UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic KENNETH T. JONES
United States Air Force

ACM 37756

23 March 2012

Sentence adjudged 18 August 2010 by GCM convened at Francis E. Warren Air Force Base, Wyoming. Military Judge: Scott E. Harding.

Approved sentence: Bad-conduct discharge, confinement for 3 years, and forfeiture of all pay and allowances.

Appellate Counsel for the Appellant: Major Michael S. Kerr and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Captain Adam D. Bentz, and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

PER CURIAM:

Consistent with the appellant's plea, a military judge found the appellant guilty of wrongful use of methamphetamine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A panel of officer members sentenced the appellant to a dishonorable discharge, confinement for 3 years, and forfeiture of all pay and allowances. The convening authority reduced the punitive discharge to a bad-conduct discharge, and approved the remainder of the sentence as adjudged. On appeal, the appellant argues that the sentence was inappropriately severe for a single use of methamphetamine by a retirement-eligible Airman Basic (AB) with a prior conviction for methamphetamine use. The appellant asks this Court to reduce the confinement period to 12 months and affirm the remainder

of the convening authority's approved sentence. Having considered all the facts and circumstances in this particular case, we agree that a shorter period of confinement is sufficient to serve the interests of justice and grant partial relief.

Background

In January 2009, as a Staff Sergeant with over 19 years of service, the appellant was tried by general court-martial and convicted of three separate uses of methamphetamine, in violation of Article 112a, UCMJ. At that time, a panel of officer members sentenced the appellant to confinement for 24 months and a reduction to the grade of E-1. As an exercise of clemency, the convening authority reduced the period of confinement from 24 months to 12 months and approved the remainder of the sentence. As a result, the appellant was released from confinement in mid-October 2009.

Approximately four months after his release from confinement, the appellant was ordered to provide a urine sample for drug testing as part of a unit inspection. Later, the appellant learned that his sample tested positive for methamphetamine. In August 2010, the appellant pled guilty to a single use of methamphetamine and elected to have a panel of officer members decide his sentence. With his informed consent, trial defense counsel asked the members to adjudge a bad-conduct discharge in lieu of confinement.

Sentence Appropriateness

The appellant contends that his approved sentence, which includes a bad-conduct discharge and confinement for three years, is inappropriately severe. We agree. This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384-85 (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) (citing *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)); *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). 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).

In *Jackson v. Taylor*, 353 U.S. 569, 576-77 (1957), the Supreme Court considered the text of Article 66, UCMJ, and its legislative history, and concluded it gave the courts of criminal appeals the power to review not only the legality of a sentence but also its appropriateness. Our superior court has likewise concluded that the courts of criminal appeals have the power to, "in the interests of justice, substantially lessen the rigor of a

legal sentence." *United States v. Lanford*, 20 C.M.R. 87, 94 (C.M.A. 1955); *see also United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002).

In the instant case, the appellant's guilty plea was provident and the approved sentence was within the maximum permissible. Nevertheless, the appellant argues that "[g]iven the approved punitive discharge's increased impact due to appellant's retirement eligibility, there is no justification for nearly trebling the length of confinement typically meted out for one specification of methamphetamine use." He believes that one year of confinement and the bad-conduct discharge would be a fair sentence. Although the appellant acknowledges that his status as a repeat offender is an aggravating factor, the record of trial reasonably raises additional aggravating facts we considered in coming to an appropriate sentence.

When analyzing the seriousness of the offense, it is significant that the appellant is not only a repeat offender, but one who used the exact same substance within a few short months after his release from a one-year sentence to confinement. His subsequent use was uncovered through the Air Force drug testing policy, after he received a chance to seek retirement and a 50% reduction to his previous sentence to confinement. Therefore, we are already armed with the knowledge that one year of confinement is an insufficient deterrent for this particular offender. Furthermore, the timing and repetitious nature of this offense, coupled with the appellant's age and apparent lack of personal responsibility, make this a uniquely serious offense. However, after reviewing the entire record, the character of the offender, and the nature and seriousness of the offense, we find that the facts and circumstances of this case do not warrant a sentence that includes confinement for three years.

Accordingly, based on the authority granted above, we approve only so much of the sentence as includes a bad-conduct discharge, confinement for two years and forfeiture of all pay and allowances.

Conclusion

The approved findings and sentence, as modified, 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, as modified, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court