UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman IVY M. MILLARD
United States Air Force

ACM 37649

27 December 2011

Sentence adjudged 5 March 2010 by GCM convened at McConnell Air Force Base, Kansas. Military Judge: Joe W. Moore (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 16 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Terri L. Carver; Lieutenant Colonel Gail E. Crawford; and Major Reggie D. Yager.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Deanna Daly; Major Naomi N. Porterfield; Captain Neal Frazier; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HECKER
Appellate Military Judges

OPINION OF THE COURT

HECKER, Judge:

Consistent with her pleas, a general court-martial composed of a military judge convicted the appellant of one specification of divers use of cocaine and one specification of divers distribution of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged sentence consists of a bad-conduct discharge, confinement for 16 months and reduction to E-1. The convening authority approved the findings and sentence as adjudged. On appeal, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant raises one issue for our consideration: whether her sentence, which

included a punitive discharge, is inappropriately severe considering the circumstances of her offenses and the substantially lower sentences adjudged for her co-actors. Having reviewed the record of trial, briefs from both sides and accompanying documents, we find no error that materially prejudices a substantial right of the appellant and affirm.

Background

The appellant pled guilty to one specification of using cocaine on divers occasions between March 2009 and January 2010. She also pled guilty to distributing cocaine on three occasions, by transporting cocaine from a civilian drug dealer to one of her civilian friends. Her drug use and distribution continued even after she was questioned by Security Forces and consented to a urinalysis, which was positive for cocaine. She entered into a pretrial agreement that capped any confinement at 24 months.

Sentence Appropriateness and Comparison

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of her 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 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 required only in closely related cases. *United States v. Christian*, 63 M.J. 714, 717, (A.F. Ct. Crim. App. 2006) (citing *United States v. Wacha*, 55 M.J. 266, 267-68 (C.A.A.F. 2001), *aff'd in part*, 66 M.J. 291 (C.A.A.F. 2008). Closely related cases include, for example, 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. "At [this Court], an appellant bears the burden of demonstrating that any cited cases are 'closely related' to . . . her case and that the sentences are '*highly disparate*.' If the appellant meets that burden . . . then the Government must show that there is a rational basis for the disparity." *Id.* (emphasis added).

On appeal, the appellant submitted Automated Military Justice Analysis and Management System (AMJAMS) and court-martial records for four other military members. She contends that these records show that those cases are closely related to her own, and that her sentence is highly disparate as compared to theirs.

The materials cited by the appellant do not support reduction of her sentence on the basis of sentence comparison, as they fall far short of meeting her burden to show the cases are closely related. Although some of these military members used drugs with or in the presence of the appellant and/or shared the same drug dealer, that alone does not make them co-actors in a common crime or lead to their cases being closely related. Additionally, only the appellant was charged with distributing cocaine, a significant degree of criminality not shared by the others.

We further note that the appellant limited her punitive exposure to the potential 20-year maximum confinement period for cocaine use and distribution by entering into a pretrial agreement that required approval of no more than 24 months of confinement. The test for whether sentences are highly disparate involves comparison of not only the raw numerical values of the sentences in the closely related cases but also consideration of any disparity in relation to the potential maximum. *Id.* at 289. In this context, even if sufficient information were provided to show that any of these other cases were closely related, it is highly unlikely that the appellant's sentence would be considered highly disparate.

We next consider whether the appellant's sentence was appropriate as judged by "individualized consideration" of the appellant "on the basis of the nature and seriousness of the offense and the character of the offender." *Snelling*, 14 M.J. at 268 (quoting *Untied States v. Mamaluy*, 10 U.S.C.M.A. 102, 106-07 (C.M.A. 1959)). In addition to using cocaine herself on multiple occasions, this appellant facilitated the illegal drug use of others by distributing cocaine, and did so even after she knew she was under investigation for drug use. After carefully examining the submissions of counsel, the appellant's military record, and all the facts and circumstances surrounding the offenses of which she was found guilty, we find that the appellant's approved sentence is appropriate.

Appellate Delay

Although not raised by the appellant, we review de novo whether the appellant has been denied the due process right to a speedy appeal. *See United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). This case was docketed with our Court on 5 May 2010. The overall delay between the docketing of the case with this Court and completion of our review is in excess of 540 days and therefore facially unreasonable.

Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530-32 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Moreno*, 63 M.J. at 135-36. When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do

not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Having considered the totality of the circumstances of this case, as well as the entire record, we conclude that any denial of the appellant's right to speedy appeal was harmless beyond a reasonable doubt and that no relief is warranted.

Conclusion

The approved findings and sentence are correct in law and fact. 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 the sentence are

AFFIRMED.

OFFICIAL

ANGELA E. DIXON, TSgt, USAF
Deputy Clerk of the Court