

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman BRIAN A. CARNEY
United States Air Force**

ACM S29932

28 February 2002

Sentence adjudged 10 January 2001 by SPCM convened at Pope Air Force Base, North Carolina. Military Judge: Thomas G. Crossan Jr. (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 60 days, forfeiture of \$695.00 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for Appellant: Lieutenant Colonel Beverly B. Knott, Lieutenant Colonel Timothy W. Murphy, and Captain Patrick J. Dolan.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major Cheryl D. Lewis.

Before
SCHLEGEL, PECINOVSKY, and LOVE
Appellate Military Judges

OPINION OF THE COURT

LOVE, Judge:

At a special court-martial, a military judge convicted the appellant of dereliction of duty for misuse of a government travel card, and wrongful use of marijuana, in violation of Articles 92 and 112a, UCMJ, 10 U.S.C. §§ 892, 912a. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 3 months, forfeiture of \$695.00 pay per month for 3 months, and reduction to E-1.¹ Pursuant to a pretrial agreement, the convening authority reduced the confinement to 60 days, but otherwise approved the sentence as adjudged. The appellant asserts that the sentence is inappropriately severe for the nature of his offenses. We find no error and affirm.

¹ The judge actually announced the forfeitures as “two-thirds pay per month for three months.”

I. FACTS

The appellant was a 21-year-old vehicle operator in the transportation squadron at Pope Air Force Base, North Carolina. He had served almost three years of a four-year enlistment in his hometown of Fayetteville, North Carolina. Unfortunately, his service record was quite poor, with two administrative actions under Article 15, UCMJ, 10 U.S.C. § 815, various letters of reprimand and letters of counseling, and several referral enlisted performance reports. Another unfortunate factor was the fact that the appellant suffered an injury as a result of inadvertently stepping into a hole filled with boiling water (pour-off from a building's steam pipe), on base, while on active duty. He suffered a third-degree burn on his lower leg, which resulted in hospitalization, surgery, and skin grafts. As he was recovering, he was placed on a medical profile that precluded him from performing his normal duties as a driver. As a result, he was assigned minimal tasks but still failed to meet certain basic standards, such as reporting for work on time.

Approximately six months after his injury, the appellant used marijuana at an off-base party with some civilian friends. In response, his commander initiated an administrative discharge action. While it was being processed, the appellant illegally used his government travel card to obtain money at a cash machine. As a result, court-martial charges were preferred.

The appellant's sentencing evidence focused on the appellant's injury and included his medical records and photographs of his leg. The trial defense counsel pointed out that a punitive discharge would negatively impact the appellant's ability to obtain Veterans' Affairs medical care and disability payments. The same argument was made to the convening authority in the appellant's clemency submissions.

II. SENTENCE SEVERITY

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we may affirm only those sentences that we find correct in law and fact and determine, on the basis of the entire record, should be approved. In determining sentence appropriateness, we must ensure that justice is done and that the appellant gets the punishment he deserves for his crimes. However, our authority on appeal does not extend to granting clemency. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988). As the court in *Healy* explained: "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves. Clemency involves bestowing mercy – treating an accused with less rigor than he deserves." *Id.* at 395. We discharge our responsibility on this issue by reviewing the evidence surrounding the offenses, as well as assessing the appellant's service record. *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982).

In this case, the appellant's injury had no bearing on his criminal misconduct or his service record. His poor duty performance pre-existed his injury and continued thereafter. By the appellant's own admission, his injury did not contribute to his acts of misconduct. While it is true that the appellant's sentence may impact the veterans' benefits he may receive, it is also true that the trial judge and the convening authority both acted with a full appreciation of the appellant's medical condition.

Under Rule for Courts-Martial (R.C.M.) 1003(b)(8)(C), a bad-conduct discharge is appropriate for a member who has repeatedly engaged in minor offenses and whose punitive separation appears to be necessary. In this case, the record reflects a pattern of minor misconduct, as well as more serious misconduct while the appellant was facing an administrative discharge. Thus, while the appellant's injury lends itself to a plea for mercy, it does not support a finding that the sentence is inappropriate in this case.

III. 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. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA BUTLER, SSgt, USAF
Chief Court Administrator