UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman KENNETH L. OVERMYER JR.
United States Air Force

ACM S30059

27 May 2003

Sentence adjudged 4 October 2001 by SPCM convened at Moody Air Force Base, Georgia. Military Judge: James L. Flanary (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 5 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Kyle R. Jacobson.

Appellate Counsel for the United States: Colonel LeEllen Coacher and Lori M. Jemison (legal intern).

Before

BRESLIN, STONE, and ORR, W.E.
Appellate Military Judges

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of wrongful use of lysergic acid diethylamide (LSD), in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged and approved sentence was a bad-conduct discharge, confinement for 5 months, and reduction to E-1. The appellant asserts that his sentence was inappropriately severe in light of the sentence imposed on his military co-actor. We disagree and affirm.

I. Facts

On or about 3 June 2001, the appellant and his friends, Airman First Class (A1C) Dobbs and Airman (Amn) Flanery, went to a nightclub. After consuming some alcohol, Amn Flanery purchased LSD and offered some to the appellant and to A1C Dobbs. The

appellant and A1C Dobbs ingested the LSD. The next day, the appellant told his superiors about his drug use which ultimately led to this case.

Approximately two months after the appellant's court-martial, A1C Dobbs was tried at a general court-martial consisting of officer members. He was also charged with one specification of wrongful use of LSD in violation of Art. 112a, UCMJ. At trial, A1C Dobbs pled and was found not guilty of the Art. 112a, UCMJ, offense, but was found guilty of the lesser included offense of attempted use, in violation of Article 80, UCMJ, 10 U.S.C. § 880. He was sentenced to hard labor without confinement for 75 days, restriction to the limits of Moody Air Force Base for 2 months, forfeiture of $500.00 pay per month for 2 months, and reduction to E-1. The convening authority reduced his sentence to a forfeiture of $500.00 pay per month for 2 months and reduction to E-1.

II. Analysis

Congress has empowered courts of criminal appeals with the authority to "determine whether a sentence is correct in law and fact, [and] also with the highly discretionary power to determine whether a sentence 'should be approved.'" *United States v. Lacy*, 50 M.J. 286, 287 (1999) (quoting Article 66(c), UCMJ, 10 U.S.C. § 866(c)). Generally, sentence appropriateness is determined by "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Reeder*, 29 M.J. 563, 564 (A.F.C.M.R. 1989) (citing *United States v. Mamaluy*, 27 C.M.R. 176 (C.M.A. 1959)). However, this Court is required to engage in sentence comparison "in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases." *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985). An appellant must demonstrate that the cited case is closely related and that the sentences are "highly disparate." *Lacy*, 50 M.J. at 288. If this burden is met, then it is incumbent upon the government to show a "rational basis" for the disparate sentences. *Id.*

We have some reservations about whether these cases are closely related. While the appellant and A1C Dobbs seem to have engaged in the same misconduct, ultimately the appellant was convicted of a different offense than his co-actor. Thus, the criminal offenses which are the gravamen of these cases are very different. Assuming the offenses are closely related, it is not clear that the sentences are disparate even though the appellant received a bad-conduct discharge and A1C Dobbs did not. The test is "not limited to a narrow comparison of the relative numerical values of the sentences at issue, but also may include consideration of the disparity in relation to the potential maximum punishment." *Id.* at 289. Both the appellant's and his co-actor's approved sentences are significantly less than the maximum punishment of a dishonorable discharge, confinement for 5 years, forfeiture of all pay and allowances, and reduction to E-1.

However, even assuming arguendo that the offenses are closely related and the sentences are highly disparate, there are cogent reasons for the sentence disparity. First, the appellant was found guilty of a different and more serious offense than A1C Dobbs. Additionally, we take into consideration the different forums selected by the appellant and A1C Dobbs. As noted previously, the appellant was tried and sentenced by a military judge sitting as a special court-martial, whereas A1C Dobbs was tried and sentenced at a general court-martial consisting of officer members. In addition to being convicted of a more serious offense, the appellant's sentence was reviewed and approved by a different convening authority than his co-actor. Finally, after considering all of the circumstances of the appellant's offense in light of his military record, we find the sentence approved by the convening authority to be appropriate. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982).

The approved findings and sentence are correct in law and fact, and no error prejudicial to the appellant's substantial rights occurred. Art. 66 (c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator