UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman MICHAEL A. PRADELLA
United States Air Force

ACM S31921

29 January 2013

Sentence adjudged 24 February 2011 by SPCM convened at Royal Air Force Mildenhall, United Kingdom. Military Judge: Jefferson B. Brown (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 75 days, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Nathan A. White.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Scott C. Jansen; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

PER CURIAM:

A special court-martial composed of a military judge convicted the appellant, consistent with his pleas, of wrongfully possessing marijuana, wrongfully distributing marijuana, wrongfully using marijuana, and wrongfully introducing marijuana onto a military base, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged sentence consisted of a bad-conduct discharge, confinement for 75 days, forfeiture of $978.00 pay per month for 3 months, and reduction to the grade of E-1. The convening authority disapproved the forfeitures and then approved the remainder of the sentence as adjudged. On appeal, the appellant asserts two issues: (1) charging him with the

wrongful possession of marijuana constitutes an unreasonable multiplication of charges since it is a lesser-included offense to the wrongful use and wrongful introduction offenses; and (2) his sentence to a bad-conduct discharge is inappropriately severe when compared to his co-actor's receipt of nonjudicial punishment and an administrative discharge. Finding no error that materially prejudices the appellant, we affirm.

Background

On two occasions in mid to late April 2010, the appellant and Airman Basic (AB) CMT met a local civilian in a park outside Royal Air Force Mildenhall and gave him £ 20-30 in exchange for marijuana. Each time, the two Airmen smoked some of the marijuana in the park. On the first occasion, the appellant stored the leftover marijuana in a dietary supplement container in his dormitory room. The second time, AB CMT stored the remainder in his dormitory room. When the appellant moved off base in November 2010, he stored some of his marijuana at his off-base residence. He possessed marijuana in that residence on two or three occasions before his home was searched by authorities in December 2010. For storing the marijuana in his on- and off-base residences, the appellant was charged with wrongful possession of marijuana on divers occasions.

The appellant smoked marijuana between ten and fifteen times during this same time period. This occurred in the park, in his dormitory room, in his off-base residence and at the off-base residence of another Airman. For this, the appellant was charged with wrongful use of marijuana on divers occasions.

The appellant was also charged with wrongfully introducing the marijuana onto RAF Mildenhall during the same time period, when he placed the leftover marijuana from that first occasion in his pocket as he came through the gate and took it to his dormitory room. He also brought it on base on one or two other occasions, after which AB CMT stored the marijuana in his own dormitory room.

In addition to smoking marijuana with AB CMT in the park, the appellant smoked marijuana with three other Airmen and a staff sergeant, on approximately seven occasions between April and December 2010. During each of these events, the appellant passed a marijuana cigarette to the others. For this, the appellant was charged with wrongful distribution of marijuana on divers occasions.

Unreasonable Multiplication of Charges

The appellant made a timely motion at trial to dismiss the possession specification, arguing it was multiplicious with the use and wrongful introduction specifications, or, in the alternative, that it constituted an unreasonable multiplication of charges for sentencing. The military judge, while concluding there was some factual overlap in the charges, found there were multiple instances where the appellant was in possession of

marijuana beyond what was needed to distribute, use, or wrongfully introduce it. He therefore denied the motion. The appellant then entered an unconditional guilty plea to all specifications. On appeal, the appellant raises only his claim that the specifications constitute an unreasonable multiplication of charges because possession is a lesser-included offense of both wrongful use and wrongful introduction of marijuana. Under the facts of this case, we disagree.

A military judge's decision to deny relief for unreasonable multiplication of charges is reviewed for an abuse of discretion. *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004); *see also United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001). The starting point for evaluating allegations of unreasonable multiplication of charges is Rule for Courts-Martial 307(c)(4), which states "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." Our superior court has adopted "a framework for determining whether a given multiplication of charges arising from the same act or transaction" is unreasonable.[1] *Quiroz*, 55 M.J. at 338 (citation and internal quotation marks omitted).

Here, the appellant has not been charged with multiple specifications resulting from the same act or transaction. We agree with the military judge that the appellant possessed marijuana on distinct occasions separate from the times he was using, distributing, or introducing it onto base. This is not a circumstance where his acts of possession occurred only when he was engaged in other criminal activity involving the illegal substance. Furthermore, even if we consider this situation in light of the *Quiroz* factors, we conclude there was no unreasonable multiplication of charges under the facts of this case.

Sentence Appropriateness

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). In doing so, we "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we] find[] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). 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. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Rangel*, 64 M.J. 678, 686 (A.F. Ct. Crim. App. 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.

[1] In determining issues of unreasonable multiplication, we apply a five-part test which considers: (1) whether a multiplicity objection was made at trial, (2) whether the specifications are aimed at distinct criminal acts, (3) whether the number of charges and specifications misrepresent or exaggerate the charged criminality, (4) whether the number of charges and specifications unreasonably increase the punitive exposure, and (5) whether the evidence shows prosecutorial overreaching or abuse in drafting the charges. *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001) (citation omitted).

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).

Additionally, "[t]he Courts of Criminal Appeals are required to engage in sentence comparison only '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. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2011) (quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). Sentence comparison is generally inappropriate unless this Court finds that any cited cases are "closely related" to the appellant's case and the sentences are "highly disparate." *Lacy*, 50 M.J. at 288. "[A]n appellant bears the burden of demonstrating that any cited cases are 'closely related' to his or 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.* Cases are "closely related" when "for example, they involve coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers." *United States v. Anderson*, 67 M.J. 703, 706 (A.F. Ct. Crim. App. 2009).

The appellant argues his sentence to a bad-conduct discharge is inappropriately severe when compared to AB CMT's receipt of nonjudicial punishment and an administrative discharge. We do not find sentence comparison appropriate in this case. Although AB CMT and the appellant did engage in similar conduct, often with each other, the record reveals that the appellant continued to use marijuana after AB CMT left the United Kingdom. Additionally, it was the appellant who physically brought the marijuana onto the military base, and, unlike AB CMT, the appellant also stored marijuana in an off-base residence within the host nation. Furthermore, we have given individualized consideration to this particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all other matters contained in the record of trial. We find that the approved sentence was clearly within the discretion of the convening authority, was appropriate in this case, and was not inappropriately severe.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[2] Articles 59(a) and 66(c),

[2] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).

UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

LAQUITTA J. SMITH
Appellate Paralegal Specialist