UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman TIMOTHY M. WIGGINS
United States Air Force

ACM S31604

22 January 2010

Sentence adjudged 13 November 2008 by SPCM convened at Langley Air Force Base, Virginia. Military Judge: Stephen R. Woody (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Michael A. Burnat, and Captain Reggie D. Yager.

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

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

PER CURIAM:

Pursuant to his pleas, a military judge sitting as a special court-martial found the appellant guilty of one specification of conspiracy to commit housebreaking and one specification of housebreaking, in violation of Articles 81 and 130, UCMJ, 10 U.S.C. §§ 881, 930. The adjudged and approved sentence consists of a bad-conduct discharge, six months of confinement, and reduction to the grade of E-1.[1]

[1] The appellant and the convening authority entered into a pretrial agreement wherein the appellant agreed to plead guilty in return for the convening authority's promise to refer the appellant's charges and specifications to a special court-martial.

On appeal, the appellant asks this Court to set aside the bad-conduct discharge and reassess the sentence. As the basis for his request, he opines that, in light of his acceptance of responsibility and the disparate sentences of his co-actors, his sentence to a bad-conduct discharge is inappropriately severe.[2] We disagree and finding no prejudicial error, we affirm the findings and the sentence.

Background

On the night of 14 May 2008, Airman First Class (A1C) JS and Airman (Amn) SL, co-workers of the appellant, approached the appellant with the idea of breaking into a local military surplus store and damaging property therein. The appellant agreed and in the early morning hours of 15 May 2008, he drove A1C JS and Amn SL to the surplus store. While the appellant remained in the automobile, A1C JS and Amn SL broke into the store. Unbeknown to the three airmen, the store owner was in the store and apprehended Amn SL at gunpoint for local law enforcement. The appellant and A1C JS escaped.

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).

In closely related cases, this Court will engage in sentence comparisons between an accused and his co-actors. *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 [g]overnment must show that there is a rational basis for the disparity." *Id*. (emphasis added).

[2] This issue is filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Axiomatically, A1C JS's and Amn SL's cases are closely related to the appellant's case. Thus, a sentence comparison is warranted. The appellant and Amn SL received the same sentence; therefore, their sentences are not highly disparate. For his crimes, A1C JS received ten months of confinement, five of which were suspended, forfeiture of $898 pay per month for ten months, and reduction to the grade of E-1. He did not receive a punitive discharge. We consider the appellant's sentence highly disparate with A1C JS's sentence.

Despite the highly disparate sentences, the appellant is not entitled to relief because a rational basis exists for the disparity. Short of his unsworn statement, the appellant offered no evidence in extenuation and mitigation. On the other hand, at his court-martial, A1C JS offered his unsworn statement and several favorable character statements.

Most telling, however, is the prior disciplinary histories of A1C JS and the appellant. There is no evidence that A1C JS has a prior disciplinary history while the appellant's disciplinary history is replete with misconduct. On this point we note that the appellant has received: (1) non-judicial punishment for failing to go, making a false official statement, and dishonorably failing to pay a just debt; (2) non-judicial punishment for failing to go; (3) four letters of reprimand for failing to report to duty, failing to report to his commander with the correct rank, and dishonorably failing to pay a just debt; and (4) two letters of counseling for failing to report to duty and dishonorably failing to pay a just debt. The appellant's prior disciplinary history not only evinces poor rehabilitative potential, it also provides a rational basis for the high disparity between A1C JS's sentence and the appellant's sentence.

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 and the character of the offender." *Snelling*, 14 M.J. at 268 (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). While we applaud the appellant for pleading guilty and accepting responsibility for his actions, it does not minimize the seriousness of his crimes. The appellant seriously compromised his standing as a military member and violated the norms of society and expected standards of military conduct. After carefully examining the submissions of counsel, the appellant's military record replete with misconduct, and taking into account all the facts and circumstances surrounding the offenses of which he was found guilty, we do not find the appellant's sentence, one which includes a bad-conduct discharge, 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, 10

U.S.C. § 866(c); *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