UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class ROBERT D. HAYDEN
United States Air Force

ACM 36917

28 July 2008

Sentence adjudged 10 October 2006 by GCM convened at Aviano Air Base, Italy. Military Judge: Adam Oler (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 30 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Donna S. Rueppell, and Captain Kevin D. Catron.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

A military judge sitting as a general court-martial convicted the appellant, in accordance with the appellant's pleas, of: two specifications of conspiring to wrongfully distribute marijuana; one specification of conspiring to wrongfully introduce marijuana onto a military installation; one specification of divers wrongful use of marijuana; one specification of divers wrongful use of methylenedioxymethamphetamine (ecstasy); one specification of divers wrongful use of cocaine; one specification of divers wrongful use of amphetamine; one specification of divers wrongful distribution of marijuana; and one

specification of divers wrongful introduction of marijuana onto a military installation, in violation of Articles 81 and 112a, UCMJ, 10 U.S.C. §§ 881 and 912.

The military judge sentenced the appellant to a dishonorable discharge, 40 months confinement, and reduction to E-1. The convening authority approved the findings and, pursuant to a pretrial agreement, approved the dishonorable discharge, 30 months confinement[1], and reduction to E-1. On appeal the appellant asks the court to disapprove his dishonorable discharge because of the following assertions of error: (1) the military judge erred in denying the appellant credit under Article 13, UCMJ, 10 U.S.C. § 813,[2] and (2) the appellant's sentence is inappropriately severe. Finding no error, we affirm.

Background

Over the course of a 12-month period of time beginning in January 2005, the appellant traveled with other airmen to the Republic of Slovenia to purchase and use marijuana, ecstasy, amphetamine, and cocaine. The appellant was the "point man" or the individual responsible for setting up the meetings to purchase the drugs from a source in the Republic of Slovenia. During this same time period, the appellant conspired with: (1) Airman First Class (A1C) JH to introduce marijuana onto Aviano Air Base, Italy and distribute marijuana to airmen at the air base and (2) Airman (Amn) DD to distribute marijuana to A1C AG. To effect the object of these conspiracies, the appellant purchased marijuana in Slovenia and brought it back to Italy and onto Aviano Air Base, Italy; sold or provided marijuana to various airmen; and arranged for Amn DD to sell marijuana to A1C AG.

On 18 April 2005, the appellant was randomly selected for urinalysis testing. On that same day, the appellant provided a urine sample and that sample subsequently tested positive for 11-nor-delta-9-tetrahydrocannabinol-9-carboxylic (THC) at 42 nanograms/milliliter (ng/ml). Following notification of his positive results, search authorizations were granted to test the appellant's urine on 14 May 2005, 19 May 2005, 31 May 2005, and 18 June 2005. The appellant provided urine samples on the aforementioned days and those samples subsequently tested positive for THC at 454 ng/ml, 27 ng/ml, 84 ng/ml, and 161 ng/ml respectively.

On 19 April 2006, search authorization was granted to test the appellant's urine; the appellant provided a urine sample and that sample subsequently tested positive for THC at 431 ng/ml, ecstasy at 531 ng/ml, and amphetamine at 442 ng/ml. Lastly, on 8 May 2006, search authorization was granted to test the appellant's urine; the appellant provided a urine sample and that sample subsequently tested positive for THC at 210

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[1] The pretrial agreement obligated the convening authority not to approve confinement, if confinement is adjudged, in excess of 36 months. The convening authority, exercising his clemency powers, approved 30 months of confinement rather than the 36 months of confinement he legally could have approved.

[2] This issue is filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

ng/ml, ecstasy at 1945 ng/ml, and amphetamine at 313 ng/ml. At trial the appellant pled guilty to all charges and specifications and the military judge, in accordance with the appellant's pleas, found the appellant guilty of all charges and specifications.

