UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class RENEE M. TEDESCHI
United States Air Force

ACM S31757

17 December 2010

Sentence adjudged 12 November 2009 by SPCM convened at Langley Air Force Base, Virginia. Military Judge: Michael E. Savage (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 30 days, forfeiture of $400.00 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Marla J. Gillman and William J. Holmes, Esquire (civilian counsel).

Appellate Counsel for the United States: Lieutenant Colonel Nurit Anderson and Gerald R. Bruce, Esquire.

Before

BRAND, GREGORY, and ROAN
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

Before a special court-martial composed of a military judge sitting alone, the appellant pled guilty to divers use of heroin and not guilty to divers possession of heroin in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The military judge accepted her plea of guilty and convicted the appellant of both offenses after trial on the merits for the possession offense. He sentenced her to a bad-conduct discharge, confinement for 30 days, forfeiture of $400 pay per month for three months, and reduction to the grade of E-1. The convening authority approved the sentence adjudged. The appellant assigns two errors: (1) the sufficiency of the evidence to support the conviction of heroin possession, and (2) the appropriateness of a bad-conduct discharge.

Background

The appellant, a security forces troop in her mid-twenties, admitted during the plea inquiry that she used heroin on two occasions in November 2008. In March 2009, the appellant volunteered information to the Air Force Office of Special Investigations (AFOSI) concerning heroin use by other Air Force members without mentioning her own prior heroin use. AFOSI entered into an agreement with the appellant on 11 April 2009 in which she agreed to work for AFOSI as a confidential informant (CI). AFOSI terminated her status as a CI on 23 April 2009 after the appellant admitted under rights advisement her own prior heroin use as well as her unauthorized purchases of heroin while working as a CI.

Sufficiency of the Evidence

As she argued at trial, the appellant asserts that the evidence is insufficient to support her conviction of possession of heroin because at the time of possession she worked as a CI for AFOSI. The appellant testified that she purchased heroin to develop information for AFOSI, but admitted she did not inform AFOSI about the purchases until AFOSI questioned her under rights advisement. She acknowledged signing an agreement when she became a CI which stated that she would not engage in any illegal activity "unless specifically directed by AFOSI." She explained that she did not inform AFOSI of her heroin purchases because she was "scared of what could happen." The AFOSI handling agent testified that he did not authorize the appellant to purchase heroin and, moreover, the appellant had expressly declined to do so.

In accordance with Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the [appellant's] guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

We find the evidence legally and factually sufficient to support the appellant's conviction. Viewed in the light most favorable to the prosecution, the testimony is legally sufficient to show that the appellant lacked legal authorization to possess heroin: both the AFOSI handling agent and the appellant herself testified that she was not authorized to purchase heroin. We also find the evidence factually sufficient to support the findings of guilt. Perhaps most telling, the appellant's admitted fear of disclosing her heroin possession to her AFOSI handling agent belies her claim that she believed her possession to be a lawfully authorized activity. Having carefully considered the evidence with particular attention to the matters raised by the appellant, we are convinced beyond a reasonable doubt that the appellant is guilty of wrongful possession of heroin.

Sentence Appropriateness

The appellant asserts that a sentence which includes a bad-conduct discharge is inappropriately severe. This Court reviews sentence appropriateness de novo. *See 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. "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006) (citing *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A 1988)); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). 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, 287-88 (C.A.A.F. 1999); *Healy*, 26 M.J. at 395-96.

As appellate government counsel notes, the appellant's request that the bad-conduct discharge be disapproved is more properly characterized as another request for clemency. In support of her request, she highlights her work with AFOSI and her military record. All these matters were before the military judge who sentenced her and the convening authority who approved the sentence. Having considered the entire record, we find the adjudged and approved sentence appropriate for this appellant who used heroin on two occasions then continued to engage in unauthorized acts of possessing heroin after becoming a CI.

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court