UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class BRIAN C. KATES
United States Air Force

ACM S32018

10 July 2013

Sentence adjudged 14 December 2011 by SPCM convened at Malmstrom Air Force Base, Montana. Military Judge: Natalie D. Richardson (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 100 days, forfeiture of $978.00 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Scott W. Medlyn.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Rhea A. Lagano; Captain Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and SOYBEL
Appellate Military Judges

PER CURIAM:

The appellant was charged with two specifications of failure to obey a lawful order, one specification of dereliction of duty, one specification for divers wrongful uses of marijuana, and one specification for divers wrongful distributions of marijuana, in violation of under Articles 92 and 112a, UCMJ, 10 U.S.C. §§ 892, 912a. Consistent with his pleas, he was found guilty of one specification of failure to obey a lawful order by using "spice" on divers occasions, one specification of divers uses of marijuana, and not

guilty of one specification of entering an off-limits establishment.[1] Contrary to his pleas, he was found guilty, by exceptions and substitutions, of a single distribution of marijuana. He was sentenced to a bad-conduct discharge, confinement for 100 days, forfeiture of $978.00 pay per month for 3 months, and reduction to the grade of E-1.

On appeal, the appellant avers that the finding of guilty to a single distribution of marijuana should be dismissed because it is vague and ambiguous; the same conviction was legally and factually insufficient; the sentence, which included a bad-conduct discharge, was overly severe in light of his co-conspirators' sentences; and he should have received credit against his sentence for pre-trial punishment in the form of restriction to base.[2] We disagree, and affirm.

Findings; Legal and Factual Sufficiency

We will consider the first two issues together because they involve the same specification. Specification 2 of the Additional Charge originally alleged that the appellant "on divers occasions between . . . 1 February 2011 and . . . 1 August 2011, wrongfully distribute[d] some amount of marijuana."

To prove the distribution, the Government called Airman Basic (AB) VL who testified that he and the appellant smoked marijuana with other people and that he saw the appellant pass the marijuana to other people. He was not more specific about the appellant's passing of the marijuana. AB VL also testified that the appellant would sometimes provide marijuana and sometimes chip in money to cover the cost of its purchase. It appeared that in all of these times the marijuana was shared among a group of people. However, AB VL also said he had no specific memory of the appellant passing it to him. The military judge asked AB VL more specifically about the times the appellant provided the marijuana. AB VL told the judge of a time that AB VL had given the appellant some marijuana and, a few days later, the appellant came back to AB VL's house with some marijuana to pay him back and they smoked it together.

When the military judge announced her findings on the specification, she found the appellant not guilty of divers distributions by excepting the words "on divers occasions" and substituting the words "to Airman Basic [VL]." After this announcement, the trial counsel asked the judge to repeat the substituted words, which she did, and added "[b]asically, I found beyond a reasonable doubt a single distribution and that distribution was to [AB VL]." Finally, the judge said she could not discern a more specific date than the "date frame" charged and she could not find him guilty of distributing to "any of the other people who were involved." After sentencing and just before the court closed, the trial counsel once again asked the judge about her findings

[1] The remaining specification under Article 92, UCMJ, 10 U.S.C. § 892, was withdrawn and dismissed with prejudice.
[2] All but the first issue were submitted pursuant to *United States v. Grostefon* 12 M.J. 431 (C.M.A. 1982).

regarding the distribution specification and asked whether she wanted to be more specific regarding the time period in her substituted words for that finding of guilty. The judge said no evidence was given that would narrow down the time any more precisely than that already given in the specification.

In *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003), our superior court reversed for ambiguity our affirmation of the panel members' finding of guilty, by exceptions and substitutions, of a single drug use when Walters was originally charged with divers uses. The evidence at trial established several possible occasions Walters could have used the drug. However, in finding him guilty of a single use, the *Walters* panel did not identify the specific occasion of drug use for which they found him guilty. The *Walters* Court found that we should have applied our holding in *United States v. King*, 50 M.J. 686 (A.F. Ct. Crim. App. 1999) (en banc),[3] rather than the common law rule espoused in *United States v. Vidal*, 23 M.J. 319 (C.M.A. 1987).

Vidal involved a single specification of rape, where the Government offered proof of guilt under two theories of liability, and the guilty finding did not identify on which theory it was based. Our superior court saw no illegality with that conviction because the specific instance of rape was known and the theory supporting the conviction was immaterial.

King is more similar to *Walters* because King was also charged with divers wrongful acts but was found guilty, by exceptions and substitutions, of a single act. As in *Walters*, the conviction in *King* was overturned as ambiguous because it could not be determined "what conduct the accused had been found guilty of and what conduct he had been acquitted of." *Walters*, 58 M.J. at 395. Our superior court noted that such ambiguity "precluded any proper exercise of [] appellate review authority under Article 66(c)," UCMJ, 10 U.S.C. § 866(c), and that:

> [I]n conducting its factual sufficiency review the Court of Criminal Appeals cannot find the Appellant guilty of any of the allegations of use of which the members found him not guilty. The Court of Criminal Appeals is required to weigh the evidence and be themselves convinced beyond a reasonable doubt of Appellant's guilt of engaging in wrongful use on the same "one occasion" that served as the basis for the members' guilty finding. Without knowing which incident that Appellant had been found guilty of and which incidents he was found not guilty of, that task is impossible.

