UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman JEREMY R. SANCHEZ
United States Air Force

ACM S32096

22 October 2013

Sentence adjudged 30 August 2012 by SPCM convened at McConnell Air Force Base, Kansas. Military Judge: Christopher M. Schumann.

Approved Sentence: Bad-conduct discharge, confinement for 60 days, forfeiture of $994.00 pay per month for 4 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major John M. Simms; and Gerald R. Bruce, Esquire.

Before

ORR, HARNEY, and MITCHELL
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HARNEY, Senior Judge:

The appellant was convicted, in accordance with his pleas, by a special court-martial panel composed of officer and enlisted members, of one specification of being derelict in his duties, one specification of recklessly operating a vehicle, and one specification of being physically in control of a vehicle while drunk, in violation of Articles 92 and 111, UCMJ, 10 U.S.C. §§ 892, 911. The members sentenced the appellant to a bad-conduct discharge, confinement for 4 months, forfeiture of $994 pay per month for 4 months, and reduction to E-1. The convening authority approved the bad-conduct discharge, forfeitures, and reduction in grade, but pursuant to a pretrial agreement (PTA), approved only 60 days of confinement.

On appeal, the appellant argues the punitive discharge is inappropriately severe. We disagree and affirm the findings and sentence.

Background

All specifications of the charges relate to the actions of the appellant on a single night, 18 July 2012. On that night, near Derby, Kansas, the appellant consumed between 8 and 10 beers at an off-base bar over the course of a couple of hours, and as a result was "pretty drunk." At approximately 0030, the appellant left the bar in his 2012 Ford Mustang to drive to a hotel and "sleep it off." The appellant was pulled over by off-base police and administered field sobriety tests (FSTs). After failing the FSTs, the appellant provided a breath sample, which showed his breath alcohol content to be 0.244, three times the legal limit under Kansas law. Prior to being pulled over, the appellant's vehicle crossed the center line and the appellant drove in the opposing lane of traffic. After the appellant was pulled over, an opened bottle of bourbon was discovered in his vehicle.

During the FSTs, the appellant explained to the law enforcement officer that he was currently in the Air Force, had previously been in trouble with the Air Force, and had received a DUI at McConnell Air Force Base, Kansas. During presentencing proceedings, the Government introduced the record of nonjudicial punishment, pursuant to Article 15, UCMJ, 10 U.S.C. § 815, which confirmed the appellant had previously received a reduction in rank, forfeitures, and restriction to base for physically controlling a vehicle while drunk on 18 November 2011. Trial counsel highlighted the appellant's response to the nonjudicial punishment, in which the appellant asked his commander to retain him in the Air Force because he believed he could be a valuable asset.

Sentence Severity

The appellant argues that the punitive discharge was inappropriate in this case. He avers that although there are three separate specifications, they all relate to the same instance of drunk driving, and a punitive discharge for drunk driving, with no other aggravating factors such as death or serious injuries, is rare. The appellant also points to his clemency submission, especially to the letter from the trial judge which recommends clemency.

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. 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). Although we are accorded great discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Nerad*, 69 M.J. 142, 146 (C.A.A.F. 2010); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

We have reviewed the record of trial, giving individualized consideration to this appellant on the basis of the nature and seriousness of his offenses and his character, to include his military record. His record included one referral enlisted performance report for a previous DUI, which occurred eight months before the charged offenses. While there were no aggravating factors for the charged offenses such as injury or death, as the appellant argues, we do not find that to be the litmus test for a punitive discharge. The appellant was fully aware that he was drunk when he left the bar, but he nevertheless chose to drive. The appellant's breath alcohol concentration was three times the legal limit; he swerved his vehicle into the opposing lane of traffic while driving; and during the FSTs the appellant showed severe signs of impairment. Moreover, the appellant has shown that lesser forms of punishment, to include reduction in rank, forfeitures, and restriction to base, were not sufficient for his prior brush with the law for a similar offense. Finally, the appellant negotiated a PTA from which he benefited, decreasing his sentence of confinement by half. While a letter from the trial judge requesting clemency is compelling, clemency remains the purview of the convening authority and not this Court. Thus, we find that the approved and adjudged sentence in this case, including the bad-conduct discharge, was appropriate, was within the discretion of the convening authority, and was not inappropriately severe.

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). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court