UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

First Lieutenant JEFFREY D. EDWARDS
United States Air Force

ACM 38190

17 October 2013

Sentence adjudged 26 June 2012 by GCM convened at Offutt Air Force Base, Nebraska. Military Judge: Natalie D. Richardson.

Approved Sentence: Dismissal, confinement for 12 months, forfeiture of all pay and allowances.

Appellate Counsel for the Appellant: Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Jason S. Osborne; Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and WIEDIE
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

WIEDIE, Judge:

At a general court-martial the appellant was convicted, in accordance with his pleas, of wrongfully possessing 3,4-methylenedioxymethamphetamine (hereinafter "Ecstasy"); wrongfully using cocaine on divers occasions; wrongfully distributing cocaine on divers occasions; wrongfully using Ecstasy on divers occasions; and wrongfully distributing Ecstasy on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A panel of officer members adjudged a sentence of a dismissal, confinement for 12 months, and forfeiture of all pay and allowances. The convening authority approved the sentence as adjudged.

On appeal, the appellant argues that his sentence is inappropriately severe. We disagree and, for the reasons discussed below, affirm the findings and sentence.

Background

The appellant's downward spiral began innocently enough with a night on the town in Omaha, Nebraska, with two friends who worked in the civilian community. At the conclusion of the evening the three went to the apartment of one of the civilians where someone eventually produced a white, powdery substance. The appellant asked what the substance was and was told it was cocaine. The appellant was asked if he wanted to try it. The appellant agreed and used the cocaine by snorting it into his nose. Over about eight months, from approximately 1 June 2011 to 24 February 2012, the appellant used cocaine roughly once a month.

Over time the appellant not only used cocaine but distributed it to various individuals. On 21 October 2011, he provided cocaine to his two civilian friends when the three of them used it together at the appellant's apartment. One of the civilians provided the appellant with $50 in exchange for the cocaine. Additionally, he provided cocaine to 2nd Lieutenant (2Lt) MM on three to five occasions. On 24 February 2012, the appellant sold cocaine to another friend, who was working as a confidential informant (CI) for the Air Force Office of Special Investigations (AFOSI).

In addition to his use and distribution of cocaine, the appellant used, distributed, and possessed Ecstasy. The appellant first used Ecstasy in January 2012. Later, on 11 February 2012, the appellant purchased eight Ecstasy pills and consumed one. That same day he provided one of the Ecstasy pills to 2Lt MM and another to the friend who was working as a CI for AFOSI. The following day, he sold three more Ecstasy pills to the CI for $60. The appellant maintained possession of the two remaining Ecstasy pills until they were seized in an AFOSI search of his apartment on 25 February 2012.

Sentence Severity

This Court reviews sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). 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), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007) (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). Although we are accorded great discretion in determining whether a

particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010).

"[We] are required to engage in sentence comparison only 'in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.'" *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A.1985)) (citations omitted). Sentence comparison is not required unless this Court finds that any cited cases are "closely related" to the appellant's case and the sentences are "highly disparate." *Id.* (citing *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999)). Closely related cases include 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. "[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 Government must show that there is a rational basis for the disparity." *Id.*

The appellant argues that his sentence, which included 12 months confinement and a dismissal, was inappropriately severe in comparison to the sentence of 30 days confinement and a dismissal received by 2Lt MM. Arguably, the cases are "closely related" in that the appellant and 2Lt MM used cocaine and Ecstasy together. The sentences can also be said to be "highly disparate" in light of the fact that the appellant received twelve times the confinement 2Lt MM received. Nonetheless, given the significant differences in the appellant's conduct and that of 2Lt MM, we conclude that the appellant's sentence was not inappropriately severe compared to 2Lt MM's sentence.

First, even though their crimes were related, they did not face the same charges. The appellant was charged with and pled guilty to use, possession, and distribution of Ecstasy as well as use and distribution of cocaine, while 2Lt MM was not charged with any distribution offenses. The appellant faced a maximum sentence that included 45 years confinement in addition to forfeitures and a dismissal, whereas 2Lt MM's maximum punishment was limited to 15 years confinement, forfeitures, and a dismissal. Second, the appellant's conduct was clearly the more egregious of the two. In addition to being the one who supplied the cocaine and Ecstasy, the appellant's use of drugs covered a longer period of time. Although there is not much difference in rank between a First Lieutenant and a Second Lieutenant, there is nonetheless a difference. The Air Force places greater responsibility on officers as they progress to higher rank and expects them to set the example for those junior in rank. Comparing the differences and similarities between the two cases, we believe a rational basis exists for the difference between the two sentences and that the appellant's conduct warranted a more severe punishment.

We have given individualized consideration to this particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all other matters contained in the record of trial. The approved sentence was clearly within the discretion of the convening authority and was appropriate in this case. Accordingly, 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 materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court