UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CHRISTOPHER R. HOWARD
United States Air Force

ACM S31662

15 August 2011

Sentence adjudged 23 April 2009 by SPCM convened at Sheppard Air Force Base, Texas. Military Judge: Gary M. Jackson.

Approved sentence: Bad-conduct discharge, confinement for 2 months, forfeiture of $933.00 pay per month for 2 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; Major Shannon A. Bennett; Major Reggie D. Yager; and Major David P. Bennett.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Jeremy S. Weber; Major Deanna Daly; Major Coretta E. Gray; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

PER CURIAM:

A special court-martial composed of officer members convicted the appellant in accordance with his pleas of one specification of divers use of cocaine in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The court sentenced him to a bad-conduct discharge, confinement for 2 months, forfeiture of $933.00 per month for 2 months, and reduction to the grade of E-1. The convening authority approved the sentence adjudged. The appellant assigns two errors: (1) whether the military judge abused his discretion by permitting trial counsel to reference administrative discharge in his sentencing argument

and (2) whether a punitive discharge is inappropriately severe based on sentence comparison.

Background

The appellant admitted during the plea inquiry that he used cocaine three times: twice with fellow Airmen at an off-base dance club on 28 November 2008 and once more the next weekend at a different club. He told the military judge that, on 28 November, he and three other Airmen (JL, PH, and WF) were at Club Inferno where they used cocaine provided by JL in the women's bathroom (JL is female). About an hour later, they snorted more. The next weekend, on 5 December, the appellant was at Club Rendezvous with the same group plus two other Airmen (RV and DO) when he again used cocaine which was provided this time by PH in the men's restroom. The government called DO to testify that the appellant used cocaine three times during the charged time frame on 5 December rather than once as admitted during the plea inquiry: twice in the bathroom separated by about 45 minutes and a third time in DO's car. A urine specimen provided by the appellant during a unit sweep on 6 December tested positive for cocaine.

Sentencing Argument and Administrative Discharge

The appellant argues that the military judge abused his discretion by permitting trial counsel to refer to administrative discharge during sentencing argument. Our standard of review for improper argument is "whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). We find that the argument was neither erroneous nor prejudicial to the substantial rights of the appellant.

The appellant first raised the possibility of administrative discharge in his unsworn statement:

> I understand that if I am not given a Bad Conduct Discharge as a form of punishment, my commander will discharge me using his administrative tools as a commander with the characterization of a General Discharge Under Other Than Honorable Conditions.

During argument on sentence, the trial counsel referred to this statement: "The first thing I want to impress upon you is [the appellant] discussed the possibility of his commander separating him for this misconduct. And the commander—." The sentence was cut short by defense objection which was overruled by the military judge. Trial counsel continued:

> You heard instructions that *that's not for your consideration*. The consideration for you right now is whether a punitive discharge is

> appropriate in this case and the government believes that it is for the following reasons . . . .

(emphasis added). He did not again mention administrative discharge.

The military judge properly instructed the members on punitive separation, informing them that a punitive discharge is a "severe punishment" that denies one "the advantages which are enjoyed by one whose discharge characterization indicates that he has served honorably." *See United States v. Greszler*, 56 M.J. 745 (A.F. Ct. Crim. App. 2002). Concerning the appellant's reference to administrative discharge in his unsworn statement, the military judge instructed the members that they should focus on an appropriate sentence and "not try to anticipate discretionary action, such as a potential administrative discharge that may be taken by [the appellant's] chain of command or other authorities." *See United States v. Friedmann*, 53 M.J. 800 (A.F. Ct. Crim. App. 2000). He further advised that any sentences recommended by counsel during argument were only their individual recommendations and nothing more.

