UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JAREESE V. JONES
United States Air Force

ACM 36596

25 January 2008

Sentence adjudged 10 November 2005 by GCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: Nancy J. Paul.

Approved sentence: Dishonorable discharge, confinement for 1 year and 6 months, $3000 fine, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain John S. Fredland.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, Major Matthew S. Ward and Captain Ryan N. Hoback.

Before

SCHOLZ, JACOBSON, and THOMPSON
Appellate Military Judges

PER CURIAM:

The appellant was convicted, contrary to his pleas, of one specification of attempting to wrongfully possess 15 kilograms of cocaine with the intent to distribute, and conspiracy to wrongfully possess cocaine with the intent to distribute, in violation of Article 80 and Article 81, UCMJ, 10 U.S.C. §§ 880, 881. A panel of officer members sentenced the appellant to a dishonorable discharge, confinement for 1 year and 6 months, a fine of $3000.00, total forfeitures, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged, except for the forfeitures, credited the appellant with 10 days illegal pretrial punishment, and deferred and waived forfeitures for the benefit of the appellant's dependant child.

The appellant assigns two errors on appeal. First, asserts the military judge erred by failing to instruct the members on the defense of entrapment. Second, he asserts that the inclusion of a dishonorable discharge in his sentence renders the sentence inappropriately severe. We find both assertions of error to be without merit and affirm his conviction and sentence.

Background

The appellant was convicted for his involvement in "Operation Desert Blue," an Air Force Office of Special Investigations (AFOSI) reverse undercover drug-smuggling sting that followed a similar Federal Bureau of Investigations (FBI) operation called "Operation Lively Green." The purpose of "Lively Green" was to uncover corruption by public figures. The scope of the investigation included public officials, law enforcement agents, and military members. Ultimately the investigation identified 101 indictable subjects involved in drug trafficking, federal bribery, extortion, and other federal offenses. The investigation revolved around a fake drug cartel transporting cocaine from Tucson, Arizona to Phoenix, Arizona. A "confidential cooperating witness" (hereinafter confidential witness) met with various service members who expressed interest in helping the "cartel" transport the cocaine. SSgt AH, a member of the appellant's squadron, was recruited by the confidential witness through offers of financial gain. At no time was SSgt AH a government agent. The appellant joined the operation after SSgt AH recruited him. SSgt AH's primary point of contact had been the confidential witness.

On 20 May 2004, the appellant, along with SSgt AH and another military member who had also been recruited by SSgt AH, met with the confidential witness in Tucson, Arizona and took possession of what the confidential witness indicated was cocaine.* The appellant transported the fake cocaine, while wearing his Air Force battle dress uniform, from Tucson to a hotel in Phoenix, Arizona. After they arrived at the hotel, the appellant was debriefed by members of the "drug cartel" -- actually the confidential witness and an undercover AFOSI operative. During this debrief, the appellant was paid $3000.00 for transporting the cocaine.

Discussion

I. Entrapment

We review a military judge's refusal to give a defense-requested instruction for an abuse of discretion. *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996). We further recognize that a military judge has substantial discretionary power in determining which instructions to give. *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993). In assessing whether a court properly exercised its discretion, a reviewing court

* The "cocaine" was actually imitation cocaine.

must examine the instructions as a whole "to determine if they sufficiently cover the issues in the case and focus on the facts presented by the evidence." *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002). The issue of whether the military judge gave the members proper instruction is a question of law, which this court reviews de novo. *Id.*

Rule for Courts-Martial (R.C.M.) 916(g) states that a defense of entrapment is one where "the criminal design or suggestion to commit the offense originated in the Government and the accused had no predisposition to commit the offense." The defense of entrapment does not apply when a private third party, not the originating government agent, induced the appellant into committing the offense. *United States v. Hairston*, 45 C.M.R. 552, 556 (A.F.C.M.R. 1972).

We find the military judge did not abuse her discretion when she chose not to grant the defense-requested instruction on entrapment. The facts presented by the evidence did not support an entrapment defense. The appellant was induced to participate in the illegal operation by a private third party, SSgt AH. The record clearly shows SSgt AH was not a government actor, and had not himself been entrapped into working for the "drug cartel." Furthermore, the evidence at trial demonstrated the appellant did not meet the second prong of R.C.M. 916(g), as there was sufficient evidence to indicate he was predisposed to committing the offenses. This evidence included recorded conversations where the appellant indicated he transported cocaine before he was in the military.

II. Sentence Appropriateness

This Court may affirm only such findings and sentence as we find correct in law and in fact, and determine, on the basis of the entire record, should be approved. Article 66(c), UCMJ, 10 U.S.C. § 866(c). When considering sentence appropriateness, we should give "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

Our duty to assess the appropriateness of a sentence is "highly discretionary," but does not authorize us to engage in an exercise 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 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 (citing *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). There is no basis for sentence comparison in this case.

Taking into account all the facts and circumstances, we do not find the appellant's sentence inappropriately severe. *See Snelling*, 14 M.J. at 268-69. After reviewing the entire record, we find the sentence is appropriate for this offender and his offenses. *United States v. Baier,* 60 M.J. 382, 383-84 (C.A.A.F. 2005); *Healy*, 26 M.J. at 395.

Conclusion

The 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, GS-11, DAF
Clerk of the Court