UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class SAMUEL D. MIRACLE
United States Air Force

ACM 35002

21 May 2004

Sentence adjudged 4 January 2002 by GCM convened at Hurlburt Field, Florida. Military Judge: John J. Powers.

Approved sentence: Dishonorable discharge, confinement for 2 years and 6 months, and reduction to E-1.

Appellate Counsel for Appellant: Major Terry L. McElyea, Major Maria A. Fried, Major Marc A. Jones, and Major Antony B. Kolenc.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Lane A. Thurgood.

Before

BRESLIN, ORR, and GENT
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, documents submitted by the defense, the assignments of error, and the government's reply thereto. The appellant first asserts that the military judge erred when he denied a motion in limine during the sentencing portion of his court-martial. The trial judge allowed testimony by J.C. concerning the fact that the appellant encouraged her to smoke "crack" cocaine when she was 16 years old, she saw the appellant teach Airman Basic (AB) Phillip D. Romano how to smoke "crack" cocaine, and she heard the appellant discuss how to get rid of "crack" cocaine headaches. The military judge made findings of fact that we adopt as our own. We hold that the military judge did not abuse his discretion by permitting the challenged testimony. Rule for Courts-Martial 1001(b)(4); *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003); *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000).

The appellant next alleges that his sentence was inappropriately severe because it included a dishonorable discharge, 30 months of confinement, and a reduction to E-1. He invites us to compare his sentence to that of AB Romano whose sentence included a bad-conduct discharge, 10 months of confinement, and forfeiture of all pay and allowances. An appellant must demonstrate that the cited case is closely related to his and that the sentences are "highly disparate." *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999). If this burden is met, then it is incumbent upon the government to show a "rational basis" for the disparate sentences. *Id.* The responsibility for determining sentence appropriateness is within the sound discretion of the courts of criminal appeals, subject to the review of our superior court on the "narrow question of whether there has been an 'obvious miscarriage of justice or abuse of discretion.'" *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (quoting *Lacy*, 50 M.J. at 288) (quoting *United States v. Dukes*, 5 M.J. 71, 73 (C.M.A. 1978))).

We find the appellant has not met his burden of demonstrating the close relationship between his case and that of AB Romano. Significantly, the appellant pleaded guilty and was found guilty of and sentenced for possession of marijuana, divers uses of cocaine, use of ecstasy, divers uses of marijuana, and absence without authority for six days, in violation of Articles 112a and 86, UCMJ, 10 U.S.C. §§ 912a, 886. The absence began on 13 September 2001, the day before the appellant was to be court-martialed. The appellant's offenses occurred between 14 January and 20 September 2001. In contrast, AB Romano was found guilty of and sentenced for divers uses of marijuana, use of cocaine, use of lysergic acid diethylamide (LSD), possession of LSD, and distribution of LSD, in violation of Article 112a, UCMJ. These offenses took place between 1 January and 25 January 2001.

Based upon the record before us, we find that the appellant has not met the burden of convincing us that the case involving AB Romano is closely related to his. Even if the cases are "closely related," the difference in the nature and number of offenses, and time for reflection between them, provides a rational basis for the disparity in the sentences.

We have determined the appropriateness of the approved sentence by an individualized consideration of the nature and seriousness of the appellant's offenses and his character. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Having done so, we hold that his sentence is not inappropriately severe.

The 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

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator