UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant SAMUEL GROSS, JR.
United States Air Force

ACM 37629

24 January 2012

Sentence adjudged 16 February 2010 by GCM convened at Maxwell Air Force Base, Alabama. Military Judge: Jeffrey A. Ferguson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 9 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Major Phillip T. Korman; and Major Nicholas W. McCue.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Joseph Kubler; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and HECKER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HECKER, Judge:

Consistent with his pleas, a general court-martial composed of a military judge convicted the appellant of seven specifications of larceny of Government property, in violation of Article 121, UCMJ, 10 U.S.C. § 921. The adjudged sentence consists of a dishonorable discharge, confinement for 9 years, reduction to E-1, and forfeiture of all pay and allowances. The convening authority approved the findings and sentence as adjudged. On appeal, the appellant raises one issue for our consideration: whether his

sentence is inappropriately severe where the Government argued for 7 years of confinement, a dishonorable discharge and a fine, but the appellant received a sentence of 9 years of confinement and a dishonorable discharge. Having reviewed the record of trial and briefs from both sides, we find no error that materially prejudices a substantial right of the appellant and affirm.

Background

The appellant pled guilty to seven specifications of theft of military property, spanning a three-year period. The appellant utilized his position as the Quality Assurance Evaluator for the Communications Squadron to defraud the Air Force of appropriated funds totaling approximately $535,000 during that time period.

As the active duty member in charge of the postal service accounts for Maxwell Air Force Base and Gunter Annex, one of the appellant's primary duties was to oversee the postage meter accounts on base. On a quarterly basis, he would provide the Communications Flight Resource Advisor with an estimate of the funding required for postage. Relying on this information, the Resource Advisor would transmit paperwork to the Defense Financial and Accounting Services, which in turn would transmit that amount of appropriated funds to the U.S. Postal Service. Because the postage meters at Maxwell Air Force Base belonged to and were managed by Pitney Bowes, the U.S. Postal Service would alert the company about the deposit, and the company would then electronically credit the postage meter with that amount. Pitney Bowes would then be responsible for tracking the funds that are related to that postage meter.

In March 2006, after one of the base postage meters was deactivated, approximately $40,000 of Air Force funds remained as a credit on the meter. The appellant sent a written request to Pitney Bowes, asking for a refund of that unused amount. Consistent with its practice, Pitney Bowes alerted the U.S. Postal Service that this amount needed to be refunded to the customer and, soon thereafter, a U.S. Postal Service-issued check arrived in the appellant's office, listing the payee as the "42nd Communications Squadron, TSgt S. Gross," with the squadron's mailing address. Instead of turning the check over to the base finance office for processing, the appellant successfully deposited this check into his personal checking account. Over the next 30 months, the appellant repeated this process six more times. For these subsequent transactions, the appellant first arranged for Air Force funds to be loaded into inactive postage meter accounts, and then requested and received refund checks for those amounts.

The appellant used this money to fund his gambling activity and to purchase items for his family, including several vehicles. His criminal activity was stopped in March 2009 when an employee at his bank alerted authorities that the appellant had deposited

into his personal account a large check made payable to the Air Force. His bank account was subsequently frozen.

In sentencing, the appellant presented evidence about his history of financial problems stemming largely from his participation in gambling activities, as well as information that indicated he had been diagnosed as a pathological gambler. Evidence of his previously outstanding military career was also presented.

In making his sentencing argument, the trial counsel argued the appellant should be sentenced to a dishonorable discharge, 7 years of confinement, a $100,000 fine, reduction to E-1, and forfeiture of all pay and allowances. The defense, while conceding that a punitive discharge was appropriate, did not argue for a specific sentence, instead electing to emphasize the appellant's stellar career and substantial gambling addiction, while noting this was a "white collar" crime and that the requested punitive discharge would deprive the appellant and his family of his military retirement income. The defense also argued a fine would be unreasonable because the money was no longer in the appellant's possession.

The military judge did not adjudge the fine requested by the Government. While he did adjudge the dishonorable discharge, reduction, and forfeitures as requested by the Government, the military judge added two years of confinement to the sentence requested by the Government.

Sentence Appropriateness

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384 (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). 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). "In the interests of justice, [we have the power to] substantially lessen the rigor of a legal sentence." *United States v. Lanford*, 20 C.M.R. 87, 94 (C.M.A. 1955); *see also United States v. Tardiff*, 57 M.J. 219, 223 (C.A.A.F. 2002).

On appeal, the appellant argues his sentence is inappropriately severe when considered in light of the mitigating evidence presented at trial, his rehabilitation potential, and the Government's sentencing argument that asked for 7 years of confinement, as opposed to the 9 years adjudged by the military judge. He thus asks us to approve only a bad-conduct discharge in lieu of the dishonorable discharge.

After carefully examining the submissions of counsel, the appellant's military record, and all the facts and circumstances surrounding the offenses of which he was found guilty, we find that the appellant's approved sentence is appropriate. He engaged in a course of criminal conduct that spanned multiple years and that abused the trust his unit and the Air Force had placed in him. He continued this conduct until he was stopped by actions taken by his bank. His actions prevented his unit from being able to use these funds to cover shortfalls in other projects, while he used the funds for gambling and discretionary purchases.

The appellant's citation to our unpublished opinion in *United States v. Arriaga*, ACM 37439 (A.F. Ct. Crim. App. 7 May 2010) (unpub. op.), *rev'd on other grounds*, 70 M.J. 51 (C.A.A.F. 2011), is unavailing. In that case, we found Arriaga's sentence for housebreaking and indecent assault to be inappropriately severe and approved only a two-year period of confinement. Although that opinion did reference the trial counsel's argument for a sentence less than the one ultimately adjudged by the panel, it is clear we concluded the facts and circumstances of the case did not warrant the sentence he received. That is not the situation here. The sentence appellant received was indeed warranted. The interests of justice do not lead us to lessen the rigor of the lawful sentence he earned through his actions.

Appellate Delay

Although not raised by the appellant, we review de novo claims whether an appellant has been denied the due process right to a speedy appeal. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). This case was docketed with our Court on 1 April 2010. The overall delay between the docketing of the case with this Court and completion of our review is in excess of 540 days and therefore facially unreasonable.

Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530-32 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Moreno*, 63 M.J. at 135-36. When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Having considered the totality of the circumstances of this case as well as the entire record, we conclude that any denial of the appellant's right to speedy appeal was harmless beyond a reasonable doubt and that no relief is warranted.

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, 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

ANGELA E. DIXON, TSgt, USAF
Deputy Clerk of the Court

[*] The Court notes the court-martial order (CMO), dated 25 March 2010, does not reflect the plea and finding for Specification 7 of the Charge. We order the promulgation of a corrected CMO.