

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman WILLIAM F. KELLY
United States Air Force

ACM S31567

24 July 2009

Sentence adjudged 08 September 2008 by SPCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: Stephen R. Woody.

Approved sentence: Bad-conduct discharge, confinement for 30 days, and reduction to E-3.

Appellate Counsel for the Appellant: Colonel Raymond J. Hardy, Jr., Major Shannon A. Bennett, and Captain Phillip T. Korman.

Appellate Counsel for the United States: Major Jeremy S. Weber, Captain Michael T. Rakowski, and Gerald R. Bruce, Esquire.

Before

BRAND, HEIMANN, and HELGET
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

In accordance with his pleas, the appellant was found guilty of one specification of wrongfully using cocaine and one specification of wrongfully using marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The approved sentence consists of a bad-conduct discharge, confinement for 30 days, and reduction to E-3.¹

¹ The convening authority deferred confinement until 18 October 2008, to allow the appellant time to recover from surgery on 30 September 2008. The convening authority also deferred the mandatory forfeitures until action was taken and waived the mandatory forfeitures for the maximum period allowed.

The issue on appeal, raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), is whether the portion of the appellant's sentence which includes a bad-conduct discharge is inappropriately severe.

Background

On 23 February 2008, the appellant, who at the time was in the rank of Staff Sergeant with almost 10 years of service, smoked a marijuana cigarette while he was on leave at a party at his sister's house in Dayton, Ohio. He took approximately four puffs from the cigarette that was provided by a civilian at the party. Unbeknownst to the appellant, the marijuana cigarette was also laced with cocaine.

On 25 February 2008, the appellant was randomly selected to provide a urine sample at the Drug Demand Reduction Office at Seymour Johnson Air Force Base (AFB). The appellant's urine specimen tested positive for marijuana and cocaine.

Inappropriately Severe Sentence

The appellant asserts that the portion of his sentence which includes a bad-conduct discharge is inappropriately severe. 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 offenses, the appellant's record of service, and all matters contained in the record of trial." *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006) (citing *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988)); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). 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, 287-88 (C.A.A.F. 1999); *Healy*, 26 M.J. at 395-96.

The maximum punishment in this case was the jurisdictional limit for a special court-martial, which includes a maximum of 12 months confinement and a bad-conduct discharge. The appellant's approved sentence was a bad-conduct discharge, confinement for 30 days, and reduction to E-3. Having given individualized consideration to this particular appellant, the nature of the offenses, the appellant's record of service,² and all

² We note that the appellant received nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815, dated 13 March 2008, for making a false official statement, and a Letter of Reprimand, dated 28 February 2008, for operating a motor vehicle while under the influence of alcohol in the state of Ohio. The appellant's record also includes combat service in Saudi Arabia and Qatar. This information was not included on the appellant's personal data sheet

other matters in the record of trial, we hold that the approved sentence, which includes a bad-conduct discharge, is not inappropriately severe.

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.

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STEVEN LUCAS, YA-02, DAF
Clerk of the Court

(PDS) that was submitted to the convening authority. However, the appellant included his deployment information in his clemency submission to the convening authority. Accordingly, the appellant was not prejudiced by the omission of his combat service on the PDS.