[3] We previously overruled *United States v. King*, 50 M.J. 686 (A.F. Ct. Crim. App. 1999) (en banc), in *United States v. Walters*, 57 M.J. 554 (A.F. Ct. Crim. App. 2002) (en banc), *rev'd*, 58 M.J. 391 (C.A.A.F. 2003). However, because *King* comports with our superior court's view on ambiguous findings, it is once again valid guidance.

Walters, 58 M.J. at 396 (citing *United States v. Smith*, 39 M.J. 448 (C.M.A. 1994)). *See also United States v. Seider*, 60 M.J. 36, (C.A.A.F. 2004). Additionally, the Court found that this situation presented a double jeopardy issue. *Walters*, 58 M.J. at 397.

The problems identified in *Walters* and *King* are not present in this case. We are easily able to identify the conduct for which the appellant was found guilty. AB VL said he had no specific memory of the appellant passing the drug to him when he smoked marijuana in a group setting. When pressed further by the judge, he told her of a time the appellant came to his house to pay him back with marijuana for some marijuana AB VL had given the appellant a few days earlier. The judge made it clear this was the only instance of distribution involving AB VL for which there was evidence. She could not identify a more specific time frame other than that alleged in the specification, but she certainly identified the specific instance of misconduct and her findings reflect that instance. There was no ambiguity and no double jeopardy issue created by her findings.

Under Article 66(c), UCMJ, we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Testing for legal sufficiency, considering the evidence produced at trial in the light most favorable to the prosecution, we find that a reasonable fact finder could have found all the essential elements beyond a reasonable doubt. *United States v. Humphreys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987) (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979))); *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

Further, after weighing the evidence admitted at trial and exposed to the crucible of cross-examination, making allowances for not having personally observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt, and therefore find the evidence factually sufficient to support the finding of guilt. Article 66(c), UCMJ; *Turner*, 25 M.J. at 325; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

Sentence Severity

The appellant argues that his sentence is inappropriately severe when compared to the sentences his co-actors received. He asserts they all had convictions for similar offenses but his sentence was comparatively more severe. We disagree.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (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. 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. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). 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); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

Additionally, the Courts of Criminal Appeals are "required to engage in sentence comparison only 'in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.'" *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). 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." *Id*. Closely related cases include 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. An appellant bears the burden of showing that any cited cases are "closely related" to his or her case and that the sentences are "highly disparate." *Id*. If the appellant meets that burden, then the government must show that there is a "rational basis for the disparity." *Id*.

Applying these standards, we decline the appellant's invitation to engage in sentence comparison. The appellant has not shown how this would be appropriate. Although he used drugs with others who were also court-martialed, the charges in each case were not the same. Only the appellant and one other of the four cases had distribution specifications. These were the only two accused who received bad-conduct discharges. Even though the other individual received no forfeitures of pay, he received more confinement than the appellant. Additionally, his charges and the appellant's were not identical. Furthermore, the appellant had one performance report which was a referral report, two letters of reprimand, and three counselings. He presented no sentencing evidence for the other cases.

We next consider whether the appellant's sentence was appropriate when given "individualized consideration" and judged by the nature and seriousness of his offenses, his record of service, and all other matters contained in the record of trial. In our view, the appellant's actions are a clear departure from the expected standards of conduct in the military and his sentence was appropriate. The appellant sought clemency from the convening authority. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offenses for which he was found guilty, we do not find the appellant's

sentence inappropriately severe. We find that the approved sentence was clearly within the discretion of the convening authority and was appropriate in this case.

Sentence Credit

Finally, the appellant seeks confinement credit under Article 13, UCMJ, 10 U.S.C. § 813, for pretrial punishment because he was confined to base for seven to ten days by his first sergeant. This allegedly occurred just after the appellant's interview with investigators from the Air Force Office of Special Investigations was concluded. The first sergeant testified that he did not restrict the appellant to base and had merely advised the appellant to "keep a low profile to include probably staying on base."

Whether an appellant is entitled to confinement credit for illegal pretrial punishment is a mixed question of fact and law. *United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000); *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997); *see Thompson v. Keohane*, 516 U.S. 99 (1995). The burden is on the appellant to establish entitlement to additional sentence credit because of a violation of Article 13, UCMJ. *United States v. Mosby*, 56 M.J. 309 (C.A.A.F. 2002). Here, the military judge believed the first sergeant's testimony and found no restriction had been ordered. We have no reason to overturn her findings of fact. *Id*. Accordingly, we find no credit under Article 13, UCMJ, to be appropriate in this case.

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.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court