UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman CHRISTOPHER S. STERLING
United States Air Force

ACM 37298

09 June 2009

Sentence adjudged 08 July 2008 by GCM convened at Travis Air Force Base, California. Military Judge: William M. Burd (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 18 months, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Lieutenant Colonel Maria A. Fried, Major Imelda L. Paredes, and Captain Michael A. Burnat.

Appellate Counsel for the United States: Major Jeremy S. Weber, Captain Michael T. Rakowsi, and Gerald R. Bruce, Esquire.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

PER CURIAM:

In accordance with his pleas, the appellant was found guilty of one specification of violating a lawful order, one specification of wrongfully possessing psilocin mushrooms with intent to distribute, two specifications of wrongfully distributing cocaine, two specifications of wrongfully using cocaine, one specification of wrongfully possessing cocaine, and one specification of wrongfully using oxycotin, in violation of Articles 92 and 112a, UCMJ, 10 U.S.C. §§ 892, 912a.[1] The approved sentence consists of a bad-conduct discharge, confinement for 18 months, reduction to E-1, and a reprimand.

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[1] Psilocin mushrooms is a Schedule I controlled substance, and oxycotin is a Schedule II controlled substance.

The appellant asserts two assignments of error before this Court. The first issue is whether the Action should be returned to the convening authority for failing to reference the confinement credit ordered by the military judge. The second issue, raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), is whether the appellant's approved sentence to a bad-conduct discharge is inappropriately severe.

Background

The appellant was ordered into pretrial confinement on 16 March 2008, where he remained until his court-martial commenced on 8 July 2008. At trial, the trial defense counsel filed a motion requesting three-for-one administrative confinement credit from 16 March 2008 to 30 May 2008 due to the appellant having suffered conditions of pretrial confinement that involved unusually harsh circumstances in violation of Article 13, UCMJ, 10 U.S.C. § 813; Rules for Courts-Martial (R.C.M.) 304(f) and R.C.M. 305(k); and Air Force Instruction (AFI) 31-205, *The Air Force Corrections System* (7 Apr 2004). While in civilian confinement for a total of 114 days, the appellant was placed in administrative segregation for 75 days. He was confined to a single cell up to 23.5 hours a day and during one period was confined to his cell for more than 72 hours without access to a shower or a phone. The military judge granted an additional 75 days of confinement credit for "conditions that were unduly rigorous."[2] In his ruling, the military judge did not specify Article 13, UCMJ, or R.C.M. 305(k) as the authority for the additional credit.

Convening Authority's Action

The appellant asserts that the Action should be returned to the convening authority because it does not include the 75 days of pretrial confinement credit the military judge awarded under R.C.M. 315(k), which is required to be included in the Action under R.C.M. 1107(f)(4)(F). The government's position is that the military judge awarded the pretrial confinement credit under Article 13, UCMJ, which is not required to be included in the Action.

We review post-trial processing issues de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000)). "When the military judge has directed that the accused receive credit under R.C.M. 305(k), the convening authority shall so direct in the [A]ction." R.C.M. 1007(f)(4)(F). R.C.M. 305(k) states, "The military judge may order additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances."

[2] This pretrial confinement credit is in addition to the 114 days awarded under *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984).

Article 13, UCMJ, provides, "No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline."

We agree with the appellant that the Action should have included the confinement credit awarded by the military judge. In *United States v. Crawford*, 62 M.J. 411 (C.A.A.F. 2006), our superior court held that if an appellant establishes a violation of Article 13, UCMJ, "then R.C.M. 305(k) provides him additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances." *Crawford*, 62 M.J. at 414 (internal citations omitted). Therefore, it does not matter if the military judge awarded the credit under Article 13, UCMJ, or R.C.M. 305(k). In either situation, R.C.M. 305(k) is the vehicle the military judge uses to award additional credit. *See United States. Thompson*, ACM S30924 (A.F. Ct. Crim. App. 25 Aug 2006) (unpub. op.). Accordingly, we order a corrected Action be accomplished in this case. R.C.M. 1107(g).

Sentence is Inappropriately Severe

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). 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. 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).

The maximum punishment in this case was a dishonorable discharge, confinement for 65 years and 6 months, forfeiture of all pay and allowances, and reduction to E-1. The appellant's approved sentence was a bad-conduct discharge, confinement for 18 months, reduction to E-1, and a reprimand. Having given individualized consideration to this particular appellant, the nature of the offenses, the appellant's record of service, and all other matters in the record of trial, we hold that the approved sentence which includes a bad-conduct discharge is not inappropriately severe.

Conclusion

We conclude the approved findings are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Therefore, on the basis of the entire record, the findings are affirmed. Because the Action fails to include the additional 75 days of pretrial confinement awarded by the military judge, the Action is incorrect. Accordingly, we return the record of trial to The Judge Advocate General for remand to the convening authority to withdraw the erroneous Action and substitute a corrected Action. Further, we order the promulgation of a corrected Court-Martial Order reflecting the correct Action. Thereafter, Article 66, UCMJ, shall apply.

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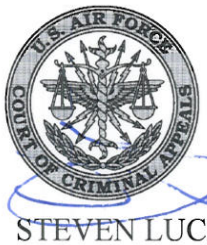

STEVEN LUCAS, YA-02, DAF
Clerk of the Court