UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman CLIFTON H. ROBBINS
United States Air Force

ACM 37753

11 December 2012

Sentence adjudged 24 August 2010 by GCM convened at Schriever Air Force Base, Colorado. Military Judge: Scott E. Harding (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 10 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Michael S. Kerr.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Captain Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

PER CURIAM:

In accordance with his pleas, the appellant was convicted at a general court-martial composed of a military judge of three specifications of wrongful use of controlled substances, two specifications of wrongful distribution of controlled substances, one specification of wrongful introduction of controlled substances onto a military installation, one specification of assault and battery, one specification of absence without leave, and one specification of reckless endangerment, in violation of Articles 112a, 128, 86, and 134, UCMJ, 10 U.S.C. §§ 912a, 928, 886, 934. The adjudged and approved sentence consisted of a bad-conduct discharge, confinement for 10 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. One issue is raised for our

consideration: whether the appellant's sentence to a punitive discharge is inappropriately severe.[1] Finding no error that materially prejudices a substantial right of the appellant, we affirm.[2]

Failure to State an Offense

Although not raised on appeal, we note that the appellant was convicted of one specification of reckless endangerment, in violation of Article 134, UCMJ. The charged specification does not allege the terminal element of Article 134, UCMJ.

Whether a charge and specification state an offense is a question of law that we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citations omitted). Our superior court recently held that failure to allege the terminal element of an Article 134 offense is error but, in the context of a guilty plea, the error is not prejudicial where the military judge correctly advises the appellant of all the elements and the providence inquiry shows that the appellant understood to what offense and under what legal theory he was pleading guilty. *United States v. Ballan*, 71 M.J. 28, 35 (C.A.A.F.), *cert. denied*, 133 S. Ct. 43 (2012) (mem.).

During the plea inquiry in the present case, the military judge advised the appellant of each element of the charged offense, to include the terminal element, and the appellant explained how his misconduct met each requirement. Therefore, as in *Ballan*, the appellant here suffered no prejudice to a substantial right: he knew under what clause he was pleading guilty and clearly understood how his conduct violated the terminal element of Article 134, UCMJ.

Sentence Severity

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his 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.*

[1] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[2] Though not raised on appeal, we note that the overall delay of more than 540 days between the time this case was docketed and reviewed by this Court is facially unreasonable. 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. *United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006) (reviewing claims of post-trial and appellate delay using the four-factor analysis in *Barker v. Wingo*, 407 U.S. 514 (1972)).

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).

The appellant was convicted of multiple specifications of wrongful use, distribution, and introduction of illicit drugs as well as assault and battery, being absent without leave, and reckless endangerment. 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. The approved sentence was clearly within the discretion of the convening authority and was appropriate in this case. Accordingly, we hold that the approved sentence is 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. 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 sentence are

AFFIRMED.

OFFICIAL

LAQUITTA J. SMITH
Paralegal Specialist