UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JAMES E. MILLS
United States Air Force

ACM 38167

16 September 2013

Sentence adjudged 3 May 2012 by GCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: Donald R. Eller, Jr.

Approved Sentence: Dishonorable discharge, confinement for 5 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Travis K. Ausland and Captain Nicholas D. Carter.

Appellate Counsel for the United States: Colonel Don M. Christensen and Gerald R. Bruce, Esquire.

Before

ORR, HARNEY, and MITCHELL
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MITCHELL, Judge:

The appellant was convicted, pursuant to his pleas, of fraudulent enlistment; absence without leave terminated by apprehension; making a false official statement; divers use of marijuana, cocaine, heroin, oxycodone, and oxymorphone; divers introduction of oxycodone onto Davis-Monthan Air Force Base (AFB), Arizona; larceny of $7,400 of goods from another Airman; and divers housebreaking in violation of Articles 83, 86, 107, 112a, 121, and 130, UCMJ, 10 U.S.C. §§ 883, 886, 907, 912a, 921, 930. A general court-martial comprised of officer and enlisted members sentenced the appellant to a dishonorable discharge, confinement for 5 years, total forfeitures of all pay

and allowances, and reduction to E-1. The convening authority approved the adjudged sentence.

On appeal, the appellant argues that his sentence was too severe.[1] We disagree and affirm the findings and sentence.

Background

The appellant was a married 20-year-old Airman First Class with almost 13 months of military service at the time of the court-martial. At the time of his enlistment on 5 April 2011, the appellant had $10,000 in a bank account of which $4,000 was from his illegal sales of oxycodone and marijuana. Prior to his enlistment, the appellant used marijuana, oxycodone, and cocaine. On his enlistment paperwork, the appellant denied his use and distribution of illegal drugs.

The appellant's drug use did not cease with his enlistment. On two occasions while he was in technical training school in July 2011 he used oxycodone with his then-fiancée, Kelly Mills. The appellant and Ms. Mills were married in Alabama in September 2011. He used oxycodone and marijuana while in Alabama before the permanent change of station move to Davis-Monthan AFB. They spent some of their wedding money to purchase oxycodone, which they used as they drove from Alabama to Arizona.

The appellant had difficulty finding a supplier of oxycodone near Davis-Monthan AFB, so he contacted his friend, Michael Garrity, in Alabama. Mr. Garrity twice sent oxycodone to the appellant via overnight delivery to his temporary lodging quarters and once to his on-base residence on Davis-Monthan AFB. The appellant and his wife continued to have difficulty locating a source of oxycodone near Davis-Monthan AFB; however, they were able to purchase cocaine and heroin, which they then used. The appellant used heroin or cocaine about three times a week in October and early-November 2011, and then increased to daily use from Thanksgiving 2011 through early-January 2012.

On Thanksgiving Day in 2011, the appellant and his wife were invited to have dessert with their next door neighbors, Senior Airman (SrA) SS and his wife, Mrs. LS. During the course of the evening, SrA SS and Mrs. LS remarked that they and their two young children would be travelling to Colorado to visit family to celebrate Christmas.

[1] As part of his argument on sentence severity, the appellant argues that trial counsel improperly referred to his housebreaking conviction as "burglary" and mischaracterized the letter of reprimand the appellant received while in pretrial confinement as evidence of theft. We have considered these issues and find them to be without merit. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

By late-December, the appellant and his wife had spent most of their money. They discussed the option of breaking into SrA SS's on-base home. When the appellant's initial attempt to enter through a back door was not successful, he and his wife took their tools, cut SrA SS's screen door, separated the window pane from the door, and entered through the side door. After gaining illegal entry into his neighbor's home, the appellant retreated to his house for latex gloves so he and his wife would not leave any fingerprints. The appellant also sent his wife back to their house for a duffel bag which they then filled with stolen goods. The appellant entered SrA SS's home three times over the course of several hours to steal his neighbor's possessions. He and his wife searched through the house to find items they could steal and then pawn or trade for drugs. With SrA SS's artificial Christmas tree still up and decorated, the appellant stole a 4-year-old child's Christmas gift from his parents. The appellant also stole jewelry, a digital camera, a gaming system and video games, a sound system, tools, a television, a vacuum cleaner, a carpet cleaner, movies, wires and wine. He stole baseball cards and a children's movie about dogs who help Santa Claus. He stole a fire safe from his neighbor's house that contained birth certificates, wedding photos, social security cards, and SrA SS and Mrs. LS's marriage license. He even stole SrA SS's military certificates and dog tags.

