UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman SCOTT H. HINOJOSA
United States Air Force

ACM S31290

15 January 2009

Sentence adjudged 16 February 2007 by SPCM convened at Patrick Air Force Base, Florida. Military Judge: Bruce S. Ambrose (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Captain Vicki A. Belleau, and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain Naomi N. Porterfield.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

PER CURIAM:

Consistent with the appellant's pleas, a military judge sitting as a special court-martial convicted him of wrongful use of methamphetamine and wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a.

The convening authority approved a sentence consisting of a bad-conduct discharge, confinement for four months, and reduction to E-1.[1] The appellant asserts that

[1] The military judge imposed a sentence of a bad-conduct discharge, confinement for four months, forfeiture of two-thirds pay and allowances for four months, and reduction to E-1. In response to the appellant's clemency matters

his sentence is inappropriately severe. Though not raised by the appellant, the Court also examined whether he is entitled to relief because of appellate processing delays. Finding no error, we affirm.

Background

The appellant was a security forces member assigned to Patrick Air Force Base, Florida. On 31 October 2006, the appellant used cocaine. Not long after this cocaine use, a local police officer saw the appellant's truck parked in the parking lot of an off-base hotel. The appellant was off-duty at the time and was waiting for a friend to return to his vehicle. When the officer approached, the appellant consented to a search of his vehicle. The officer found a pushrod in the vehicle, which was known by the officer to be used to pack crack cocaine into a pipe. The field test on the pushrod tested positive for cocaine. The appellant was released, but later that morning he was interviewed by a security forces investigator. After a rights advisement, the appellant consented to a urinalysis test. While giving the sample, the appellant stated to the investigator, "For both of our sakes, I hope it comes back clean." The test would later come back positive for cocaine. While at an off-base club less than one week later, the appellant was given a pill by a friend to help him with his depression. Despite being told the pill was ecstasy, which the appellant knew to be illegal, he consumed it. Later that evening, he told a fellow security forces member that he was worried about the pending urinalysis results because he had been told that cocaine stays in one's system for seventy-two hours. He also stated that he had used ecstasy earlier that evening. The appellant also told a civilian base security guard that he used cocaine in the last three days and hoped the test would come back clean. A search authorization was obtained, and the appellant was ordered to provide another urinalysis sample. The second urinalysis test came back positive for methamphetamine. The appellant later learned that the pill he consumed at the off-base club, which he thought was ecstasy, was actually methamphetamine.

Inappropriately Severe Sentence

The appellant asserts the approved sentence of four months confinement, reduction to E-1, and a bad conduct discharge is inappropriately severe given the circumstances surrounding the offenses and mitigating factors.[2] During sentencing and in

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and noting the error in announcing the sentence in a proper format for a special court-martial, the staff judge advocate recommended the convening authority not approve the adjudged forfeitures.

[2] The appellant outlined a number of complaints he had with his initial post-trial confinement at a local civilian confinement facility prior to his transfer to a military confinement facility. We note the appellant does not allege a violation of Article 55, UCMJ, 10 U.S.C. § 855, or the Eighth Amendment to the Constitution, U.S. CONST. amend. VIII, in his brief or his submissions before this Court. Concluding that the facts do not raise even a prima facie claim of cruel and unusual punishment, we do not address this issue. To prove an Eighth Amendment violation, the appellant must show "(1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [the appellant's] health and safety; and (3) that he 'has exhausted the prisoner-grievance system . . . and that he has petitioned for relief

his presentation of clemency matters for consideration by the convening authority, the appellant pointed out that he was only nineteen at the time of the offenses and made mistakes. He was under great stress after learning his mother had a disease which he thought was terminal. He became depressed and used the drugs. In addition to depression, the appellant cited other disorders he had been diagnosed with suffering. The appellant's family presented a number of letters of support noting what a good young man he was and asking for understanding and mercy. Prior to his court-martial, the appellant agreed to speak to other young airmen about his experiences and regrets. He told the convening authority he learned from his confinement and asked for mercy. After reviewing his clemency matters, the convening authority agreed not to impose forfeitures, but approved the remainder of the sentence as adjudged. On appeal, the appellant points out the difficulties he is experiencing after his release from confinement. He asks this Court to disapprove the bad-conduct discharge.

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. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). We have a great deal of discretion in determining whether a particular sentence is appropriate, but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *Healy*, 26 M.J. at 395-96.

The appellant used cocaine, and subsequently used methamphetamine. In fact, his second use of drugs occurred less than one week after the initiation of an investigation for his use of cocaine. The appellant's misconduct was serious and inexcusable. After careful review of the record of trial, all the facts and circumstances surrounding the offenses of which the appellant was found guilty, and the appellant's post-trial submissions, including the appellant's declaration submitted on appeal, we conclude the appellant's sentence is not inappropriately severe.

Unreasonable Post-Trial Delay

In this case, the overall delay of 626 days 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

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under Article 138, UCMJ, 10 U.S.C. § 938 . . . .'" *United States v. Lovett,* 63 M.J. 211, 215 (C.A.A.F. 2006) (footnotes and citations omitted).

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 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.

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 and that no relief is warranted.

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