UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant MICHAEL F. SEPPALA
United States Air Force

ACM S31267

26 September 2008

Sentence adjudged 16 January 2007 by SPCM convened at Ramstein Air Base, Germany. Military Judge: Adam Oler (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 2 months, and reduction to E-2.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel John P. Taitt, Major Matthew S. Ward, and Major Amy E. Hutchens.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

THOMPSON, Judge:

Consistent with the appellant's pleas, a military judge sitting as a special court-martial convicted him of one charge and specification of conspiracy to wrongfully distribute psilocybin mushrooms, a Schedule I controlled substance, in violation of Article 81, UCMJ, 10 U.S.C. § 881, and one charge and specification of wrongful divers uses of psilocybin mushrooms, a Schedule I controlled substance, in violation of Article

112a, UCMJ, 10 U.S.C. § 912a.[1] The military judge sentenced him to a bad-conduct discharge, 100 days confinement, and reduction to E-2. Pursuant to a pretrial agreement, the convening authority approved a bad-conduct discharge, two months confinement, and reduction to E-2. The appellant asserts that the portion of the sentence extending to a bad-conduct discharge is inappropriately severe. We disagree.

Background

The appellant and several friends and co-workers were making plans to attend the annual "Rock am Ring" Music Festival at Nuerberg, Germany. While working the night shift, the appellant and a co-worker, then-Staff Sergeant (SSgt) R, decided to drive to Maastricht, The Netherlands, to purchase psilocybin mushrooms to be used during the concert. They agreed they would travel on an upcoming day off and knew they would be able to find a shop where mushrooms could be purchased. They also agreed they would make additional purchases for their friends who were also attending the concert and for anyone else who may want some mushrooms. The appellant collected money from their friends, including then-Airman First Class (A1C) G and an enlisted Army soldier.[2]

The appellant, SSgt R, and then-SSgt S drove to Maastricht to make the buy. Upon arrival, the appellant asked for directions to a "head shop"[3] where they could purchase some mushrooms. At the shop, the appellant asked the clerk about purchasing mushrooms, and the clerk showed them a list of different mushrooms for sale. The three agreed to purchase eight to ten boxes of the mushrooms, and the appellant paid the clerk. Two days later, the appellant, SSgt R, and then-SSgt D, another co-worker, drove to Nuerberg, Germany, for the concert. The appellant and SSgt R shared a tent and stored the mushrooms in their tent. The next day, the appellant, SSgt R, A1C G, then-Airman (Amn) S, and then-Senior Airman (SrA) C, who was also from the appellant's unit, decided to use some mushrooms. They went inside the tent occupied by Amn S and SrA C and consumed some mushrooms. The next afternoon, the appellant and SrA C consumed some more of the mushrooms. That evening, the appellant and A1C G once again used more of the mushrooms. The drug use was discovered, investigated, and resulted in a host of UCMJ actions against the various participants.

Sentence Appropriateness

The appellant asserts that his sentence is inappropriately severe when compared to the sentences of the other airmen involved in these offenses because only he and SSgt R received a bad-conduct discharge as part of their sentence.

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[1] Pursuant to a pretrial agreement, the convening authority agreed to dismiss one specification of wrongful use of cocaine and one specification of wrongful use of anabolic steroids.

[2] A1C G was married to the appellant at the time of the offenses; however, they were legally separated. By the time of trial they were divorced.

[3] A "head shop" is a store that sells psilocybin mushrooms and other drugs and drug paraphernalia.

This Court reviews 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). We have a great deal of discretion in determining whether a particular sentence is appropriate, but are not authorized to engage in exercises of clemency. *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). Matters submitted in clemency, including items found in the allied papers, may be considered in evaluating sentence appropriateness. *United States v. Peoples,* 29 M.J. 426, 428 (C.M.A. 1990); *Healy,* 26 M.J. at 396.

Although we generally consider sentence appropriateness without reference to sentences in other cases, we are required to examine the sentence disparities in closely-related cases and are permitted, but not required, to do so in other cases. *United States v. Christian,* 63 M.J. 714, 717 (A.F. Ct. Crim. App, 2006) (citing *United States v. Wacha,* 55 M.J. 266, 267-68 (C.A.A.F. 2001)), *pet. granted on other grounds,* 65 M.J. 320 (C.A.A.F. 2007). Closely related cases include those which pertain to "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Lacy,* 50 M.J. at 288. The appellant bears the burden of demonstrating that any cited cases are "closely related" to his case and that the sentences are "highly disparate." *Id.* If the appellant meets that burden, then the government must show that there is a rational basis for the disparity. *Id.*

