement with Col [RA], and I remember him being familiar with both of these items."

Considering the post-trial declarations from Col RA and Maj JG, we are satisfied that the convening authority reviewed Defense Exhibits O and N prior to taking action in this case. Accordingly, this issue is without merit.

Inappropriately Severe Sentence

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).

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 approved sentence was a bad-conduct discharge, confinement for eight months, and reduction to E-1. Having given individualized consideration 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.

Sentence Reassessment and Appropriateness

Because we modified the findings, we must next consider whether we can reassess the sentence. If we can determine to our satisfaction that "absent any error, the sentence adjudged would have been of at least a certain severity, then a sentence of that severity or less will be free of the prejudicial effects of error," and we may reassess the sentence

accordingly. *United States v. Moffeit*, 63 M.J. 40, 41 (C.A.A.F. 2006) (quoting *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986)). A "dramatic change in the 'penalty landscape'" gravitates away from our ability to reassess a sentence. *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003). "If the error at trial was of constitutional magnitude, then [we] must be satisfied beyond a reasonable doubt that [the] reassessment cured the error." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *Sales*, 22 M.J. at 307).

We are confident that we can reassess the sentence in accordance with the above authority. Setting aside Charge II and its Specification does not change the maximum punishment the appellant faced, which is the jurisdictional limit of the special court-martial. Therefore, the sentencing landscape has not changed. Accordingly, after careful consideration of the entire record, we are satisfied beyond a reasonable doubt that, in the absence of Charge II and its Specification, the military judge would have rendered a sentence of no less than that adjudged at trial. We are further satisfied that, in the absence of Charge II and its Specification, the convening authority would have approved a sentence no less than that which was approved.

Conclusion

The approved findings, as modified, and the sentence, as reassessed, are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred.[2] Article 66(c), UCMJ; *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

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

[2] The Court notes that the Court-Martial Order (CMO), dated 26 August 2008 fails to list the finding of Guilty in regards to Specification 2 of Charge I. The Court orders the promulgation of a corrected CMO.