UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman YOLANDA HIGH
United States Air Force

ACM 37777

17 January 2013

Sentence adjudged 28 September 2010 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: Jeffrey A. Ferguson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 24 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford and Major Michael S. Kerr.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A Letendre; Major Deanna Daly; Captain Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

OPINION OF THE COURT

HECKER, Judge:

A general court-martial composed of a military judge convicted the appellant, consistent with her pleas, of three specifications of wrongful distribution of controlled substances and one specification of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged sentence consisted of a dishonorable discharge, confinement for 24 months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged, while waiving the mandatory forfeitures for the benefit of the appellant's dependent daughter. On appeal, pursuant to *United*

States v. Grostefon, 12 M.J. 431 (C.M.A. 1982), the appellant asserts three errors: (1) her guilty pleas were improvident; (2) she was denied the effective assistance of counsel; and (3) her sentence is inappropriately severe. Finding no error that materially prejudices the appellant, we affirm.

Providency of Guilty Pleas

The appellant pled guilty to wrongful distribution of Oxycodone (Percocet), Hydrocodone (Lortab), and Morphine Sulfate on divers occasions, between March and October 2009.[1] She had received prescriptions for each of these controlled substances due to an ongoing back problem, but she chose to give some of the medication to other Airmen.[2] On occasion, she would charge them a small amount of money for the pills. On one occasion, in either December 2009 or January 2010, the appellant snorted cocaine at her off-base residence with another Airman. The appellant now contends that her guilty pleas are improvident because she had very recently been united with a child she had given up for adoption and was "willing to sign and say anything" so she could end the trial preparation sessions with her defense counsel and spend time with her child.

"A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion." *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996), *quoted in United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). "A military judge abuses this discretion if he fails to obtain from the accused an adequate factual basis to support the plea – an area in which we afford significant deference." *Inabinette*, 66 M.J. at 322. (citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)). *See also United States v. Nance*, 67 M.J. 362, 366 (C.A.A.F. 2009). In conducting this review, "we apply the substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea." *Inabinette*, 66 M.J. at 322.

During the providence inquiry, after properly apprising the appellant of the elements and definitions of the offenses of wrongful distribution of controlled substances and wrongful use of cocaine, the military judge elicited the appellant's own description of why she believed she was guilty. Prior to accepting her guilty plea, he asked her if she

[1] The appellant was also charged with wrongful use of these substances, based on the Government's contention that it was unlawful for her to snort her prescribed medications as opposed to taking them in their original pill form. After the appellant attempted to enter a guilty plea to these three specifications, the military judge raised a question about whether such a plea could be provident. The military judge later entered pleas of not guilty to these three specifications. Following consultation with the convening authority, the trial counsel withdrew and dismissed the specifications. The Court notes the court-martial order indicates the appellant pled guilty to Specifications 1, 3, and 5. A corrected court-martial order is ordered.

[2] Some of these distributions occurred while the appellant was restricted to base and living in the dormitory as she awaited trial by special court-martial for a one-time wrongful use of cocaine and multiple failures to go. At that 8 June 2009 court-martial, then-Senior Airman High was sentenced by a military judge to 2 months of confinement and reduction to E-2. After serving her sentence, the appellant resumed her distribution, this time from her off-base residence.

had been given adequate time to prepare for trial, and whether she fully understood the significance of making such a plea, including the possibility of being sentenced to confinement for 50 years. This directly contradicts her post-trial claim that she only agreed to plead guilty so she could spend the preceding weekend with her child. After considering the record as a whole and the totality of circumstances of the providence inquiry, including the full range of the appellant's responses during the plea inquiry, we find her plea was not improvident.

