UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman HERBERT T. MULLENS III
United States Air Force

ACM 38278

6 December 2013

Sentence adjudged 28 September 2012 by GCM convened at Peterson Air Force Base, Colorado. Military Judge: Grant L. Kratz.

Approved Sentence: Dishonorable discharge, confinement for 54 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Michael A. Schrama.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Daniel J. Breen; Major Charles G. Warren; and Captain Richard J. Schrider.

Before

HELGET, WEBER, and PELOQUIN
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HELGET, Senior Judge:

Consistent with his pleas, a general court-martial composed of officer members convicted the appellant of escaping from confinement, driving while drunk, and wrongfully using heroin, in violation of Articles 95, 111, and 112a, UCMJ, 10 U.S.C. §§ 895, 911, 912a. Contrary to his pleas, the appellant was convicted of desertion, two specifications of larceny, one specification of wrongful appropriation,[1] and

[1] The appellant was charged with a third specification of larceny, in violation of Article 121, UCMJ, 10 U.S.C. § 921, but was found guilty of the lesser included offense of wrongful appropriation.

two specifications of housebreaking, in violation of Articles 85, 121, and 130, UCMJ, 10 U.S.C. §§ 885, 921, 930.[2] The members sentenced the appellant to a dishonorable discharge, confinement for 54 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the adjudged sentence.

Before this Court, the appellant claims his sentence is inappropriately severe. Finding no error that materially prejudices a substantial right of the appellant, we affirm.

Background

During his providency inquiry, the appellant admitted to using heroin on five occasions between 1 December 2011 and 11 January 2012. He testified he had returned from a deployment in November 2011 and had been emotionally upset. A friend had told him she had been experiencing similar issues and used heroin to control her emotions. The first time the appellant used heroin was in the parking lot of a mall in Colorado Springs, Colorado (CO). The other four uses were at his apartment in Colorado Springs. The last use occurred on 11 January 2012. The appellant's friend injected approximately 30 CCs into his arm at which point everything immediately went black and he began to suffocate. The next thing the appellant remembers is waking up in the hospital.[3]

According to the appellant, on 5 April 2012, he drank three shots of vodka within a 30-minute period. Within about 10 minutes after drinking the last shot, he left his apartment and drove to a local Wal-Mart. On his way he got into an accident wherein he hit one vehicle on its side and rear-ended a second vehicle in front of him. A subsequent blood-alcohol test showed the appellant was above the legal limit.

On 13 April 2012, the appellant was ordered into pretrial confinement by his commander and was incarcerated at the Teller County Detention Center in Teller County, CO. On 18 April 2012, the appellant was escorted by two members of his squadron to Peterson Air Force Base (AFB), CO, for a pretrial confinement hearing. It was decided he would remain in pretrial confinement. On the way back to the Detention Center, the appellant and his escorts stopped at a McDonald's in Woodland Park, CO, to eat. While at McDonald's, the appellant requested and was granted permission to use the restroom while his escorts remained at the table. Instead of going to the restroom, the appellant departed the restaurant via an exit near the restrooms and ran into the woods.

Concerning the remaining charges, on 20 April 2012, after two days on the run, the appellant knocked on the door of Ms. MH who lived near Woodland Park.

[2] The appellant was also charged with one specification of disorderly conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The appellant was found not guilty of this offense pursuant to the military judge granting the defense motion for a finding of not guilty under Rule for Courts-Martial 917.

[3] The appellant was charged with one wrongful use of heroin, but admitted to five uses during the providency inquiry.

Unbeknownst to the appellant, Ms. MH was a retired Lieutenant Colonel in the Air Force who immediately recognized him from local media reports. The appellant was wearing a hunting jacket with a fox fur around his neck, along with his Airman Battle Uniform (ABU) pants. He also had a knife on his belt. He arrived in an orange Polaris All-Terrain Vehicle (ATV). He asked Ms. MH to drive him to a rental car business because he needed transportation to Denver and could not drive the ATV because it did not have any license plates. Ms. MH went back into her house and called the Teller County Sheriff's Office. The dispatcher requested Ms. MH to keep the appellant occupied for approximately 20 minutes to give the authorities sufficient time to respond. Ms. MH then informed the appellant that she had contacted a local Enterprise Rental Car agency and they would be there in 20 minutes. Ms. MH testified that the appellant looked tired but was cognizant and aware of his surroundings.

At approximately the same time, Trooper GR, Colorado State Patrol, overheard the County dispatcher airing a possible sighting of the appellant and decided to respond to Ms. MH's residence. Upon arrival, Trooper GR and another State Trooper approached the appellant who was sitting in the ATV. When asked to identify himself, the appellant stated his name was O'Brien. Trooper GR noticed there was a map of the Pike's Peak National Forest and an animal pelt lying on the front passenger seat of the ATV.