On 31 December 2011, the appellant, who was employed by the Air Force as a firefighter, left the fire station in the middle of his 24-hour shift. He met his wife and used marijuana, cocaine, and heroin instead of returning for duty. While he was absent without leave over the next few days, the appellant used cocaine and heroin intravenously. The appellant was apprehended on 5 January 2012 by off-base police officers and returned to military control. He was then placed in pretrial confinement.

Coincidentally, on the same day the appellant was arrested, his neighbors returned from their Christmas vacation to find their home ransacked. They reported the thefts to Security Forces (SFS). During the investigation, the appellant was interviewed by an investigator from SFS. At the interview, the appellant stated he did not pawn any of the items stolen from SrA SS's house. However, some of the items were still in local pawn shops and were identified by the owner, and records revealed that the appellant had in fact pawned the items.

Prior to trial, the appellant made a pretrial agreement offer that included a provision requiring the convening authority to withdraw and dismiss the charges and specifications for housebreaking and larceny and limit confinement to no more than five years, in exchange for the appellant pleading guilty to all remaining offenses. The convening authority rejected this offer. The appellant then offered to plead guilty to all charges and specifications in exchange for a sentence limitation to no more than five years confinement. The convening authority approved and accepted this second offer.

Sentence Appropriateness

This Court "may affirm only . . . the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We review sentence appropriateness de novo, employing "a sweeping congressional mandate" to ensure "a fair and just punishment for every accused." *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (citations omitted). 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. *See 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 we are not authorized to engage in exercises of clemency. *United States v. Healy*, 26 M.J. 395, 396 (C.M.A. 1988).

Our review of the record included the appellant's unsworn statement, his clemency request, the defense exhibits submitted at trial, and the letters submitted during clemency. We also considered that the appellant was engaged in nearly continuous criminal misconduct for most of his 13 months on active duty, aside from the time he was in basic training. The appellant took advantage of his neighbor's Thanksgiving hospitality by breaking into their home and stealing, among many other things, their son's Christmas gift. His betrayal of their neighborliness resulted in a 4-year-old child distrusting others. The appellant also chose to leave the fire station in the middle of his shift on New Year's Eve in order to use illegal drugs, when common sense would indicate that there is an increased likelihood that a firefighter would be needed for duty. Based on the review of the entire record of trial, we have determined that the adjudged and approved sentence is appropriate.[2]

[2] "Absent evidence to the contrary, accused's own sentence proposal is a reasonable indication of its probable fairness to him." *United States v. Hendon*, 6 M.J. 171, 175 (C.M.A. 1979) (citing *United States v. Johnson*, 41 C.M.R. 49, 50 (C.M.A. 1969)). A court-martial may adjudge a sentence less than the limits in a pretrial agreement (PTA) and may consider sentencing factors distinct from those in front of the convening authority. *Id*. An appellant who has been prejudiced by error may be entitled to sentence relief even if the adjudged sentence is less than limitation in the PTA. *United States v. Kinman*, 25 M.J. 99 (C.M.A. 1987). We recognize that the application of *Hendon* has been limited by our Navy brethren in *United States v. Brandon*, 33 M.J. 1033 (N.M.C.M.R. 1991) and again in *United States v. Payne*, 1996 WL 927728, (N.M.C.M.R 1996). We have previously cited *Hendon* and relied on its rationale. *See United States v. El-Amin*, 38 M.J. 563 (A.F.C.M.R. 1993). In this case, we are able to perform our sentence appropriateness assessment without reference to the PTA limitation, and thus do not need to rule on the weight, if any, to be given to the sentence limitation in a PTA when there is no error.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c).

Accordingly, the findings and the sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court