UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman CHAD M. WALLACE
United States Air Force

ACM 36407

29 August 2006

Sentence adjudged 1 June 2005 by GCM convened at Wright-Patterson Air Force Base, Ohio. Military Judge: Donald A. Plude.

Approved sentence: Bad-conduct discharge, confinement for 54 months, forfeiture of all pay and allowances, and reduction to E-1.

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

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Amy E. Hutchens.

Before

BROWN, JACOBSON, and SCHOLZ
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

BROWN, Chief Judge:

We examined the record of trial, the assignments of error (including the affidavit filed by the appellant), and the government's response thereto. The appellant asserts that his guilty pleas to wrongful distributions of cocaine and marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, are improvident. He also maintains, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), that he was denied effective assistance of counsel and that his approved sentence of a bad-conduct discharge, confinement for 54 months, total forfeiture of all pay and allowances, and reduction to E-1, is inappropriately severe.

Providency of the Pleas

In determining whether a guilty plea is provident, the test is whether there is a "substantial basis in law and fact for questioning the guilty plea." *United States v. Jordan,* 57 M.J. 236, 238 (C.A.A.F. 2002) (citing *United States v. Prater,* 32 M.J. 433, 436 (C.M.A. 1991)). In order to establish an adequate factual basis for a guilty plea, the military judge must elicit "factual circumstances as revealed by the accused himself [that] objectively support that plea[.]" *Id.* (quoting *United States v. Davenport,* 9 M.J. 364, 367 (C.M.A. 1980)). We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle,* 44 M.J. 374, 375 (C.A.A.F. 1996) (citing *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995)).

"Where an accused's responses during the providence inquiry suggest a possible defense to the offense charged, the [military] judge is well advised to clearly and concisely explain the elements of the defense in addition to securing a factual basis to assure that the defense is not available." *United States v. Pirero,* 60 M.J. 31, 34 (C.A.A.F. 2004) (quoting *United States v. Jemmings,* 1 M.J. 414, 418 (C.M.A. 1976)). The military judge must resolve inconsistencies and apparent defenses or the guilty pleas must be rejected. *Id.* (citing *United States v. Outhier,* 45 M.J. 326, 331 (C.A.A.F. 1996)); *Jemmings,* 1 M.J. at 418.

Entrapment is an affirmative defense to wrongful distribution of cocaine and marijuana. *See* Rule for Courts-Martial 916(g). However, if an appellant is predisposed to distribute these drugs, then this defense is not available. *Id.*; *United States v. Vanzandt,* 14 M.J. 332, 343 (C.M.A. 1982).

The appellant's testimony during the *Care*[1] inquiry objectively supports the appellant's acknowledgment that he was predisposed to distribute cocaine and marijuana.[2] Under the facts and circumstances of this case, we are convinced, as the appellant was at trial, that he was not entrapped when he distributed cocaine and marijuana to three fellow Air Force members. *See Vanzandt*, 14 M.J. at 343; *see also United States v. Whittle*, 34 M.J. 206, 208 (C.M.A. 1992). We conclude there is no basis to disturb the appellant's pleas and hold his pleas were provident.

Ineffective Assistance of Counsel

The appellant alleges that his trial defense counsel were ineffective because they failed to raise entrapment as a defense to the drug distribution charges and did not move to suppress the appellant's statements to the Air Force Office of Special Investigations. We review claims of ineffective assistance of counsel de novo. *United States v. Key*, 57 M.J. 246, 249 (C.A.A.F. 2002) (citing *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F.

[1] *See United States v. Care,* 40 C.M.R. 247 (C.M.A. 1969).
[2] The military judge thoroughly explained the entrapment defense to the appellant during the *Care* inquiry and repeatedly asked the appellant whether he believed he was entrapped. On each occasion the appellant said he was not entrapped and was predisposed to distribute the illegal drugs. He also admitted that on two occasions he made a profit when he distributed the drugs.

1997)). In order to successfully raise a claim of ineffective assistance of counsel, an appellant must show deficient performance and prejudice. *Strickland v. Washington,* 466 U.S. 668, 687 (1984); *Key,* 57 M.J. at 249. Counsel are presumed to be competent. *United States v. Lee*, 52 M.J. 51, 52 (C.A.A.F. 1999). Applying the factors set forth in *United States v. Ginn,* 47 M.J. 236, 248 (C.A.A.F. 1997), we conclude that we can resolve the assignment of error based on the record and the appellate filings. After examining the record and the appellate filings, we find trial defense counsels' performance was not deficient. We find the appellant has failed to meet his burden of proving ineffective assistance of counsel. *See Strickland,* 466 U.S. at 687.

Sentence Appropriateness

Article 66(c), UCMJ, 10 U.S.C. § 866(c), provides that this Court "may affirm . . . the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." In *Jackson v. Taylor*, 353 U.S. 569, 576-77 (1957), the Supreme Court considered the legislative history of Article 66, UCMJ, and concluded it gave the (then) Boards of Review the power to review not only the legality of a sentence, but also whether it was appropriate. Our superior court has also determined that the Courts of Criminal Appeals have the power to, "in the interests of justice, substantially lessen the rigor of a legal sentence." *United States v. Lanford*, 20 C.M.R. 87, 94 (C.M.A. 1955). *See also United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002).

"Generally, sentence appropriateness should be judged by 'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). Sentence comparison is generally inappropriate, unless this Court finds that any cited cases are "closely related" to the appellant's case and the sentences are "highly disparate." *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999) (citing *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). There is no basis to engage in sentence comparison in this case.

We have given individualized consideration to this particular appellant and carefully reviewed the facts and circumstances of this case. The sentence is within legal limits and no error prejudicial to the appellant's substantial rights occurred during the findings or sentencing proceedings. Nonetheless, we find that a lesser sentence of a bad-conduct discharge, confinement for 48 months, forfeiture of all pay and allowances, and reduction to E-1 should be affirmed.

Conclusion

The 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). However, we affirm only so much of the sentence as includes a bad-conduct discharge, confinement for 48 months, forfeiture of all pay and

allowances, and reduction to E-1. Accordingly, the findings and sentence, as modified, are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator