UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JONATHAN L. ROE
United States Air Force

ACM S32322

19 December 2016

Sentence adjudged 4 May 2015 by SPCM convened at Minot Air Force Base, North Dakota. Military Judge: Shelly W. Schools (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 2 months, and reduction to E-1.

Appellate Counsel for Appellant: Major Isaac C. Kennen; Major Thomas A. Smith; and Mr. Brian L. Mizer, Esquire.

Appellate Counsel for the United States: J. Ronald Steelman, III and Mr. Gerald R. Bruce, Esquire.

Before

SPERANZA, C. BROWN, and JOHNSON
Appellate Military Judges

OPINION OF THE COURT

SPERANZA, Judge:

A special court-martial composed of a military judge sitting alone found Appellant guilty, consistent with his pleas and pursuant to a pretrial agreement, of wrongful use and distribution of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The military judge sentenced Appellant to a bad-conduct discharge, two months of confinement, and

reduction to the grade of E-1. The convening authority approved the adjudged sentence consistent with the terms of the pretrial agreement.[1]

On appeal, Appellant contends the convening authority unlawfully increased his punishment by issuing a barment order prohibiting Appellant from entering the installation "for any purpose other than seeking medical treatment." Accordingly, Appellant seeks to have his bad-conduct discharge set aside. Finding no relief is warranted, we affirm the findings and sentence as approved by the convening authority.

Background

On the evening of 1 August 2014, Senior Airman (SrA) SL, SrA HC, SrA SB, and Airman First Class (A1C) JP met Airman (Amn) AF at a sports bar in Minot, North Dakota. After a while, the Airmen noticed Appellant was also at the bar. Appellant was assigned to the same squadron as SrA SL, SrA HC, SrA SB, and Amn AF. After the bar closed at 0030 hours, the Airmen decided to go to SrA SL's house to play drinking games and they invited Appellant to join them. After accepting the party invitation, Appellant bought cocaine from a man at the bar, briefly stopped at his own residence, and then joined the others at SrA SL's residence at approximately 0100 hours.

Once there, Appellant pulled a small plastic bag containing the cocaine out of his pocket and prepared at least three lines of cocaine on the kitchen counter. Appellant used a rolled dollar bill to snort one line of cocaine. Some of the other Airmen at the party asked Appellant if they could use the cocaine. Appellant obliged, leaving the remaining lines and bag of cocaine on the counter for others to use. Both SrA SL and SrA AB inhaled at least one line of the cocaine through rolled dollar bills.

SrA SL's wife, also a Senior Airman, witnessed the cocaine use, and her observations were relayed to investigators on 6 August 2014. SrA SL's wife consented to a search of her residence. SrA SL's wife described a full-length body mirror on which she observed cocaine being inhaled. During their consent search, investigators found this mirror and noticed a small amount of white powdery substance still on the mirror. Investigators seized the mirror and submitted it for forensic analysis. Analysis revealed Appellant's fingerprints on the mirror and confirmed the white powdery substance was, as the bar drug dealer told Appellant, indeed cocaine.

On the day the convening authority completed action on Appellant's case, the convening authority's staff judge advocate advised Appellant, in writing, of his required excess leave and appellate leave status. This memorandum advised Appellant, *inter alia*, that he and his dependents "will be entitled to medical care, use of military exchange

[1] In exchange for Appellant's offer to plead guilty, the convening authority agreed to approve no confinement in excess of five months if confinement and a bad-conduct discharge were adjudged, and to approve no confinement in excess of six months if confinement and no bad-conduct discharge were adjudged.

facilities, commissaries, and other military welfare benefits." But it also cautioned Appellant that "[t]hese entitlements may be curtailed or terminated for cause . . . ." After acknowledging receipt, Appellant established Missouri as his appellate leave state, but he remained in the local area and began working two contractor jobs on Minot Air Force Base.

One of these jobs was as a bartender at the on-base bar. After at least one member of the base legal office noticed Appellant tending the bar after his conviction, the court-martial convening authority, also the installation commander, barred Appellant from entering or reentering Minot Air Force Base for a period of five years. In the written barment order, the commander noted that Appellant wrongfully used and distributed cocaine, and that he considered Appellant's continued presence on the installation "to be detrimental to the maintenance of good order and discipline." The commander's order permitted Appellant to enter the base "for the sole purpose of obtaining medical treatment," if Appellant was entitled to medical treatment at base medical facilities.

