UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class TIMOTHY B. HELMS
United States Air Force

ACM S31923

19 December 2012

Sentence adjudged 18 February 2011 by SPCM convened at Ellsworth Air Force Base, South Dakota. Military Judge: Matthew D. Van Dalen.

Approved sentence: Bad-conduct discharge.

Appellate Counsel for the Appellant: Captain Ja Rai A. Williams.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Roberto Ramirez; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and CHERRY
Appellate Military Judges

PER CURIAM:

A special court-martial composed of officer members convicted the appellant, contrary to his pleas, of divers use of cocaine and use of heroin, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, and sentenced him to a bad-conduct discharge. The convening authority approved the sentence as adjudged. Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant argues that his counsel was ineffective, that his sentence is inappropriately severe, and that unlawful command influence dissuaded a potential sentencing witness from testifying.

Background

While home on leave in December 2010, the appellant bought and used both cocaine and heroin, which resulted in an overdose and a trip to the hospital emergency

room where a drug screen confirmed the presence of both drugs. Upon his return to Ellsworth, the appellant confessed to using both substances as well as using cocaine in June 2010. At trial, the Government offered the confession and corroborating evidence to include the hospital drug screen. In his unsworn statement in sentencing, the appellant told the court members, "I did what I did. It's the largest mistake I've ever made in my life." He waived submission of clemency matters, stating that he was fully satisfied with his counsel and the advice provided concerning the waiver.

Assistance of Counsel

The appellant now complains that his counsel was ineffective by: (1) failing to rebut expert testimony in sentencing that cocaine use could lead to addiction, (2) failing to offer testimony concerning error rates in hospital drug tests, (3) failing to prepare questions for his father's testimony in sentencing, (4) failing to request an instruction on voluntary intoxication as a defense, and (5) agreeing that the trial counsel could argue for a punitive discharge only if he "did not ask for more than nine months of confinement." We conclude that we can resolve this issue without additional factfinding. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). First, the cross-examination of the pharmacist in sentencing did, in fact, rebut his testimony concerning addiction by showing that the effects described depend on many individual factors that the pharmacist did not know. Second, the hospital drug screen was offered only to corroborate the appellant's confession; therefore, evidence of error rates in such tests would have minimal if any probative value. Third, defense counsel asked extensive questions of the appellant's father which show thorough preparation. Fourth, the appellant's confession shows that voluntary intoxication was not a viable defense because the appellant admitted to knowing exactly what he was doing. Fifth, trial counsel argued for a bad-conduct discharge and *10* months – an apparent violation of the supposed agreement alleged by the appellant. Examining the appellate filings and the record as a whole, we hold that the appellant was not denied effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984), *cited in United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010).

Concerning the alleged unlawful command influence, the appellant assumes that his "chain of command intimidated" a prospective sentencing witness because it "seemed suspicious" that the witness changed his mind about testifying. He also claims that the Government tried to prevent his father from testifying as a sentencing witness by refusing to pay travel expenses – an issue raised as a motion to compel which was denied by the military judge. Having considered the record with particular attention to the matters asserted by the appellant, we find that his speculation is insufficient to support the claim of unlawful command influence. *See United States v. Simpson*, 58 M.J. 368 (C.A.A.F. 2003) (When raised on appeal, the appellant must show sufficient facts to establish undue command influence and that it caused an unfair trial.). Finally, we do not find the

sentence inappropriately severe. *See United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982).

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 sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court

[*] We note that the overall delay of over 18 months between the time the case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (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. *See United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). 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. The post-trial record contains no evidence that the delay has had any negative impact on the appellant. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.