Relying on *United States v. Briggs*, 69 M.J. 648 (A.F. Ct. Crim. App. 2010), *pet. denied* 69 M.J. 177 (C.A.A.F. 2010), the appellant argues that the military judge should not have permitted trial counsel to argue administrative discharge characterizations. In *Briggs*, we held that the military judge did not abuse his discretion by preventing trial defense counsel from arguing administrative discharge alternatives to a punitive discharge because such argument is on a collateral matter that "blurs the distinction between a punitive discharge and an administrative discharge." *Id.* at 651. Here, rather than attempt to argue the relative merits of an administrative discharge, trial counsel simply stated that administrative discharge was not for their consideration.

In his sentencing argument, trial counsel properly characterized a bad-conduct discharge as a "severe punishment." In support of his recommendation for a punitive discharge he focused on the character of the offense and the offender, and, in line with the military judge's instructions, argued that a punitive discharge would appropriately deprive the appellant of the benefits reserved for those who have served honorably. Viewed in the context of the entire trial, we see nothing erroneous in this argument. *Baer*, 53 M.J. at 238 (sentencing argument must be viewed in context).

Sentence Appropriateness

The appellant argues that his adjudged bad-conduct discharge is inappropriate based on sentence comparison. In support of his argument he submits by separate motion the special court-martial orders showing the sentences of four other Airmen involved in cocaine use with him. Two of the Airmen, PH and JL, pled guilty to divers distribution and use of cocaine and each received a bad-conduct discharge and confinement for three months. A third Airman, RV, pled guilty to divers use of cocaine and received a bad-

conduct discharge but no confinement. The fourth Airman, WF, pled guilty to a single use of cocaine and received confinement but no bad-conduct discharge. Concerning the sentences of PH and JL, who both distributed and used cocaine, the appellant argues that his sentence should be less because he did not distribute. The appellant asserts that his sentence should be commensurate with that of RV who received a bad-conduct discharge but no confinement for essentially the same charge as the appellant's. He asks that we reassess his sentence and not approve the bad-conduct discharge.

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). 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, 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, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

Sentence comparison is required only in closely related cases. *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006) (citing *United States v. Wacha*, 55 M.J. 266, 267-68 (C.A.A.F. 2001)), *aff'd in part*, 66 M.J. 291 (C.A.A.F. 2008). Closely related cases include, for example, 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 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*. (emphasis added). The test for whether sentences are highly disparate involves comparison of not only the raw numerical values of the sentences in the closely related cases but also consideration of any disparity in relation to the potential maximum. *Lacy*, 50 M.J. at 289. Some sentence disparity in closely related cases does not alone invalidate an otherwise legal sentence "provided each military accused is sentenced as an individual." *United States v. Durant*, 55 M.J. 258, 261 (C.A.A.F. 2001).

Based on the facts related by the appellant at trial, we will treat the cases of the appellant's co-actors in cocaine abuse as closely related. We do not, however, find the sentences highly disparate. Here, as in *Lacy*, a difference of a few months between the adjudged confinement is not highly disparate. Each faced the jurisdictional maximum of a special court-martial which included a bad-conduct discharge and confinement for 12 months. The two Airmen who distributed cocaine received one month more confinement than the appellant, but, more on point to the appellant's requested remedy,

all four who were charged with divers use of cocaine received a punitive discharge. The sentences are not highly disparate.

We next consider whether the appellant's sentence was appropriate as judged by "individualized consideration" of the appellant "on the basis of the nature and seriousness of the offense[s] and the character of the offender." *Snelling*, 14 M.J. at 268 (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.A.A.F. 1959)). After carefully examining the submissions of counsel, the appellant's military record, and all the facts and circumstances surrounding the offenses of which he was found guilty, we do not find that the appellant's approved sentence is inappropriately severe for repeated wrongful use of cocaine with other Airmen.

Appellate Delay

We note that the overall delay of 23 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. Having considered the totality of the circumstances and the entire record,[1] we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.

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).

[1] We note that the appellant's counsel requested and received eight requests for delay, extending the time for filing an assignment of errors 424 days from the date the record was received by the appellant's counsel. The appellant concurred in the requested delay.

Accordingly, the approved findings and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court