UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic WILLIAM R. MARTIN
United States Air Force

ACM 35599

19 September 2005

Sentence adjudged 19 March 2003 by GCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: Steven B. Thompson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 9 years, forfeiture of all pay and allowances.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Natasha V. Wrobel, and Major Andrea M. Gormel.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Michael J. Cianci, Jr., and Lieutenant Colonel Robert V. Combs.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

STONE, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, in accordance with his pleas, of absence without leave, three assaults, and breaking restriction, in violation of Articles 85, 128, and 134, UCMJ, 10 U.S.C. §§ 885, 928, 934. The appellant also pled guilty to three drug offenses, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. His sentence included a dishonorable discharge, confinement for 9 years, and forfeiture of all pay and allowances. The convening authority approved the sentence as adjudged.

On appeal, the appellant raises two issues for our consideration. First, he claims that two of the three drug specifications constitute an unreasonable multiplication of charges. Second, he argues that his sentence is inappropriately severe. Finding no merit to either issue, we affirm.

Unreasonable Multiplication of Charges

The appellant challenges two of his drug convictions, claiming they are "substantially one transaction" and thus constitute an unreasonable multiplication of charges. *See* Rule for Courts-Martial 307(c)(4), Discussion. One specification alleges wrongful distribution of cocaine on divers occasions between 1 April and 21 July 2002 at or near Tuscon, Arizona. The other alleges wrongful introduction of cocaine between 5 June and 21 July 2002 onto Davis-Monthan Air Force Base, Arizona, with the intent to distribute. In support of this argument he focuses on the statements he made during the providency inquiry, noting that he provided virtually the same factual circumstances to support both specifications.

The equitable doctrine of unreasonable multiplication of charges is intended to control prosecutorial overreaching. In *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004), our superior court endorsed the following nonexclusive factors for determining whether the government has unreasonably multiplied charges:

> (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?
>
> (2) Is each charge and specification aimed at distinctly separate criminal acts?
>
> (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?
>
> (4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure?
>
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

Id. See also United States v. Quiroz, 55 M.J. 334, 338-39 (C.A.A.F. 2001).

The appellant pled unconditionally guilty to these specifications, and raises the issue for the first time on appeal. In the past, we have held that when an appellant did not object to multiple charges at trial, we will apply waiver. *United States v. Butcher*, 53 M.J. 711, 714 (A.F. Ct. Crim. App. 2000), *aff'd*, 56 M.J. 87 (C.A.A.F. 2001). *See also*

Quiroz, 55 M.J. at 338 (concluding that the courts of criminal appeals have the authority to determine under what circumstances they will apply waiver or forfeiture to cases involving an unreasonable multiplication of charges). We conclude we do not have to determine whether to apply waiver in this case because the appellant is not entitled to relief in any event.

The appellant's focus on the statements he made during the providency inquiry is misplaced. As an equitable doctrine, the focus is on the "reasonableness" of the prosecutorial decision. We have carefully considered the five *Pauling* factors, and find the appellant has failed to establish any of them. The appellant distributed cocaine on a regular basis at both his on-base dormitory room and his off-base apartment. We conclude the appellant could fairly and reasonably be held accountable for more than one offense for his conduct and hold that the appellant was not subjected to an unreasonable multiplication of charges.

Sentence Appropriateness

The appellant next claims his sentence is inappropriately severe. The primary manner in which we review sentence appropriateness is to give "individualized consideration" to an appellant by looking at his or her character and the seriousness of the offenses. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). This task is "highly discretionary," but it is not an exercise of clemency. *United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 1999).

The appellant's criminal conduct for more than five months was unquestionably very serious. Not only was he heavily involved with cocaine use, distribution, and introduction, he also committed dangerous and violent acts. Twice, while traveling in a moving vehicle, he shot at or near a vehicle carrying a group of unknown people, making deliberate efforts to ensure the other drivers could see him. On another occasion, he pointed a gun at his wife's head. He also broke restriction imposed pursuant to Article 15, UCMJ, 10 U.S.C. § 815, and was absent without leave for a two-day period. Moreover, documentary evidence admitted during presentencing reflects a consistent pattern of misconduct prior to the events that led to his court-martial. Given the number and types of crimes committed, the appellant's past disciplinary problems, and the absence of any significant mitigating and extenuating circumstances, we hold that the sentence is appropriate.

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). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court