The appellant asserts his case is "closely related" to the other cases involving the individuals who used the mushrooms with the appellant. The appellant points out that the majority of the individuals involved did not receive a bad-conduct discharge. The appellant's argument relies primarily on the trial defense counsel's clemency memorandum. After reviewing the trial defense counsel's clemency memorandum, this Court notes references to SSgt R, A1C G, and "one other member who was court-martialed for using mushrooms at this concert also received only 30 days confinement and reduction to E-1." In addition, the appellant's brief also refers to the cases of Amn S and Amn D (the Court notes this was SSgt D) and states they did not receive bad-conduct discharges and their confinement was significantly lower than the appellant's. The appellant provides no evidence to support this assertion, and the trial defense counsel's clemency memorandum does not discuss either person. While the trial defense counsel's clemency memorandum indicates that SSgt R received a bad-conduct discharge and that A1C G received 21 days confinement, with no reduction or bad-conduct discharge, the Court has no factual information regarding the circumstances surrounding the conviction and sentencing of these individuals. The Court is unable to determine who the "other member" is who is referenced in the trial defense counsel's clemency memorandum. Finally, the Court has not been provided with any documentation or evidence establishing

what the charges and sentences were for each of the co-actors. However, despite the gaps in the appellant's evidence and documentation, we do find the airmen were all involved in a common criminal scheme to use mushrooms at the concert. Therefore, we find the cases of those other airmen who attended the concert and used mushrooms with the appellant to be "closely related" to the appellant's case. *Id.*

However, we are not able to bridge the evidence and documentation gaps to find that the appellant has met his burden in establishing that the sentences are "highly disparate." The appellant's brief, including its reliance on the trial defense counsel's clemency memorandum, does not provide the specificity the Court requires to find that the sentences are highly disparate, which would thereby shift the burden to the government to establish there is a rational basis for such disparity. *Id.*

Even if we conclude the sentences were highly disparate, this Court conducted a review of the entire record, including the allied papers and clemency submissions, and finds there to be a rational basis for any sentence disparity. First, the appellant was the mastermind of the mushroom use at the concert. He was involved from the beginning in planning, collecting the money, traveling to and locating the "head shop," buying the mushrooms, conspiring to distribute, transporting the mushrooms to the concert, storing the mushrooms in the tent he shared with SSgt R, and using the mushrooms on several occasions. Second, as a non-commissioned officer, his use with and in the presence of junior airmen is an aggravating factor. He was from a small, 16-person unit, and he used two times with SrA C, who is from his unit. Over the course of two days, the appellant used the mushrooms in the presence of three junior airmen. Third, the allied papers reveal requests for testimonial immunity for three of the airmen involved, A1C G, Amn S, and a third airmen who was acquitted. Although it is not clear from the record whether the requests were approved by the convening authority, this documentation indicates the three airmen were poised to testify in the appellant's case and in fact had testified in another companion case. It is reasonable to conclude these airmen would be given some consideration for their cooperation. Fourth, during sentencing, the military judge commented that he gave great consideration to the fact the appellant had been restricted to the local area pending his court-martial.[4] The trial defense counsel's clemency memorandum noted in a footnote that this is probably why the military judge only reduced the appellant to E-2.[5] Fifth, the appellant received the benefit of the pretrial agreement, in that the convening authority agreed to limit confinement to two months.[6]

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[4] The defense counsel and the appellant did not consider this to be an Article 13, UCMJ, illegal pretrial punishment. The military judge conducted an inquiry and did not find illegal pretrial punishment.

[5] As a note, the military judge announced on the record that he had been the trial judge for three other companion cases: two guilty plea judge alone special courts-martial, and one litigated members court-martial, which resulted in an acquittal. The fact that one military judge has heard four of the cases lends credibility to the finding that there was a rational basis for the sentences. *See generally United States v. Durant,* 55 M.J. 258, 260 (C.A.A.F. 2001); *United States v. Lacy,* 50 M.J. 286, 287 (C.A.A.F. 1999).

[6] As noted above, the convening authority agreed to dismiss two specifications upon successful completion of the guilty plea.

Based on review of the entire record, we find there to be a rational basis for any disparity that might exist with the sentences of the other cases.

We next consider whether the appellant's sentence was appropriate, judged by "individualized consideration" of the appellant "on the basis of the nature and seriousness of the offense and character of the [appellant]." *See Snelling,* 14 M.J. at 268 (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). After carefully reviewing the entire record of trial, we find the appellant's approved sentence, including the bad-conduct discharge, appropriate.

Moreno Consideration

In this case, the overall delay of 555 days between the time the case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *United States v. Moreno,* 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison,* 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt and that no relief is warranted.

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). However, we order the promulgation of a corrected Court-Martial Order, reflecting the withdrawal of Specification 2 and Specification 3 of Charge II after arraignment.

The approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court