Assistance of Counsel

The appellant contends that her trial defense counsel provided her ineffective assistance of counsel when they: (1) recommended she elect trial by military judge because the court-martial panel included multiple prior enlisted members who tend to be "harsh" when judging enlisted members; (2) prevented her from contacting civilian defense counsel by saying the military judge would see that as an effort by her to delay the trial and may not give her an extension; (3) improperly told her to plead guilty to charges where the only evidence against her was hearsay from others who had been court-martialed, including a witness who had an affair with the appellant's ex-husband, had been disciplined for false official statements, and lied during her testimony at the appellant's trial; and (4) failed to conduct an adequate investigation as they were not assigned to her case until just before her trial and did not adequately prepare for or handle the testimony of the prosecutor from her first court-martial. In affidavits provided in response to a Government-requested order from this Court, the appellant's trial defense counsel, Major MQ and Captain MRB, describe their involvement with the appellant, their preparation for her court-martial, and their discussions with the appellant about her rights.

Harrington v. Richter, 131 S. Ct. 770, 788 (2011), reaffirmed that the de novo standard of review for ineffective assistance of counsel claims is "most deferential." Claims of ineffective assistance of counsel are reviewed by applying the two-pronged test set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See United States v. Green*, 68 M.J. 360, 361-62 (C.A.A.F. 2010). Under *Strickland*, an appellant must demonstrate: (1) a deficiency in counsel's performance that is "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) that "the deficient performance prejudiced the defense . . . [through errors] so serious as to deprive the defendant of a fair trial . . . whose result is reliable." *Strickland*, 466 U.S. at 687. In the context of a guilty plea, the prejudice question is whether "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007).

"[T]he defense bears the burden of establishing the truth of the factual allegations that would provide the basis for finding deficient performance." *Tippit*, 65 M.J. at 76 (citation omitted). Even if there are opposing affidavits raising a factual dispute that is "material" to the resolution of the post-trial claim, we can resolve the claim without a fact-finding hearing if: (1) the facts alleged in the appellant's declaration, even if true, would not warrant relief if the factual dispute was resolved in her favor; (2) the appellant's affidavit consists of speculative or conclusory observations and not specific facts; (3) the appellate filings and the record as a whole compellingly demonstrate the improbability of the facts alleged by the appellant; or (4) the appellant's post-trial claim contradicts matters within the record of a guilty plea (including the appellant's expression of satisfaction with counsel) and the appellant has not set forth facts that would rationally explain why she would have made such statements at trial but not upon appeal. *United States v. Ginn*, 47 M.J. 236, 244-45, 248 (C.A.A.F. 1997); *see also United States v. Fagan*, 59 M.J. 238, 243 (C.A.A.F. 2004) (concluding a fact-finding hearing was required after finding the inapplicability of any of the *Ginn* factors).

We need not resort to a fact-finding hearing here. At her court-martial, the appellant was advised by the military judge about her right to elect trial by panel members, to retain civilian counsel, and to plead not guilty.[3] After acknowledging those rights and choosing not to ask the military judge any questions about them, the appellant knowingly and voluntarily agreed to plead guilty at a trial by military judge and to not seek a civilian counsel. She also expressed her satisfaction with her trial defense counsel and indicated she had been given adequate time and opportunity to discuss the case with those counsel. The appellant has not provided any facts that would rationally explain why she made these statements at trial and has now changed her story. *See Ginn*, 47 M.J. at 248. The record of trial as a whole compellingly demonstrates the improbability of these assertions, as well as her claims that her trial defense counsel did not adequately prepare for trial and that insufficient evidence existed to find her guilty at a litigated trial. Having reviewed the issue de novo, in accordance with the applicable standards, we find no merit whatsoever in the ineffective assistance claim.

Sentence Appropriateness

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). In doing so, 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. Rangel*, 64 M.J.

[3] We note that, because this was not the appellant's first court-martial, she was being advised of these matters for the second time.

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).

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 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 do not find sentence comparison appropriate in this case. Furthermore, 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.

Conclusion

The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[4] Article 66(c), UCMJ; *United States v.*

[4] Although not raised by the appellant, we note that more than 18 months have elapsed between the time the case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court. Because such delays are 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 it 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. 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 was harmless beyond a reasonable doubt, and that relief is not otherwise warranted. *United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).

Reed, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court