Prior to sentencing, the appellant filed an Article 13, UCMJ motion averring that he was denied medical treatment (alcohol and drug abuse prevention treatment (ADAPT)) and that such a denial constituted illegal pretrial punishment in violation of Article 13, UCMJ. After hearing all the evidence and testimony presented by the parties and considering the arguments of counsel, the military judge made detailed findings of fact, and denied the appellant's motion, finding that the appellant was not denied ADAPT treatment and thus suffered no pretrial punishment in violation of Article 13, UCMJ.

Discussion

Article 13 Credit

This Court's determination of whether the appellant suffered from unlawful pretrial punishment involves constitutional and statutory considerations. *Bell v. Wolfish*, 441 U.S. 520, 535-36 (1979); *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005). We will defer to the findings of fact by the military judge unless they are clearly erroneous; however, our application of those facts to the constitutional and statutory considerations, as well as any determination of whether this appellant is entitled to credit for unlawful pretrial punishment, involves independent de novo review by this Court. *King*, 61 M.J. at 227 (citing *United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000)).

The appellant bears the burden of establishing his entitlement to additional sentence credit because of a violation of Article 13, UCMJ. *King,* 61 M.J. at 227; *see also* Rule for Courts-Martial 905(c)(2). We reviewed the military judge's findings of fact, and we find that they are amply supported by the evidence presented, and therefore are not clearly erroneous. Based upon our review of the facts, we conclude that the appellant was not denied ADAPT treatment, suffered no illegal pretrial punishment, and thus is not entitled to Article 13, UCMJ credit.

Inappropriately Severe Sentence

The appellant asserts that the portion of his sentence including a dishonorable discharge is inappropriately severe in light of the sentences received by others in closely related cases. This Court reviews sentence appropriateness de novo. *See United States v. Baier*, 60 M.J. 382, 383-84 (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).

Additionally, 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); *United States v. Dodge*, 59 M.J. 821, 829 (A.F. Ct. Crim. App. 2004), *aff'd in part and rev'd in part on other grounds*, 60 M.J. 368 (C.A.A.F. 2004). Moreover, while we are required to examine sentence disparities in closely related cases, we are not required to do so in other cases. *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006), *pet. granted on other grounds*, 65 M.J. 320 (C.A.A.F. 2007) (citing *United States v. Wacha*, 55 M.J. 266, 267-68 (C.A.A.F. 2001)).

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. "At [this Court], an 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 has submitted printouts from the Air Force's Automated Military Justice Analysis and Management System (AMJAMS) in order to make his case that of the eight individuals involved with the appellant in his criminal activities, only he received a dishonorable discharge. While the other eight individuals were involved, to varying degrees, with the appellant's drug enterprise, only one, Amn DD, committed the gravamen offense of distributing drugs. Thus only Amn DD's case is "closely related."

At a summary court-martial, Airman DD pled guilty and was found guilty of one specification of divers use of marijuana and one specification of distribution of marijuana. The summary court-martial sentenced Airman DD to 25 days confinement, forfeitures of $849, and a reduction to E-1. However, Amn DD's case pales in comparison with the appellant's. Airman DD distributed marijuana on one occasion to one individual and limited his drug use to marijuana. Conversely, the appellant distributed marijuana to multiple individuals on multiple occasions and used not only marijuana on multiple occasions but ecstasy, cocaine, and amphetamine as well.

Put simply, the appellant was the "mastermind" of the drug enterprise and abused more drugs on more occasions than Amn DD. Accordingly, we find that the appellant's sentence is not "highly disparate" to Amn DD's sentence either on a comparison of the "relative numerical values of the sentences at issue" or in "consideration of the disparity in relation to the potential maximum punishment" of each. *See Lacy*, 50 M.J. at 289.

We next consider whether the appellant's sentence was appropriate judged by "individualized consideration" of appellant "on the basis of the nature and seriousness of

the offense and the character of the accused." *See Snelling*, 14 M.J. at 268. After carefully reviewing the entire record of trial, we find the appellant's approved sentence, including the dishonorable discharge, appropriate.

Conclusion

The findings and the 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. at 41. Accordingly, the findings and the sentence are

AFFIRMED.

OFFICIAL

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