

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman BENJAMIN J. SIZEMORE
United States Air Force

ACM 38020 (f rev)

11 October 2013

Sentence adjudged 4 August 2011 by GCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: Francisco Mendez (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 20 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Daniel E. Schoeni and Captain Thomas Franzinger.

Appellate Counsel for the United States: Colonel Don M. Christensen and Gerald R. Bruce, Esquire.

Before

HELGET, HARNEY, and WEBER
Appellate Military Judges

UPON FURTHER REVIEW

This opinion is subject to editorial correction before final release.

PER CURIAM:

At arraignment before general court-martial composed of military judge alone, the appellant entered pleas of guilty to one specification of making a false official statement, in violation of Article 107, UCMJ, 10 U.S.C. § 907; two specifications of larceny, in violation of Article 121, UCMJ, 10 U.S.C. § 921; and one specification of wrongful appropriation as a lesser included offense of a third charged larceny, in violation of Article 121, UCMJ. The appellant entered pleas of not guilty to the remaining charges

and specifications. The military judge accepted his pleas and, after trial on the merits, also convicted him contrary to his pleas of the charged greater offense of larceny as well as one specification of attempted distribution of cocaine, one specification of attempted introduction of cocaine, and one specification of distribution of marijuana, in violation of Articles 80 and 112a, UCMJ, 10 U.S.C. §§ 880, 912a. The court sentenced him to a bad-conduct discharge, confinement for 20 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged. The appellant argued that his sentence is inappropriately severe.*

We previously affirmed the findings and sentence. *United States v. Sizemore*, ACM 38020 (A.F. Ct. Crim. App. 14 March 2013) (unpub. op.). On 25 September 2013, the Court of Appeals for the Armed Forces granted the appellant's petition for review on the issue of whether one of the judges who participated in the original decision was unconstitutionally appointed. In the same order, the Court vacated our decision and remanded the case for further review by a properly appointed Court of Criminal Appeals in light of *Ryder v. United States*, 515 U.S. 177 (1995) and *United States v. Carpenter*, 37 M.J. 291 (C.M.A. 1993), *vacated*, 515 U.S. 1138 (1995). *United States v. Sizemore*, ___ M.J. ___ (C.A.A.F. 2013) (order granting review).

Our decision today reaffirms our earlier decision.

We review the appropriateness of the approved sentence de novo. *United States v. Baier*, 60 M.J. 382, 384-85 (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. 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). Upon consideration of the appellant's character, the nature and seriousness of his offenses, and the entire record of trial, we find the sentence appropriate.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

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

Accordingly, the approved findings and sentence are

AFFIRMED.



FOR THE COURT

STEVEN LUCAS
Clerk of the Court