UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class COREY D.S. HERNANDEZ
United States Air Force

ACM 37741

18 January 2013

Sentence adjudged 20 July 2010 by GCM convened at Offutt Air Force Base, Nebraska. Military Judge: Nancy J. Paul (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 5 years, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Major Michael S. Kerr; Captain Robert D. Stuart; and Captain Luke D. Wilson.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Captain Erika L. Sleger; 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:

A general court-martial composed of a military judge convicted the appellant, consistent with his pleas, of involuntary manslaughter and providing false information to a police officer, in violation of Articles 119 and 134, UCMJ, 10 U.S.C. §§ 919, 934.[1] The adjudged sentence consisted of a dishonorable discharge, confinement for 5 years,

[1] The appellant was also charged with murder by engaging in an inherently dangerous activity, aggravated assault with a loaded firearm, unlawfully concealing evidence, and negligent homicide, in violation of Articles 118, 128 and 134, UCMJ, 10 U.S.C. §§ 918, 928, 934. As part of the pretrial agreement, the Government withdrew these specifications and the military judge dismissed them with prejudice at the close of the court-martial.

and reduction to the grade of E-1. The convening authority approved the sentence as adjudged. On appeal, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant asserts that his sentence is inappropriately severe. Finding no error that materially prejudices the appellant, we affirm.

Background

On the night of 10 December 2009, after dinner and drinks at a local restaurant in Bellevue, Nebraska, the appellant and several Air Force friends, including Senior Airman (SrA) MAG, went to one of the Airmen's apartment to continue drinking. While there, SrA MAG showed off his personal handgun, aiming its laser sight at the walls and ceiling. He also aimed the gun at people's heads, asking if they trusted him and then pulling the trigger. The gun never went off and no one was upset by his behavior.

Several hours later, after going to SrA MAG's apartment with two other Airmen, the appellant saw SrA MAG load the gun clip with live ammunition and put the clip inside the gun. SrA MAG put the gun in front of the appellant and told him to pick it up. Doing so, the appellant aimed it at SrA MAG's head, from a distance of 2-3 feet away. When SrA MAG told the appellant to "pull it, pull it," the appellant squeezed the trigger, striking SrA MAG in the head and killing him instantly. Although the appellant did not know there was a bullet in the chamber and did not expect the gun to go off, he admitted at trial his behavior constituted culpable negligence and that he was guilty of involuntary manslaughter.

When civilian police officers arrived on the scene, they interviewed the appellant and the two other Airmen. The appellant lied, telling them SrA MAG had shot himself. After learning the truth from the other two Airmen, the police officers transported the appellant to the police station to be interviewed by a detective under rights advisement. Hoping the investigation would not go further, the appellant again lied and said SrA MAG had shot himself. When pressed by the detective, the appellant confessed to shooting SrA MAG. For this conduct, the appellant pled guilty to knowingly furnishing false and material information to a peace officer and admitted his conduct was both service discrediting and prejudicial to good order and discipline.

Sentence Appropriateness

The appellant asserts that his punishment to a dishonorable discharge and five years of confinement is inappropriate since the death of SrA MAG was a tragic accident enabled by his own reckless behavior. He contends his sentence should either be three years of confinement with a dishonorable discharge, or five years of confinement with a bad-conduct discharge.

In reviewing sentence appropriateness, 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). Applying these standards to the present case we do not find a dishonorable discharge and five years confinement inappropriately severe for the appellant's involvement in the death of SrA MAG and the appellant's lies to law enforcement.

Conclusion

The findings and sentence are correct in law and fact, [2] and no error prejudicial to the substantial rights of the appellant occurred.[3] Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

[2] The Court notes what appears to be an administrative error in the court-martial order (CMO), dated 12 September 2010, in that it incorrectly reflects two specifications to Additional Charge II; in fact, Additional Charge II only carries one specification and what is listed as "Specification 2" of Charge II should be reflected as the Specification of Additional Charge III. The Court orders a corrected CMO.

[3] Although not raised by the appellant, we note the overall delay of more than 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." *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 it 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 and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review was harmless beyond a reasonable doubt and that relief is not otherwise warranted. *United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court