UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman JEFFREY J.D. JOLLIFF
United States Air Force

ACM S31715

14 October 2010

Sentence adjudged 19 June 2009 by SPCM convened at Ramstein Air Base, Germany. Military Judge: William E. Orr, Jr. (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford, Major Shannon A. Bennett, Major Darrin K. Johns, and Captain Andrew J. Unsicker.

Appellate Counsel for the United States: Colonel Don M. Christensen, Lieutenant Colonel Jeremy S. Weber, Major Coretta E. Gray, and Gerald R. Bruce, Esquire.

Before

BRAND, GREGORY, and WEISS
Appellate Military Judges

PER CURIAM:

Pursuant to the appellant's pleas, a military judge sitting as a special court-martial convicted the appellant of one specification of wrongful possession of marijuana, one specification of divers wrongful use of oxycodone, one specification of divers wrongful possession of psilocybin mushrooms, and one specification of wrongful use of marijuana in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged and approved sentence consists of a bad-conduct discharge, three months of confinement, and reduction to the grade of E-1.

On appeal, the appellant argues that: (1) the military judge abused his discretion by accepting the appellant's plea to divers wrongful possession of psilocybin mushrooms because there was no evidence that he possessed the mushrooms on more than one occasion and (2) his sentence is inappropriately severe when compared to the lesser sentences of his coactors.[1] Finding error with the finding of guilty for the divers wrongful possession of psilocybin mushrooms, we modify that finding, affirm the remaining findings, and reassess the sentence.

Providency of the Appellant's Plea to Divers Possession of Psilocybin Mushrooms

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). An accused may not plead guilty unless the plea is consistent with the actual facts of his case. Article 45(a), UCMJ, 10 U.S.C. § 845(a); *United States v. Moglia*, 3 M.J. 216, 218 (C.M.A. 1977). An accused may not simply assert his guilt; the military judge must elicit facts "as revealed by the accused himself" to support the plea of guilty. *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)); *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996). When there is "a substantial basis in law and fact for questioning the plea," the plea cannot be accepted. *United States v. Hardeman*, 59 M.J. 389, 391 (C.A.A.F. 2004).

In this case, the appellant was charged with divers possession of psilocybin mushrooms in the Federal Republic of Germany. During his providency inquiry, the appellant admitted that he purchased the psilocybin mushrooms in the Netherlands. He then took them back to his off-base residence in Germany where he stored them in a container in his bedroom closet until they were discovered by agents with the Air Force Office of Special Investigations. There is no evidence in the record to indicate that the appellant possessed psilocybin mushrooms on any other occasion. Under the specific circumstances of this case, we find that the appellant possessed the psilocybin mushrooms on only one occasion, as he exercised one continuous and exclusive possession. *United States v. Fredenburg*, ACM 35880, unpub. op. at 2 (A.F. Ct. Crim. App. 21 Nov 2005) (citing *United States v. Wheeler*, ACM S30433 (A.F. Ct. Crim. App. 5 May 2005) (unpub. op.); *United States v. Dees*, ACM 34841 (A.F. Ct. Crim. App. 13 Dec 2002) (unpub. op.)) (finding that the appellant had continuous and exclusive possession of the ecstasy pills because there was no evidence that he "added to his stockpile or possessed other ecstasy pills that were not originally among the 20,000 he purchased"). Accordingly, we affirm the finding of guilty to Specification 3 of the Charge, excepting the language "on divers occasions."

[1] The second issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). The appellant asserted a third assignment of error regarding ineffective assistance of counsel; however, it was withdrawn by motion on 21 July 2010.

Having taken corrective action on the findings, we must remand the case for a sentence rehearing or reassess the sentence. *United States v. Boone*, 49 M.J. 187, 194 (C.A.A.F. 1998). In *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986), our superior court held that we may reassess a sentence if we can reliably determine that the sentence which would have been adjudged at the trial level, absent the error, "would have been at least of a certain magnitude." Reassessing the sentence in consideration of the error noted, the entire record of trial, and the principles set forth in *Sales*, this Court is convinced beyond a reasonable doubt that the military judge, as the sentencing authority, would have imposed at least a bad-conduct discharge, three months of confinement, and reduction to the grade of E-1. We reassess the sentence accordingly.

Sentence Appropriateness

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire 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). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, 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).

Sentence comparisons are required only in closely related cases. *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006) (citing *United States v. Wacha*, 55 M.J. 266, 267-68 (C.A.A.F. 2001)), *aff'd in part*, 66 M.J. 291 (C.A.A.F. 2008). Closely related cases include, for example, those which pertain to "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Lacy*, 50 M.J. at 288. "At [this Court], an 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*. (emphasis added).

We decline the appellant's invitation to engage in sentence comparisons with Senior Airman (SrA) CK, SrA RP, and Airman First Class (A1C) MC. In an affidavit to this Court, the appellant claims that SrA CK, SrA RP, and A1C MC's cases were closely related; however, neither the fact that the appellant may have socialized with these individuals nor the fact that they were allegedly investigated for drug-related offenses during the same time period that the appellant was investigated makes them coactors. To be entitled to a sentence comparison with these individuals, the appellant must show that they were coactors or individuals involved in a common or parallel scheme with him.

The appellant has fallen short of his burden; thus, he is not entitled to a sentence comparison.

We next consider whether the appellant's sentence was appropriate judged by "individualized consideration" of the appellant "on the basis of the nature and seriousness of the offense[s] and the character of the offender." *Snelling*, 14 M.J. at 268 (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.A.A.F. 1959)). The appellant's actions are a clear departure from the norms of society and the expected standards of conduct in the military. After carefully examining the submissions of counsel, the appellant's military record, and all the facts and circumstances surrounding the offenses of which he was found guilty, we do not find that the appellant's approved sentence is inappropriately severe.

Conclusion

The approved 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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court