UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class TIMOTHY B. HELMS
United States Air Force

ACM S31963

09 January 2013

Sentence adjudged 1 June 2011 by SPCM convened at Ellsworth Air Force Base, South Dakota. Military Judge: Martin T. Mitchell.

Approved sentence: Bad-conduct discharge, confinement for 3 months, forfeiture of $978.00 pay for 3 months, and reduction to E-1.

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

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

At a special court-martial composed of officer members, the appellant pled guilty to two specifications of absence without leave, one specification of violating a lawful general order and one specification of wrongful distribution of “Spice,” in violation of Articles 86, 92 and 134, UCMJ, 10 U.S.C. §§ 886, 892, 934. After the military judge accepted his pleas and entered findings of guilty, the court sentenced him to a bad-conduct discharge, confinement for 3 months, hard labor without confinement for 3 months, forfeitures of $978 pay per month for 3 months, restriction to Ellsworth Air Force Base for 2 months, and reduction to the grade of E-1. The convening authority approved only so much of the sentence as provided for a bad-conduct discharge, confinement for 3 months, forfeitures of $978 pay per month for 3 months, and reduction

to the grade of E-1. On appeal, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant asserts: (1) unlawful command influence deprived him of due process of law; (2) the pretrial confinement review officer abused his discretion when he approved the appellant's continued pretrial confinement; and (3) his sentence to a punitive discharge is inappropriately severe, considering the circumstances and the disparate sentences of his co-actors. Finding no error that materially prejudices the appellant, we affirm.

Background

In February 2011, the appellant was court-martialed for the first time, receiving a bad-conduct discharge following a litigated trial where he was found guilty of divers use of cocaine and a single use of heroin. Shortly thereafter, while awaiting his discharge, the appellant elected to absent himself from his place of duty and failed to show up for work for almost two weeks. After he was contacted, he reported for work but then elected to leave his shift early without permission.

On several occasions during this time period, the appellant smoked the botanical/herbal incense known as "Spice," in violation of a lawful general order issued by the Commander, Air Combat Command. During some of these uses, the appellant would share the "Spice" with active duty friends, which he admitted was prejudicial to good order and discipline.

Unlawful Command Influence

The appellant has the initial burden of raising the issue of unlawful command influence. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999) (citing *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A. 1994)). At the appellate level, the appellant "must show (1) facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that unlawful command influence was the cause of the unfairness." *Id.* (citations omitted).

The appellant claims the unlawful command influence occurred when his "chain of command" instructed everyone in his squadron to not write character letters for him; prevented him from having contact with his attorney prior to his pre-trial confinement hearing, by sending him to a civilian jail in another city; and ordered Airmen from his squadron to attend his trial, thus allowing the prosecutor to argue to the panel they need to make an example of him. Having considered the entire record, we find the appellant's claims are without merit and fail to demonstrate that his court-martial proceedings were unfair.

Pretrial Confinement

After he left his duty station without authority for the second time, the appellant was placed in pretrial confinement on 22 March 2011, for approximately two weeks. Shortly after he was released, his unit learned he had been smoking "Spice." He was then returned to pretrial confinement, where he remained until his court-martial, eventually receiving 62 days of credit against his adjudged 90-day sentence. The appellant contends he was illegally put in pretrial confinement, because he was not a flight risk and it was not foreseeable that he would fail to appear for trial.

We review a military magistrate's ruling on the lawfulness of pretrial confinement for an abuse of discretion. *United States v. Gaither*, 41 M.J. 774, 778 (A.F. Ct. Crim. App. 1995). Pretrial confinement is governed by Rule for Courts-Martial 305(h)(2)(B), which requires that a commander have probable cause to believe that: "(i) An offense triable by a court-martial has been committed; (ii) The prisoner committed it; and (iii) Confinement is necessary because . . . [t]he prisoner will not appear at trial . . . or . . . will engage in serious criminal misconduct; and (iv) Less severe forms of restraint are inadequate." Having reviewed the materials considered by the pretrial confinement magistrate before the appellant was placed in pretrial confinement on both occasions, we find the magistrate did not abuse his discretion in finding that confinement to be appropriate and necessary under the applicable standards.

Sentence Appropriateness

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). In doing so, 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. Rangel*, 64 M.J. 678, 686 (A.F. Ct. Crim. App. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate, but 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).

Additionally, "[t]he Courts of Criminal Appeals 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)). Sentence comparison is generally inappropriate unless this Court finds that any cited cases are "closely related" to the appellant's case and the sentences are "highly disparate." *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*.

We do not find sentence comparison appropriate in this case. Furthermore, 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. We find that the approved sentence was clearly within the discretion of the convening authority, was appropriate in this case, and was not inappropriately severe.

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court