UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CORY R. HALL
United States Air Force

ACM S31889

05 February 2013

Sentence adjudged 30 November 2010 by SPCM convened at Scott Air Force Base, Illinois. Military Judge: Michael J. Coco (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 4 months, forfeiture of $964.00 pay per month for 4 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Michael S. Kerr and Captain Shane A. McCammon.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Scott C. Jansen; Major Brett D. Burton; and Gerald R. Bruce, Esquire.

Before

ROAN, GREGORY, and HARNEY
Appellate Military Judges

PER CURIAM:

A military judge sitting as a special court martial convicted the appellant of one specification of violating a lawful general order by wrongfully smoking botanical incense known as "spice," in violation of Article 92, UCMJ, 10 U.S.C. § 892, and one specification each of wrongfully using psilocybin mushrooms, oxycodone, and hydrocodone, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 4 months, forfeiture of $964.00 pay per month for 4 months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

Before this Court, the appellant argues that his sentence is inappropriately severe in light of a more lenient sentence imposed upon a co-defendant. We disagree and, for the reasons discussed below, affirm the findings and sentence.

Background

The appellant pled guilty to the charges and specifications. During his *Care*[*] inquiry, the appellant admitted to wrongfully smoking spice at least 10 times between April 2009 and August 2010, in violation of the lawful order issued by the Commander, Air Mobility Command. He further admitted to wrongfully using, on occasion, psilocybin mushrooms, oxycodone, and hydrocodone, all within the charged timeframes. The appellant stated he received the psilocybin mushrooms from Senior Airman (SrA) JF, and the oxycodone and hydrocodone from Airman Basic JC.

SrA JF was tried before a special court-martial panel of officer members on 1 December 2010. Consistent with his pleas, SrA JF was convicted of one specification of violating a lawful general order by wrongfully smoking botanical incense known as "spice," in violation of Article 92, UCMJ, as well as one specification of wrongful use of psilocybin and one specification of wrongful distribution of psilocybin, in violation of Article 112a, UCMJ. The members sentenced SrA JF to a bad-conduct discharge, 60 days of confinement, forfeiture of $964.00 pay per month for 4 months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

Sentence Severity

The appellant asserts that his sentence was inappropriately severe when compared to that of his co-defendant, SrA JF. We disagree.

This Court reviews sentence appropriateness de novo. *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, 10 U.S.C. § 866(c). We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, 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. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). 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, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

[*] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

Additionally, "[t]he Courts of Criminal Appeals are required to engage in sentence comparison only 'in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.'" *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). Sentence comparison is generally inappropriate unless this Court finds that any cited cases are "closely related" to the appellant's case and that the sentences are "highly disparate." *Lacy*, 50 M.J. at 288. "[A]n 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.*

We find that the appellant's case is not closely related to that of SrA JF's and that the sentences are not highly disparate. The only direct nexus between the appellant's conduct and that of SrA JF's is that, on one occasion, SrA JF distributed psilocybin mushrooms to the appellant. The appellant has not shown that he and SrA JF were co-actors involved in a common or parallel scheme, or had any other nexus regarding the other offenses for which the appellant was convicted, including wrongfully smoking spice, wrongfully using oxycodone, and wrongfully using hydrocodone. Although the appellant received two more months of confinement and forfeitures than SrA JF, we note that he also used two additional drugs that SrA JF did not use. We do not find these differences "so dramatic as to be highly disparate." *United States v. Anderson*, 67 M.J. 703, 706 (A.F. Ct. Crim. App. 2009).

Additionally, when considering disparity, we may consider the difference between the actual and maximum potential sentences. *Lacy*, 50 M.J. at 298. The appellant received a sentence far less than the jurisdictional maximum sentence of a special court martial: a bad-conduct discharge, 12 months of confinement, forfeiture of 2/3 pay per month for 12 months, reduction to E-1, and a fine. This factor weighs against the appellant in the "highly disparate" analysis. *Id*. at 289; *Anderson*, 67 M.J. at 706-07.

Finally, we have given individualized consideration to this particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all other matters contained in the record of trial. We find that the approved sentence was clearly within the discretion of the convening authority, was appropriate in this case, and was not inappropriately severe.

Appellate Delay

We note that the overall delay of over 18 months between the time this case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "(1) the length of

the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to timely review and appeal, and (4) prejudice." *United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. The post-trial record contains no evidence that the delay has had any negative impact on the appellant. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.

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.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court