At this point, Deputy MR from the Teller County Sheriff's office arrived on the scene, and immediately identified the appellant from a "wanted" poster. The appellant was handcuffed and placed in the back seat of Deputy MR's vehicle. The appellant claimed they had the wrong person and he was not an escapee from the Air Force. He was then transported back to the Teller County Detention Facility.

A subsequent investigation revealed the ATV belonged to Mr. SS. On 20 April 2012, Mr. SS received a call from a neighbor that lived by his cabin in the Woodland Park area, who indicated that someone had knocked on his door the previous night at 0200 requesting directions to the town of Woodland Park. However, after receiving directions, the individual headed in the direction of Mr. SS's property. The neighbor also mentioned that he had seen some activity on Mr. SS's property. In response, Mr. SS decided to go and check his property. On his way, Mr. SS received a call from the Teller County Sheriff's Office indicating they had retrieved an ATV that appeared to belong to him. Mr. SS proceeded to the Sheriff's Office where he positively identified his ATV.

Mr. SS next made contact with the El Paso Sheriff's Office because his property was actually located in El Paso County. Accompanied by Deputy GB of the El Paso Sheriff's Office, Mr. SS went to his property in the Woodland Park area. Mr. SS noticed part of the fence near his gate was broken and he could see ATV tracks on the road next to the broken fence. They then checked the lower level of the barn where Mr. SS stored his ATV and noticed the doors had been pried open. On the upper level of the barn was a living area accessible from the outside via a set of stairs. Mr. SS observed the window

was broken and there was glass all over the floor. He also noticed that a fox pelt was missing, along with a pillow, some lanterns, and flashlights.

After examining the barn, Mr. SS and Deputy GB proceeded to the cabin. They walked around to the rear of the cabin where a window had been broken. Inside the cabin was a mess of food all over the counters and the kitchen table. On the bed they found a shower towel and an ABU jacket which bore the appellant's name. Mr. SS also noticed that a fish filet knife, a fleece hunting jacket, and some underwear and socks were missing. He also found one of his t-shirts covered with blood.

The appellant testified at trial. According to his testimony, on 18 April 2012, the day of his pretrial confinement hearing, the appellant obtained a box of nighttime Benadryl from his squadron and purchased two boxes of off-brand Nyquil at the base Shoppette. His original plan was to take all of the medication at McDonald's to kill himself. Instead, after escaping into the woods, he swallowed approximately 80 pills with the only bottle of water he had in his possession. He claimed that he blacked out and did not remember anything until he woke up on 20 April 2012 laying on the Polaris ATV. He was wearing his ABU pants, a jacket, and a tan ABU shirt that was covered with blood. He also had the fishing knife.

On cross-examination, the appellant testified he did not remember breaking into Mr. SS's cabin and barn, breaking any windows, taking a shower, or telling the police officers his name was O'Brien. He did however remember informing the police officers that he had found the ATV abandoned in a field about a mile down the road from Ms. MH's residence. The appellant also confirmed that he digested all 80 pills of Benadryl and Nyquil with one 16-ounce bottle of water. In rebuttal, the Government called the appellant's escorts who testified that when he purchased his meal at the McDonald's, the appellant requested cash back. Also, prior to leaving Peterson AFB, the appellant withdrew cash from the Shoppette ATM. During the Government's case-in-chief, one of the escorts testified that on the way to McDonald's, the appellant commented that he knew about a couple of homes in the mountains that were used as summer homes but were vacant during the rest of the year.

Sentencing Severity

The appellant asserts that his sentence consisting of a dishonorable discharge and confinement for 54 months is inappropriately severe. We disagree.

This Court reviews sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). 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. 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). 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. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

In its presentencing case, the Government called Mr. JG, who was injured as a result of the appellant's vehicle colliding with his vehicle. Mr. JG testified he sustained injuries to his back and neck, lost about a week and a half from work, was still undergoing physical therapy for his injuries, and his vehicle sustained over $5,000 in damages. The Government also called Mr. SS who testified about the damages to his Polaris ATV, cabin, garage, and fence, totaling approximately $3,625.

The maximum punishment authorized in this case was a dishonorable discharge, confinement for 22 years and 6 months, forfeiture of all pay and allowances, and reduction to E-1. Considering all of the facts and circumstances of this case, the adjudged sentence was not inappropriately severe. The appellant committed numerous serious offenses. Wrongfully using heroin on multiple occasions, driving drunk causing injuries to another person, escaping from confinement, desertion, housebreaking, larceny, and wrongful appropriation are all very severe crimes. There were also multiple victims in this case who were directly affected by the appellant's misconduct. Finally, although the appellant took responsibility for some of his crimes, his testimony concerning the offenses committed after he escaped from confinement was incredulous, a factor the members could properly consider in determining his rehabilitative potential. Having examined the entire record of trial, we find the appellant's sentence appropriately reflected the gravity of his misconduct.

Conclusion

The approved findings and sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

LEAH M. CALAHAN
Deputy Clerk of the Court