UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant WILLIE E. MICKLE II
United States Air Force

ACM S31459

22 January 2009

Sentence adjudged 12 February 2008 by SPCM convened at Dover Air Force Base, Delaware. Military Judge: Le T. Zimmerman (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 2 months, forfeiture of $898.00 pay per month for 2 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Imelda L. Paredes, and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain Ryan N. Hoback.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

Pursuant to the appellant's pleas, a military judge sitting as a special court-martial convicted him of one specification of wrongful divers use of marijuana and one specification of wrongful use of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged and approved sentence consists of a bad-conduct discharge, two months confinement, forfeitures of $898 pay per month for two months, and a reduction to E-1.

On appeal the appellant asks the Court to set aside his bad-conduct discharge or, in the alternative, grant appropriate sentence relief. The basis for his request is that he opines, in light of "the extenuating circumstances contributing to his crimes, his overall good character and military service, and his rehabilitation potential," his sentence to a bad-conduct discharge is excessively harsh.* We disagree. Finding no prejudicial error, we affirm.

Background

On 5 July 2007, 27 July 2007, 5 September 2007, 26 October 2007, and 12 December 2007, the appellant provided urine samples for drug testing. The appellant's urine samples were sent to the Air Force Drug Testing Laboratory and each subsequently tested positive for tetrahydrocannabinol, the marijuana metabolite, at a level above the Department of Defense (DOD) cut-off. On 10 January 2008 and 11 January 2008, the appellant again provided urine samples for drug testing. The appellant's urine samples were sent to the Air Force Drug Testing Laboratory and each subsequently tested positive for tetrahydrocannabinol at a level above the DOD cut-off.

On 17 January 2008, the appellant's commander preferred one charge and one specification of wrongful divers use of marijuana against the appellant. On 31 January 2008, prior to the receipt of the appellant's last two positive urinalysis test results, the convening authority referred this charge and specification to a special court-martial.

On 12 February 2008, after receiving notification of the appellant's last two positive urinalysis results, the appellant's commander preferred one additional charge and specification of wrongful use of marijuana against the appellant. On that same day, the convening authority referred this additional charge and specification to the appellant's special court-martial. At trial, the military judge, trial counsel, and defense counsel erroneously treated the charges as one charge and two specifications rather than two separate charges with a specification each. As a result, the appellant pled to and was found guilty of one charge and two specifications.

Inappropriately Severe Sentence

This Court reviews 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*

* The appellant raised this issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

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 the case *sub judice*, the appellant's multiple marijuana offenses seriously compromise his standing as a non-commissioned officer and a military member. His crimes are further aggravated by the fact that he chose to continue using marijuana despite knowing that he had tested positive for using marijuana. The appellant either believed his latter crimes would not be discovered or was indifferent to being caught.

In short, after carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offenses of which he was found guilty, we do not find the appellant's sentence excessively harsh or inappropriately severe.

Irregular Plea

Though not raised as an issue on appeal, we take this opportunity to discuss the implications of the appellant's plea to one charge and two specifications vice two charges and a specification under each. We find that the appellant's failure to enter a plea to the Additional Charge amounted to an irregular pleading. However, this procedural irregularity was harmless. It is well settled that failure to enter a plea to a charge does not affect the pleas of guilty to the specifications contained there under.

Moreover, it is also well settled that the failure to make findings as to a charge is immaterial because an accused's criminality is determined by the findings as to the specification, not the charge. *United States v. Logan,* 15 M.J. 1084 (A.F.C.M.R. 1983); *United States v. Caudill,* 43 C.M.R. 924 (A.F.C.M.R. 1970). In the instant case, the appellant pled to and was found guilty of the Charge and the specifications contained under the Charge and the Additional Charge. The fact that he did not plead guilty to and was not found guilty of the Additional Charge is of no legal consequence.

Erroneous Promulgating Order

Finally, we note several errors with the promulgating order that require correction. First, the order should reflect a charge, an additional charge and a specification under each rather than a charge and two specifications. Second, the plea to the Additional Charge should be "None entered." Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 10.8.2.2 (21 Dec 2007). The finding to the Additional Charge should be "None; the Additional Charge was erroneously merged at trial with the Charge." *Id.* The Specification under the Charge, currently reflected as Specification 1, is missing the following language, "on divers occasions." Lastly, the Specification under the Charge, currently reflected as Specification 1, erroneously uses the word "between" rather than

the word "from." Preparation of a corrected court-martial order is hereby directed. *See United States v. Smith*, 30 M.J. 1022, 1028 (A.F.C.M.R. 1990).

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 approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court