UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman RANDY S. ETZWEILER
United States Air Force

ACM 35306

30 April 2004

Sentence adjudged 11 June 2002 by GCM convened at Spangdahlem Air Base, Germany. Military Judge: Linda S. Murnane (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 14 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Lieutenant Colonel Robin S. Wink, Major Terry L. McElyea, Major Andrew S. Williams, and Captain L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher and Lieutenant Colonel Lance B. Sigmon.

Before

PRATT, GRANT, and CONNELLY
Appellate Military Judges

OPINION OF THE COURT

CONNELLY, Judge:

The appellant was convicted at a general court-martial of use on divers occasions of marijuana and psilocybin mushrooms, distribution on divers occasions of marijuana and psilocybin mushrooms, introduction of marijuana and introduction of psilocybin mushrooms on divers occasions onto a military installation, and fraudulent enlistment, in violation of Articles 83 and 112a, UCMJ, 10 U.S.C. §§ 883, 912a. His approved sentence included a bad-conduct discharge, confinement for 14 months, forfeiture of all pay and allowances, and reduction to E-1.

I. Providence of Plea

In his first assignment of error the appellant contends that his plea to the fraudulent enlistment specification of Charge II is improvident, because he did not procure an enlistment by fraudulent means. The government concedes error. The appellant admitted his pre-service use to his recruiter, but then denied such use on his enlistment questionnaire. The record is silent as to how many times the appellant engaged in pre-service marijuana use. Pre-service marijuana use of five times or less is not disqualifying for enlistment. *See* Air Force Instruction 36-2002, *Regular Air Force and Special Category Accessions*, Attachment 2, ¶ A2.1 (7 Jun 1999); Air Education and Training Command Instruction 36-2002, *Recruiting Procedures for the Air Force*, ¶¶ 4.10, 4.11 (18 Apr 2000). Because the appellant's plea is improvident as to Charge II and its Specification, the findings as to that Charge and its Specification are set aside and the appellant's sentence will be reassessed.

II. Sentence Appropriateness and Comparison

In his second assignment of error, the appellant submits that his sentence is inappropriately severe when compared to the sentence of another airman. An appellant must demonstrate the cited case is closely related and the sentences are "highly disparate." *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999). If this burden is met, then it is incumbent upon the government to show a "rational basis" for the disparate sentences. *Id.* Generally, sentence appropriateness should be judged by "individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

The appellant submits the case of Airman First Class (A1C) Stephen Gosselin for sentence comparison purposes. An examination of the stipulation of fact admitted into evidence in A1C Gosselin's case shows that A1C Gosselin admitted to using marijuana six times (twice with the appellant), using hallucinogenic mushrooms twice (never with the appellant), introducing hallucinogenic mushrooms onto a military installation once and distributing marijuana once. A1C Gosselin was sentenced at a special court-martial to a bad-conduct discharge, 30 days' confinement and reduction to E-1. An examination of the appellant's stipulation of fact shows 30 marijuana uses, 4 psilocybin mushroom uses, 4 distributions of marijuana, 3 distributions of psilocybin mushrooms, and 1 introduction each of marijuana and psilocybin mushrooms onto a military installation. With the exception of two uses of marijuana, the appellant and A1C Gosselin are not co-actors involved in a common crime. The appellant has failed to demonstrate that his case and the case of A1C Gosselin are closely related. Sentence comparison is not appropriate in this case. Even if the cases are closely related, the difference in the number of uses provides ample reason for the disparity in the sentences.

III. Sentence Reassessment

Because we have disapproved the appellant's conviction for Charge II and its specification, we must reassess the sentence. In *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), our superior court summarized the required analysis:

> In *United States v. Sales*, 22 MJ 305 (CMA 1986), this Court set out the rules for sentence reassessment by a Court of Criminal Appeals. If the court can determine that, absent the error, the sentence would have been at least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing. *Id*. at 307. A sentence of that magnitude or less "will be free of the prejudicial effects of error." *Id.* at 308. If the error at trial was of constitutional magnitude, then the court must be satisfied beyond a reasonable doubt that its reassessment cured the error. *Id*. at 307. If the court "cannot reliably determine what sentence would have been imposed at the trial level if the error had not occurred," then a sentence rehearing is required. *Id.*

Under the circumstances of this case, we find that we can reassess the sentence in accordance with the established criteria.

At trial, the appellant faced a maximum punishment of a dishonorable discharge, 49 years' confinement, forfeiture of all pay and allowances and reduction to airman basic. After setting aside the conviction for Charge II and its Specification, the maximum possible punishment would be the same except that the maximum possible confinement would be reduced from 49 years to 47 years. Thus, dismissing Charge II and its specification would have little impact on the maximum punishment.

Even after setting aside the findings of guilt as to Charge II and its specification, there was very substantial evidence of significant and extensive misconduct involving drug abuse. The appellant's duty performance was marginal and he had several instances of misconduct prior to the court-martial, resulting in non-judicial punishment, two letters of reprimand and a letter of counseling. Thus, there was a substantial amount of evidence demonstrating the nature and extent of the appellant's misconduct, even absent any error.

Considering these factors, we find that dismissing Charge II and its specification does not substantially diminish the totality of the misconduct before the sentencing authority. Indeed, the appellant's sentence may well have remained the same. However, in an excess of caution, we will reduce the sentence. We conclude that reducing the appellant's confinement from 14 months to 13 months will cure any error. *Doss*, 57 M.J. at 185. We are satisfied that, absent the error, the sentence would not have been less than

a bad-conduct discharge, confinement for 13 months, total forfeitures, and reduction to E-1.

IV. Conclusion

The findings of guilt for Charge II and its specification are set aside and the specification and charge are dismissed. The findings, as modified, and the sentence, as reassessed, 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. 2002). Accordingly, the findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator