UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DANIEL A. ZARBATANY, JR.
United States Air Force

ACM 37448

04 October 2010

Sentence adjudged 05 December 2008 by GCM convened at Elmendorf Air Force Base, Alaska. Military Judge: Don M. Christensen.

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

Appellate Counsel for the Appellant: Colonel James B. Roan, Major Shannon A. Bennett, Major Darrin K. Johns, and Major Reggie D. Yager.

Appellate Counsel for the United States: Lieutenant Colonel Jeremy S. Weber, Major Kimani R. Eason, Captain Charles G. Warren, and Gerald R. Bruce, Esquire.

Before

BRAND, GREGORY, and ROAN
Appellate Military Judges

PER CURIAM:

The appellant entered pleas of guilty before a general court-martial to two specifications of absence without leave (AWOL) for a period of less than three days, two specifications of wrongful use of cocaine, and two specifications of wrongful use of marijuana in violation of Articles 86 and 112a, UCMJ, 10 U.S.C. §§ 886, 912a. He entered a plea of not guilty to one specification of distributing cocaine in violation of Article 112a, UCMJ. After the military judge accepted his pleas and entered findings of guilty, a panel of officers acquitted him of the specification of distribution and sentenced him to a bad-conduct discharge, confinement for six months, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade.

The military judge awarded 119 days credit for pretrial confinement plus an additional credit of 476 days for unusually harsh conditions of pretrial confinement, relying on the authority of *United States v. Adcock*, 65 M.J. 18 (C.A.A.F. 2007) (finding that knowing and deliberate violations of service regulations support the award of administrative credit under Rule for Courts-Martial (R.C.M.) 305(k)). With adjudged confinement of six months, the credit resulted in the appellant's release from confinement at the conclusion of the court-martial. In acting on the sentence, the convening authority properly referenced the credit, disapproved the adjudged forfeiture, and approved the punitive discharge and reduction in grade. The appellant asserts on appeal that his sentence is inappropriately severe, particularly arguing that the punitive discharge should be disapproved to provide meaningful relief because the pretrial confinement credit exceeded the adjudged confinement to which the credit applied. We disagree.

Credit for illegal pretrial confinement applies to confinement adjudged. R.C.M. 305(k), *quoted in Adcock*, 65 M.J. at 23; *United States v. King*, 61 M.J. 225, 229 (C.A.A.F. 2005) (noting that the remedy for a violation of Article 13, UCMJ, 10 U.S.C. § 813, is administrative credit against adjudged confinement per R.C.M. 305(k)). If the credit exceeds adjudged confinement, the credit will then be applied to: (1) hard labor without confinement, (2) restriction, (3) fine, and (4) forfeiture, in that order, but will not be applied against "any other form of punishment." R.C.M. 305(k). The rationale for this restriction on conversion of credit to other forms of punishment is the qualitative difference between imposition of a punitive discharge and/or reduction in grade and imposition of confinement. Drafter's Analysis, *Manual for Courts-Martial, United States*, A21-21 (2008 ed.); *see also United States v. Josey*, 58 M.J. 105, 108 (C.A.A.F. 2003) (noting that "punitive separations are so qualitatively different from other punishments that conversion is not required as a matter of law"). In the present case, the convening authority credited the appellant with the days awarded by the military judge and disapproved the adjudged forfeitures, leaving no other form of punishment to which the credit could properly apply.

Citing Chief Judge Effron's concurrence in *United States v. Rock*, 52 M.J. 154 (C.A.A.F. 1999), the appellant argues that effective relief from pretrial confinement may extend to disapproval of a punitive discharge. However, the Chief Judge's concurrence focused on whether credit for illegal pretrial confinement should be against the confinement adjudged or that which could be approved under the terms of a pretrial agreement—not on whether such credit should extend to disapproval of a punitive discharge. *Rock*, 52 M.J. at 157-58. Nor do we find persuasive the appellant's argument that our superior court in *United States v. Harris*, 66 M.J. 166, 169 (C.A.A.F. 2008), implicitly acknowledged the authority to set aside a punitive discharge—the *Harris* Court rejected the appellant's argument that credit for illegal confinement that exceeded the amount already served required disapproval of the punitive discharge. In the present case, the military judge properly awarded additional administrative credit for unduly

harsh conditions of pretrial confinement and the convening authority properly applied the credit to the adjudged sentence.

Turning to the appellant's more general argument concerning sentence appropriateness, 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 offenses, 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. Rangel*, 64 M.J. 678, 686 (A.F. Ct. Crim. App. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate, but 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).

The appellant admitted to having an addiction to illegal drugs. He describes his first use of cocaine as happening at his residence during a 2007 holiday party. A civilian introduced him to it. He soon began using cocaine on weekends and days off, and his cocaine use continued into the summer of 2008. He also frequently used marijuana during February 2008 and the summer of 2008. His first AWOL occurred after he stayed out all night despite knowing that he had to be at work by 0600, and he remained absent until he was apprehended at his residence at about 1000. The second AWOL happened about two weeks later when he failed to return to work after taking his wife to a medical appointment. He told the military judge during the plea inquiry that during the 24-hour absence he spent time with "a civilian off base." The appellant's recurring drug abuse only stopped when his wife reported him to law enforcement. Having given individualized consideration to this particular appellant, the nature of the offenses, and all other matters in the record of trial to include the appellant's pretrial confinement, we hold that the approved sentence is not 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.

ROAN, Judge did not participate.

OFFICIAL

STEVEN LUCAS
Clerk of the Court