Appellant appealed the order, asserting it precluded him from working at his on-base jobs. The commander denied the appeal, citing Appellant's conviction for cocaine use and distribution, as well as "the need for good order, discipline and security at Minot Air Force Base." Appellant's previous appellate defense counsel contacted the staff judge advocate to express several concerns related to Appellant's barment, to include Appellant's access to certain entitlements. The deputy staff judge advocate responded, generally maintaining that the commander's order was legally sufficient but offering assurances that Appellant would be allowed access to local defense counsel. Appellant's counsel then sought the assistance of her Government counterpart, after which the commander supplemented Appellant's barment order to permit him to enter the base for the sole purpose of obtaining "dental, medical, legal, or Inspector General services," if Appellant was entitled to those services.

Increase in Appellant's Punishment

Appellant contends that the barment order impermissibly increased his punishment as adjudged at his court-martial. He argues that the installation commander's order interfered with his entitlement to access benefits and services located on Minot Air Force Base pending his discharge, effectively amounting to a *de facto* premature execution of his punitive discharge. As a result, he requests this court set aside the bad-conduct discharge.

The Government responds that this court has no authority to review the commander's decision because the barment order is not part of the findings or sentence approved by the convening authority. *See* Article 66(c), UCMJ, 10 U.S.C. § 866(c). The Government cites *Clinton v. Goldsmith*, 526 U.S. 529 (1999), comparing the barment order served on Appellant to the Air Force's plan to drop Goldsmith from the rolls, and contending both are beyond the jurisdiction of the military appellate courts because they are merely administrative actions.

Article 66(c) provides in part:

> In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. . . .

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), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007); *see also United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). We review jurisdictional questions de novo. *United States v. Davis*, 63 M.J. 171, 176 (C.A.A.F. 2006) (citing *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000)).

As an initial matter, the Government's comparison of the instant case with the analysis in *Goldsmith* is not entirely apt. *See United States v. Flackus*, ACM 38847 (A.F. Ct. Crim. App. 15 November 2016) (unpub. op.). First, this appeal does not ask us to enjoin an administrative government action collateral to his court-martial's findings and sentence, as was the case in *Goldsmith*.[2] "Rather, he asks this court for relief in the form of action on the sentence approved by the convening authority in a case presently before this court. This is exactly this court's function under Article 66(c)." *Id.* at 5. Second, this court's role is different from our superior court's in that we are charged with approving sentences we determine to be correct in law and fact, *and* that we find should be approved on the basis of the whole record. 10 U.S.C. §§ 866(c), 867(c); *see United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). Our superior court has consistently recognized the "broad power to moot claims of prejudice" conferred upon the service Courts of Criminal Appeals. *Tardif*, 57 M.J. at 223 (quoting *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998)). Although this court does not engage in acts of clemency, *see United States v. Healy*, 26 M.J. 394, 396–97 (C.M.A. 1988), we have appropriately granted sentence relief for conditions of post-trial confinement and excessive post-trial delay, even in the absence of a due process violation or specific prejudice to the appellant. *See United States v. Bodkins*, 60 M.J. 322, 324 (C.A.A.F. 2004) ("Courts of Criminal Appeals have broad discretion to grant or deny relief for unreasonable or unexplained delay, and a finding of specific prejudice is not required."); *see also United States v. Gay*, 74 M.J. 736, 743–45 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016).

[2] Appellant sought comparable relief in a Petition for Extraordinary Relief in the Nature of a Writ of Mandamus, requesting this court direct the commander to rescind the barment order. This court granted the Government's motion to dismiss Appellant's petition for lack of jurisdiction.

Nevertheless, we do not find sentence relief appropriate here. Although our Article 66(c) authority to determine sentence appropriateness is broad, we again emphasize that this court is not a forum for Appellant to seek redress for every injustice, perceived or otherwise, he has suffered at Government hands. Unlike conditions of confinement or post-trial processing delay, the barment order is not part of a sentence adjudged by a court-martial, or integral to the court-martial and appellate review process. Appellant's contention that the commander's barment order amounts to a *de facto* premature execution of his punitive discharge exaggerates its impact and does not transform it into an element of his sentence. *See Flackus*, unpub. op. at 5. In summary, we find the sentence imposed in this case commensurate with Appellant's offenses and appropriate given the facts in this case. No exercise of the extraordinary use of our Article 66(c) power to grant sentence relief is warranted here.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and the sentence are **AFFIRMED**.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist