UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DUSTIN T. WERT
United States Air Force

ACM 37367

19 January 2010

Sentence adjudged 17 September 2008 by GCM convened at Pope Air Force Base, North Carolina. Military Judge: Paula B. McCarron.

Approved sentence: Dishonorable discharge, confinement for 24 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain G. Matt Osborn, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

Pursuant to his pleas, a military judge found the appellant guilty of one specification of desertion with the intent to shirk important service and one specification of missing movement through design, in violation of Articles 85 and 87, UCMJ, 10 U.S.C. §§ 885, 887. Contrary to his pleas, a panel of officer members sitting as a general court-martial found the appellant guilty of wrongful appropriation of an automobile, in violation of Article 121, UCMJ, 10 U.S.C. § 921, and sentenced him to a dishonorable

discharge, 24 months of confinement, total forfeiture of pay and allowances, and reduction to the grade of E-1. The convening authority approved the adjudged sentence.*

On appeal, the appellant asks this Court to set aside the findings on Charge III and its Specification and reassess the sentence and to set aside the dishonorable discharge or grant other appropriate sentence relief. As the basis for his request, he opines: (1) the evidence is legally and factually insufficient to support his wrongful appropriation conviction because the alleged victim constructively consented to the appellant's possession of the automobile and the evidence failed to show the appellant had an intent to temporarily deprive the alleged victim of the automobile and (2) his sentence to a dishonorable discharge and 24 months of confinement is overly severe as his wife's closely related case resulted in a sentence consisting of a bad-conduct discharge and 135 days of confinement. Finding no prejudicial error, we affirm the findings and the sentence.

Background

On 2 April 2008, the appellant visited a car dealership to purchase an automobile and while there he entered into a contract to purchase a 2008 Mitsubishi Lancer. A sales representative from the car dealership allowed the appellant to leave with the automobile provided he return later to pay for the automobile. The appellant never paid for the automobile and after approximately two weeks Ms. JM, a sales representative at the car dealership, reported the appellant for theft. On 15 April 2008, the appellant, who had orders to deploy to Iraq, missed his deployment, deserted, and remained in desertion status until he was apprehended approximately 11 days later.

Legal and Factual Sufficiency of Findings on Charge III and its Specification

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) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))).

In 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

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* The military judge granted and the convening authority approved 134 days of confinement credit for illegal pretrial confinement as well as an additional 144 days of *Allen* credit. *See United States v. Allen*, 17 M.J. 126 (C.M.A. 1984).

is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). We have considered the evidence produced at trial in a light most favorable to the government and find a reasonable fact finder could have found, beyond a reasonable doubt, all of the essential elements of the questioned specification. On this point, we note that the evidence clearly establishes that a sales representative from the car dealership gave the appellant possession of the automobile only on the condition that he return to pay for the vehicle. Evidence of the appellant's failure to pay for the vehicle and his continued use of the vehicle with little regard for the car dealership is legally sufficient to support the appellant's wrongful appropriation conviction.

Lastly, 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 accused'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, 10 U.S.C. § 866(c); *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973). We have carefully considered the evidence under this standard and are convinced beyond a reasonable doubt that the accused is guilty of this specification.

Inappropriately Severe Sentence

We review 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). 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).

We decline the appellant's invitation to engage in sentence comparison because it is required only in closely related cases and the appellant fails to make reference to any closely related 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)), *aff'd*, 66 M.J. 291 (C.A.A.F. 2008). 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. "At [this Court], an appellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are '*highly disparate*.' If the appellant meets that burden . . . then the

Government must show that there is a rational basis for the disparity." *Id*. (emphasis added).

While the appellant's wife conspired with him to miss his deployment to Iraq, she had no involvement with his desertion and wrongful appropriation. As such, her case hardly qualifies as a closely related case and a sentence comparison is not required. Moreover, assuming, arguendo, that a sentence comparison is warranted, a rational basis exists for the disparity in the sentences. The appellant's wife pled to and was found guilty of conspiracy to miss movement and being absent without leave terminated by apprehension whereas the appellant was found guilty of missing movement by design, desertion to shirk important service, and wrongful appropriation of an automobile. His offenses, which are clearly more serious than his wife's offenses, warrant a more severe punishment.

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[s] and the character of the offender." *Snelling*, 14 M.J. at 268 (citation omitted). The appellant's actions are a clear departure from the norms of society and expected standards of conduct in the military. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offenses of which he was found guilty, we do not find that the appellant's sentence, one which includes a dishonorable discharge and 24 months of confinement, is overly or inappropriately severe.

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, YA-02, DAF
Clerk of the Court