**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Airman Basic JAMES C. HENDERSON II**
**United States Air Force**

**ACM S31552**

**24 November 2009**

Sentence adjudged 05 September 2008 by SPCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: David S. Castro.

Approved sentence: Bad-conduct discharge and confinement for 123 days.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Michael A. Burnat, and Major Grover H. Baxley.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Major Kimani R. Eason, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges



PER CURIAM:

In accordance with the appellant's pleas, a military judge convicted him of one specification of divers wrongful use of cocaine, one specification of wrongful distribution of Tylenol 3 (Codeine-Acetaminophen), one specification of divers wrongful distribution of Percocet (Oxycodone-Acetaminophen), one specification of wrongful distribution of Vicodin (Hydrocodone-Acetaminophen), one specification of divers wrongful use of marijuana, one specification of divers wrongful introduction of cocaine onto a military installation, and one specification of willful dereliction of duty by improperly storing a firearm in his on-base dormitory room, in violation of Articles 112a and 92, UCMJ, 10 U.S.C. §§ 912a, 892.

A panel of officers sitting as a special court-martial sentenced the appellant to a bad-conduct discharge and 200 days of confinement. The convening authority approved the bad-conduct discharge and 123 days of confinement.[1] On appeal the appellant asks this Court to set aside his bad-conduct discharge or grant other appropriate relief. The basis for his request is that he opines, in light of his guilty plea, remorse, and assistance in on-base drug investigations, his sentence to a bad-conduct discharge is inappropriately severe.[2] He also asserts that his sentence to a bad-conduct discharge is inappropriately severe because a coactor, Airman JM, received less confinement than him. We disagree. Finding no prejudicial error, we affirm.

*Background*

On three occasions between September 2007 and November 2007, the appellant smoked marijuana. Two occasions occurred at a friend's on-base residence and the third occasion occurred while the appellant was on temporary duty at Nellis Air Force Base, Nevada. During this same period, the appellant was involved in a motorcycle accident and was prescribed Percocet and Vicodin for pain management. Staff Sergeant WD, a supervisor, bribed the appellant by giving him cash, time off, and expensive bags of dog food for Percocet, Vicodin, and Tylenol 3 pills.[3]

Between 15 February 2008 and 31 March 2008, the appellant and Airman JM purchased cocaine off base, brought the cocaine onto Davis-Monthan Air Force Base, Arizona, and used the cocaine in Airman JM's on-base dormitory room. On 29 April 2008, agents with the Air Force Office of Special Investigations (AFOSI) summoned the appellant to their office for an interview. After a proper rights advisement, the appellant waived his rights, agreed to answer questions, confessed to his crimes, and consented to a search of his on-base dormitory room. During the search of the appellant's dormitory room, AFOSI agents discovered a handgun belonging to the appellant.

*Inappropriately Severe Sentence*

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). 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 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,

[1] The appellant and the convening authority signed a pretrial agreement wherein the appellant agreed to plead guilty to the charges and specifications in return for the convening authority's promise not to approve confinement in excess of nine months.
[2] This issue is filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[3] The appellant did not have a prescription for Tylenol 3. The Tylenol 3 pills belonged to the appellant's ex-wife.

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, 287-88 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

With respect to the appellant's assertion that his sentence is more severe than Airman JM's, we note that 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 case and that the sentences are '*highly disparate*.' If the appellant meets that burden . . . then the [g]overnment must show that there is a rational basis for the disparity." *Id*. (emphasis added).

Without question, Airman JM was a coactor with the appellant. As such, Airman JM's case is "closely-related" to the appellant's case. However this does not end the inquiry. The fact that Airman JM's adjudged confinement was less than the appellant's adjudged confinement does not mean the sentences are highly disparate. The appellant acknowledges that both he and Airman JM received a bad-conduct discharge and the only acknowledged difference in the sentences is that he received 200 days of confinement while Airman JM received two months of confinement. The convening authority, in an act of clemency, reduced the appellant's confinement to 123 days. In short, while the appellant's approved sentence of confinement is approximately double Airman JM's sentence of confinement, the sentences, though disparate, are not highly disparate.

We next consider whether the appellant's sentence was appropriate judged by "individualized consideration" of the appellant "on the basis of the nature and seriousness of the offense[s] and the character of the [appellant]." *Snelling*, 14 M.J. at 268. While it is admirable that the appellant accepted responsibility for his misconduct by pleading guilty, expressing remorse, and working with military investigators, his acceptance of responsibility does not lessen the seriousness of his crimes. By his actions, he has seriously compromised his standing as a military member. The appellant's crimes are all the more aggravated by the fact that he committed the offenses, in part, on base and involved at least three other military members in his criminal enterprise.

Moreover, we note that this is not the appellant's first brush with the law. He received: non-judicial punishment for failing to comply with medical quarter's restriction; non-judicial punishment for sleeping on duty and for being absent without leave; a letter of reprimand for encouraging an individual to destroy the personal property of another; a letter of reprimand for improperly storing his firearm in the on-base residence of another; and a letter of counseling for being disrespectful to a non-commissioned officer. Put simply, his previous misconduct evinces a lack of

rehabilitative potential. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offenses of which he was found guilty, we do not find the appellant's sentence to a bad-conduct discharge 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 approved findings and sentence are

AFFIRMED.

OFFICIAL


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